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Abstract

The rule of law in a democratic nation demands that the laws governing people are not secret. Yet parts of the executive branch’s legal policy that govern aspects of the current war on terror are laid out in non-public opinions issued by the Department of Justice’s Office of Legal Counsel. Many of those opinions, which are almost always binding on the executive branch and are used to provide legal comfort to government officials in the form of protection against future investigation or prosecution, are still secret or were kept secret for years before being leaked or disseminated to Congress and the public.

This Article assesses the historical pattern of politicization of executive branch legal policy in times of war or armed conflict and analyzes how secrecy in the development and implementation of legal policy compromises its quality and undermines public confidence in the integrity of executive branch constitutional interpretation. This Article critiques the lack of information disclosure from a domestic perspective and illustrates how other nations that face severe national security threats maintain greater transparency and accessibility in the development of legal policy, and thus a greater degree of integrity in their national security programs.
No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win

Sudha Setty*

“Inter arma enim silent leges.” 1
(In times of war, the law falls silent)

“Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.” 2

INTRODUCTION

One of the key hallmarks of a democratic nation is that there are no secret laws. 3 In the post-September 11, 2001 era, the Bush administration has relied on national security concerns and the unitary executive theory of presidential power as justifications for maintaining secret legal policies that govern parts of the war on terrorism that affect serious issues of human rights and civil liberties. These legal policies sometimes stake out positions that

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are at odds with legislation, treaties and court decisions, but the parameters of the executive branch legal policies are sometimes unknown because of the lack of public disclosure. Administration critics have decried the use of secret legal policy, and have called for the disclosure of legal opinions generated by the Department of Justice Office of Legal Counsel.

This Article considers the call for disclosure and concludes that it is feasible, desirable and realistic to expect the disclosure of most Office of Legal Counsel opinions. This Article recognizes the historical pattern of politicization of executive branch legal policy during a war or armed conflict, and analyzes how secrecy in the development and implementation of legal policy runs afoul of the rule of law, compromises the quality of legal policy being generated by the Office of Legal Counsel and undermines public confidence in the integrity of executive branch constitutional interpretation. This Article uses both a historical and a comparative analysis to critique the use of secret law; first, by considering how the U.S. has historically dealt with the development of executive branch legal policy in wartime; second, by illustrating how other nations that face severe national security threats maintain greater transparency and accessibility for legal policy related to national security matters; and third, how the use of unitary executive theory to support nondisclosure is at odds with historical practice and the rule of law.

Part I outlines the history of the office of Attorney General and the Office of Legal Counsel, offers examples of the politicization of executive branch legal policy during times of conflict, and places in context the politicized opinions of the Office of Legal Counsel under the current administration.

Part II critiques the process by which the Office of Legal Counsel under the current administration develops, disseminates

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4 See Jack M. Balkin & Sanford Levinson, The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State, 75 Fordham L. Rev. 489, 498-99 (2006) (noting that “[i]n many areas, the constitutional law enunciated in formal opinions and memoranda issued by the Office of Legal Counsel…is sometimes at least as important as any decision of Article III courts”).

and authorizes legal policy without proper internal or external safeguards as to the quality of opinions being issued.

Part III notes that scholars have promoted disclosure of executive branch legal policy as one of many potential means of countering the effects of a politicized environment within the Department of Justice. This Part outlines the need for a general policy of disclosure in terms of increasing the quality of the opinions issued, curbing the greatest excesses of the secret opinions, and asserts the need for a new mandatory disclosure requirement for future administrations.

Part IV addresses whether a call for disclosure is workable in light of two typical rebuttals offered by U.S. administrations: the pragmatic argument that secrecy and non-disclosure are necessary to maintain the integrity of the national security efforts, and that the lack of disclosure is consistent with the President’s powers, particularly during wartime. This Part critiques both of those arguments in favor of secret law, based on Congress’s constitutional powers for oversight of the Executive, historical practices of the United States, as well as a comparative analysis with India, Israel and the UK.

I. THE POLITICIZATION OF THE OFFICE OF THE ATTORNEY GENERAL

One of the fundamental responsibilities of the U.S. Attorney General and his or her subordinates in the Office of Legal Counsel is to provide legal advice and counsel to the administration. As the chief legal officer of the United States, the Attorney General has an obligation to uphold the rule of law by providing the best possible legal counsel to the President and administration and to limit the effect of political pressures to mold

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his or her opinion to facilitate the political goals of the President.\(^7\) The importance of adhering to the rule of law is compounded when the legal opinions offered by the Attorney General are used as legal comfort: protecting government actors from future liability and criminal prosecution while conducting work on behalf of the administration.\(^8\)

However, numerous obstacles exist to the Office of Legal Counsel offering its most impartial, and arguably best, assessment of the law, including the inherent conflicts of interest which arise when the administration attempts to influence the Office of Legal Counsel to issue opinions that are politically advantageous to the administration.\(^9\) Historically, this political pressure has been brought to bear during times of war or armed conflict, raising doubts as to whether any administration can achieve the “best practice” of offering non-politicized legal advice at all times.\(^10\)

A. The Roles of the Attorney General and the Office of Legal Counsel

\(^7\) Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. Nat’l Sec. Law & Pol’y 455, 464-66 (2005) (arguing that the appropriate ethical standard for legal advice rendered by OLC lawyers is such that “the lawyer’s role is not simply to spin out creative legal arguments. It is to offer her assessment of the law as objectively as possible.”) (citing ABA MODEL RULES OF PROF’L CONDUCT R. 2.1 (2003)). Clark contrasts this obligation of a legal advisor to offer his or her “best assessment” of the law with that of a legal advocate, who can offer any non-frivolous interpretation of the law when arguing on behalf of a client before a judge. *Id.* at 465. *See also* Transcript of Senate Judiciary Committee Hearing on Oversight of the Department of Justice, Jan. 30, 2008) (hereinafter “Oversight Hearing Transcript”), at 47 (Sen. Whitehouse notes that the Attorney General is in a role like that of a “corporate lawyer to the administration”).

\(^8\) Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 23, 96 (W.W. Norton & Co. 2007) (noting that it is “practically impossible to prosecute someone who relied in good faith on an [Office of Legal Counsel] opinion, even if the opinion turns out to be wrong”). *Id.* at 96.

\(^9\) Clark, supra note __, at 465.

\(^10\) *See, e.g.,* Walter Dellinger, Dawn Johnsen, et al., *Principles to Guide the Office of Legal Counsel* (2004), reprinted in 54 U.C.L.A. L. Rev. 1559 app. 2, at 1603 (calling for the OLC to maintain a non-politicized stance in developing legal policy); Goldsmith, *supra* note __, at 34-35 (noting that the OLC should offer opinions that strike a balance between a neutral exposition of the law and client advocacy on behalf of the administration’s desired result).
The history of the roles of the Attorney General and the Office of Legal Counsel provide insight into the pattern of politicization of these offices in wartime.

The role of Attorney General has existed since prior to the inception of the federal government,\(^{11}\) having been modeled after the English governmental system and the colonial state governments in America,\(^{12}\) and was established at the federal level by the Judiciary Act of 1789.\(^{13}\) In enacting the Judiciary Act, Congress and the President delegated executive branch constitutional interpretation to the office of the Attorney General.\(^{14}\)

The tension between the Attorney General’s dual obligations—on the one hand to render the highest quality legal advice possible to the President, and on the other hand to offer politically advantageous opinions to the President—has existed from the very beginning of the office in the U.S. federal system.\(^{15}\) President Washington made it clear to Edmund Randolph, the first Attorney General of the U.S., that he wanted the Attorney General to be “a skilled, neutral expounder of the law rather than a political advisor.”\(^{16}\) In response, Randolph wrote to Washington in 1794, shortly after the end of his term in office:

“[M]y opinions, not containing any systematic adherence to party, but arising solely from my views of right, fall sometimes on one side and sometimes on the other…. [W]hile I retain a consciousness of my ability to resist an undue influence, I cannot deny the satisfaction which I feel in maintaining [my reasoning]. I have often indeed expressed sentiments contrary to yours. This was my duty; because they were my sentiments. But, sir, they were never tinctured by any other motive, than to present to your reflection the misconstructions which wicked men

\(^{11}\) Baker, supra note __, at 37.
\(^{12}\) Baker, supra note __, at 37-38.
\(^{14}\) Goldsmith, supra note ___, at 32.
\(^{15}\) Baker, supra note ___, at 55.
might make of your views, and to hold out to you a truth of infinite importance to the United States.’”

Although the Attorney General originally served as a counselor to both the President and to Congress, the Attorney General and the Department of Justice are now understood to be firmly within the auspices of the executive branch.

The Office of Legal Counsel, generally referred to as the OLC, has been in existence since 1933 as part of the Department of Justice. Its role is to provide legal advice on the actions of all of the administrative departments that report to the President: it makes a determination on whether proposed actions and programs are illegal or unconstitutional, and provides advice to the President as to whether programs should be cancelled or modified due to legal constraints. In fact, the OLC renders all but a small portion

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17 Moncure D. Conway, *Omitted Chapters of History, Disclosed in the Life and Papers of Edmund Randolph, Governor of Virginia, First Attorney-General, United States Secretary of State* 218-19 (G.P. Putnam 1888).
18 In large part, the office of the Attorney General and its role in government were not given a close examination at the time it was adopted into the U.S. federal system—it was simply understood that the President and Congress required legal counsel, and that the Attorney General could provide the necessary advice to both of the political branches of government. Baker, supra note ___, at 15.
19 Baker, supra note ___, at 16, 59. Nonetheless, some argue that there remains a residual tension as to how much information the Attorney General is obligated to disclose to Congress, particularly with regard to the legal policy developed and implemented by the executive branch. *Id.*, at 10-11. Baker notes a second tension arising from the Attorney General’s role as counselor to the administration and his or her role as an officer of the court. *Id.* at 2, 22-25.
21 Goldsmith, *supra* note ___, at 32. See also Office of Legal Counsel Homepage, at http://www.usdoj.gov/olc (visited April 11, 2008) (noting that the OLC “is responsible for providing legal advice to the executive branch on all constitutional questions”). The client of the OLC, as with the Attorney General, is generally understood to be the administration as a whole. See Baker, *supra* note ___, at 10-11. This sets the OLC apart from the Office of the White House Counsel—a presidential appointee who serves as the President’s personal counsel and adviser. See generally Maryanne Borrelli, *et al.*, *The White House Counsel’s Office*, 31 Presidential Studies Quarterly 561 (2004).
of the legal opinions generated by the Department of Justice. The head of the OLC reports to the Attorney General.

The OLC has been viewed historically as the “first line of defense” against self-serving legal interpretation by the executive branch. However, as the OLC is obligated to respond to real-time legal questions, the danger of politicization or other undermining of the integrity of the opinions becomes pressing; there are few mandated external controls over the OLC, no oversight outside the direct chain of command in the administration, and no public accountability for the legal policy being developed and relied upon. Over the years, the OLC has avoided some of the pitfalls that exist from a lack of accountability by operating under strong cultural norms of apoliticism. However, that culture has not always been maintained, both in the OLC and in the Justice Department as a whole.

B. Historical Examples of the Attorney General Facilitating the Accrual of Presidential Power

This tension is often dormant, and the public becomes aware of its existence only when it flares up; for example, when the Attorney General or the OLC offers an opinion based primarily on political exigency, as opposed to balancing the interests of the administration and the obligation to give sound legal advice.

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22 Randolph D. Moss, Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel, 52 Admin. L. Rev. 1303, 1308 (2000)
23 See 28 U.S.C. §§ 511-513 (delineating the Attorney General’s authority to render legal opinions to the President and executive branch); 28 U.S.C. § 510 (codifying the right of the Attorney General to delegate the responsibility to draft legal opinions to the OLC); see also 29 C.F.R. § 0.25; Goldsmith, supra note __, at 32.
24 Goldsmith, supra note __, at 33.
25 Goldsmith, supra note __, at 33.
26 Goldsmith, supra note __, at 35.
27 See Cornell W. Clayton, The Politics of Justice: The Attorney General and the Making of Legal Policy 34 (M.E. Sharpe 1992) (arguing that because OLC is asked to develop legal policies that support administration goals, it is often viewed as one of the most politicized units within the Department of Justice).
28 Here I am referring to the interests of an administration based on political needs, not necessarily influenced by partisan politics.
29 Sam J. Ervin, The Whole Truth: The Watergate Conspiracy 118-19 (Random House: 1980) (discussing the public belief that the Department of Justice was (...continued)
As with the George W. Bush administration, this tension consistently occurs during a war or other military conflict when a President believes that he can and should assert greater executive power under the Commander-in-Chief clause\textsuperscript{30} to respond appropriately to wartime crises.\textsuperscript{31} Controversial examples of this type of wartime action are found throughout U.S. history, and two such examples illustrate the same tension that exists in the current administration.

The first is the legal comfort offered by Abraham Lincoln’s Attorney General, Edward Bates, to authorize the suspension of the writ of \textit{habeas corpus} for Confederate soldiers during the Civil War.\textsuperscript{32} This was a decision that Bates made reluctantly in order to support Lincoln’s already articulated war strategy.\textsuperscript{33} Bates set aside his misgivings about the legality of the suspension of the writ to support the President’s Civil War strategy,\textsuperscript{34} authoring an opinion that acknowledged both the right of the court to issue a writ of \textit{habeas corpus}, as well as the President’s right to refuse to obey such a writ.\textsuperscript{35}

To gain support for his war plan, Lincoln heavily publicized his belief that the suspension of the writ of \textit{habeas corpus} (continued…)

\textsuperscript{30} U.S. Constitution, Art. II. sec. 2, cl. 1.
\textsuperscript{32} Bates’ opinion was issued on July 5, 1861. John F. Jameson, \textit{Dictionary of United States History: 1492-1895, Four Centuries of History} 284 (Puritan Publishing Co. 1894). Lincoln ordered the arrest and detention of Confederate soldiers in April of 1861, see Abraham Lincoln, Executive Order to the Commanding General of the Army of the United States (Apr. 27, 1861), in 6 A Compilation of the Messages and Papers of the Presidents, 3128, 3219 (James D. Richardson ed., 1917), making clear that although Bates’ opinion was valuable to Lincoln, it was not the decisive opinion on whether to suspend the writ. Margulies, \textit{supra note }\textsuperscript{32}, at 60. See also David J. Barron & Martin S. Lederman, \textit{The Commander in Chief at its Lowest Ebb: A Constitutional History}, 121 Harv. L. Rev. 941, 998-1000 (2008).
\textsuperscript{33} Baker, \textit{supra note }\textsuperscript{32}, at 3.
\textsuperscript{34} Baker, \textit{supra note }\textsuperscript{32}, at 3.
\textsuperscript{35} Clayton, \textit{supra note }\textsuperscript{32}, at 20.
corpus was necessary to the Union Army’s wartime efforts.\(^\text{36}\) There is no doubt that Lincoln consolidated and increased presidential power in response to the exigencies of war, and that the decision to suspend the writ of *habeas corpus* was part of that effort;\(^\text{37}\) there is also no doubt that Lincoln’s efforts were well-known and his shift in legal policy was subject to significant public scrutiny.\(^\text{38}\) Further, as a result of the publicity, efforts to build a consensus, public support, and congressional concern over the war, Congress passed resolutions in support of the suspension of the writ of *habeas corpus* for Confederate soldiers.\(^\text{39}\)

A second example in which the “best assessment” of legal counsel was subsumed by political interests was the decision by Francis Biddle, Franklin Roosevelt’s Attorney General, to acquiesce to the internment of Japanese Americans during World

\(^\text{36}\) The most notable effort was Lincoln’s July 4, 1861 address to Congress, in which he argued that the suspension of the writ of *habeas corpus* was necessary to preserve the nation. See Abraham Lincoln, Special Session Message (July 4, 1861) in 7 Messages and Papers, supra note ____., at 3221.


\(^\text{38}\) Goldsmith, *supra* note ___, at 82-83.

\(^\text{39}\) Jameson, supra note ___, at 284. Lincoln’s desire to suspend the writ of *habeas corpus* was met with strident opposition from Roger B. Taney, Chief Justice of the U.S. Supreme Court. In *Ex parte Merryman*, 17 F. Cas. 144 (1861), Taney denied the right of the President to suspend the writ, with Taney offering the following indictment of Lincoln’s attempt to, in Taney’s view, subvert the rule of law:

> “These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms….I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.”

Later, the Court authorized the suspension of the writ of *habeas corpus* during the Civil War, for the limited context of when Confederate soldiers were captured but civilian courts were fully closed. *See Ex Parte Milligan*, 71 U.S. 2 (1866).
War II under Roosevelt’s war-making powers as President.  

Although evidence suggests that the decision to offer legal comfort for the interment was made against Biddle’s judgment as to the best interpretation of the law, and perhaps even against his judgment as to a morally or legally defensible argument, Biddle reconciled himself to supporting Roosevelt’s plan to intern Japanese Americans to alleviate perceived national security concerns.

Roosevelt, like Lincoln nearly a century before, publicized his decision and rallied public support for the measure. In fact, Congress supported the President’s decision, and the


Biddle’s advice was later validated by the U.S. Supreme Court in Korematsu v. United States, 323 U.S. 214 (1944) (holding that the decision of President Roosevelt to intern Japanese Americans during World War II was consistent with the President’s war powers).

41 Schlesinger, supra note ___, at 56.

42 Schlesinger, supra note ___, at 56.

43 See Peter Margulies, When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy, 30 Fordham Int’l L.J. 642, 651 (noting that the legal defense of internment “hinged on a stereotype of Japanese-Americans as insidious and inescrutable security risks” and that government lawyers appealed to the court’s acceptance of “the discrimination that Japanese-Americans had frequently faced in the United States”). In 1982, the congressionally charged Commission on Wartime Relocation and Internment of Civilians concluded that there was no military necessity for internment, but rather, it was a product of wider societal and governmental problems, including “race prejudice, war hysteria and a failure of political leadership.” Eric K. Yamamoto, et al., Race, Rights and Reparation: Law and the Japanese American Internment 40 (Aspen 2001).

Scholars have noted that Roosevelt’s ability to rally public, congressional and judicial support for his wartime policies cemented the perceived need for executive flexibility in carrying out controversial policies at times of emergency. See Scheppele, supra note ___, at 850-51.

44 Congress’s validation of Executive Order No. 9066 was made explicit by the Act of Congress of March 21, 1942, 56 Stat. 173, 18 U.S.C.A. §97a, making it a misdemeanor to disregard the curfew and movement restrictions put into place by Executive Order No. 9066. See also Hirabayashi v. United States, 320 U.S. 81 (1943) (validating the curfew requirements of the 1942 Act).
constitutionality of the internment was validated in 1944 by the U.S. Supreme Court in *Korematsu v. United States*.45

In the cases of Bates and Biddle, the politicization of the Office of the Attorney General occurred in a time of great national tension, when the President was exercising his wartime powers. Although the justifications for offering legal comfort may in retrospect seem tenuous at best,46 the fact that the decision-making was made public and in consultation with Congress allowed for some measure of public confidence in the making of executive branch legal policy,47 and perhaps more importantly, the opportunity for public scrutiny to force changes in bad policy.48

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45 323 U.S. 214 (1944). Korematsu’s conviction for being found outside of an exclusionary zone for persons of Japanese descent was overturned in 1984. *Korematsu v. U.S.*, 584 F. Supp. 1406 (N.D. Cal. 1984) (Judge Patel, in overturning the conviction, noted that “[f]ortunately, there are few instances in our judicial history when courts have been called upon to undo such profound and publicly acknowledged injustice”). *Id.* at 1413.

46 In contrast, other administrations have leveraged the fact that the Department of Justice, unlike other administrative agencies, has no particular industry or special interest group to answer to, and is, therefore, most prone to unilateral presidential control. *Clayton, supra note __*, at 77-78 (noting that President Nixon exercised a great deal of control of the Department of Justice).

47 Johnsen, supra note __, at 1590 (noting that when President Ronald Reagan wanted to put forth a different constitutional provision than had previously been used by Congress and the judiciary, he made that debate public). Publicity, however, does not guarantee accountability; in the case of the suspension of the writ of *habeas corpus*, the judiciary attempted to check President Lincoln’s actions, *see Ex parte Merryman*, 17 F. Cas. 144 (1861) (denying the right of the President to suspend the writ), but President Lincoln chose not to comply with regard to Confederate soldiers taken prisoner by Union forces.

48 In contrast, the legal advice offered during the presidency of Richard Nixon has been criticized both for substance and the secrecy in which it was shrouded. *See United States v. Nixon*, 418 U.S. 683, 703-07, 94 S.Ct. 3090 (1974) (accepting the idea of a broad deliberative privilege for a President, but rejecting the right of executive branch constitutional interpretation to trump that of the judiciary). *See also* Oversight Hearing Transcript, at 2 (Sen. Patrick Leahy commented to Attorney General Michael Mukasey:

“I first came to the Senate 33 years ago. The nation and the Department of Justice were reeling from Watergate. The trust of the American people in their government had been shaken. The damage done over the last seven years to our constitutional democracy and our civil liberties rival the worst of those dark days. This president’s administration has repeatedly ignored the checks and balances that have been wisely placed on executive power by our founders…[A]mong the (...continued)
C. Current Examples of the Politicization of the Office of Legal Counsel

During the seven years of the current Bush administration, the Office of Legal Counsel has drafted numerous memoranda and legal opinions which have engendered a great deal of criticism on two fronts: first, for the substance of the policies promulgated. As with the examples of Bates and Biddle, one criticism of the current OLC is that its legal advice facilitates a vast expansion of presidential power. The second body of criticism stems from the process by which the OLC developed and implemented its legal policy. In sharp contrast to the Bates and Biddle examples, the primary concern here is the secretive process by which legal policy is developed and implemented.

In fact, the Bush administration’s concerted effort to cut the judiciary and Congress out of the decision-making process on legal policy is the antithesis of the approach undertaken by the Lincoln

(continued…)

most disturbing aspects of those years has been the complicity of the Justice Department, which has provided cover for the worst of these practices during those seven years.”

Id. at 2.


51 Scott Shane, David Johnston and James Risen, Secret U.S. Endorsement of Severe Interrogation, N.Y. Times, Oct. 4, 2007 (noting that the current Bush administration adapted new legal policies on interrogation “without public debate or Congressional vote, choosing to rely instead on the confidential legal advice of a handful of appointees”); Schlesinger, supra note ___., at 61 (concluding that the current Bush administration is the most secretive in U.S. history, including Nixon).
and Roosevelt administrations. Although issues of war and armed conflict have affected many administrations, when executive branch legal policy is not disclosed in a meaningful fashion to other parts of the administration, the other branches of the federal government, or to the public, it is clear that the quality of the legal policy, as well as the credibility of the administration’s lawyers, suffers greatly.

A number of examples of controversial and secret legal opinions evidence the current administration’s expansive view of presidential powers vis-à-vis the war on terror, and the intense interest in excluding Congress, the public, and even other departments within the executive branch from understanding the parameters of executive branch legal policy.

First, two August 2002 OLC memoranda which analyzed the definition of “torture” with regard to interrogation techniques used on persons captured in the war on terror and held outside of the United States. The first memorandum was drafted by OLC

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53 Not every OLC opinion related to national security matters was insulated from other administrative departments. E.g., Memorandum of William H. Taft, IV, State Department Legal Adviser, to John C. Yoo, Deputy Assistant Attorney General, Re: Your Draft Memorandum of January 9, Jan. 11, 2002 (a 40-page critique of an OLC draft memorandum regarding detainee treatment, noting that “both the most important factual assumptions on which your draft is based and its legal analysis are seriously flawed”). Id. at 1. See also M. Elizabeth Magill, *Can Process Cure Substance? A Response to Neal Katyal’s “Internal Separation of Powers,”* 116 Yale L.J. Pocket Part 125 (2006).

54 The concern about secret laws and rules being developed by the Bush administration extends beyond the OLC. See, e.g., Bruce Ackerman, *Take Your Paws Off the Presidency!,* July 15, 2008, Slate.com, available at http://www.slate.com/id/2195384/?from=rss (visited July 19, 2008) (discussing the possibility of secret executive orders in place that would alter the presidential succession process notwithstanding constitutional and congressional constraints).

attorney John Yoo and signed by Assistant Attorney General Jay Bybee. Although the administration relied on this Memorandum beginning in 2002 to delineate those interrogation techniques which were arguably lawful, the Memorandum itself was only made public after it was leaked in mid-2004 after the public learned of detainee abuses at the Abu Ghraib prison in Iraq. At that point, Congressional and public outrage at the content of the Memorandum, which authorized the use of harsh interrogation techniques and narrowed the conventional definition of torture to

(continued…)


56 John Yoo, Behind the ‘Torture Memos;’ As Confirmation Hearings Near, Lawyer Defends Wartime Policy, San Jose Mercury News, Jan. 2, 2005, at 1P (acknowledging that he helped to draft the Bybee Memorandum).

57 The Defense Department incorporated significant portions of the language from the Bybee Memorandum in their own report on interrogation practices. See WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (2003); see also Douglas Jehl, David Johnston & Neil A. Lewis, C.I.A. Is Seen as Seeking New Role on Detainees, N.Y. TIMES, Feb. 16, 2005, at A16 (the Bybee Memorandum was “sought by the C.I.A. to protect its employees from liability”).


60 The Bybee Memorandum, supra note ___, at 46 (“[W]e conclude that torture as defined in and proscribed by [the Convention Against Torture], covers only extreme acts….Because the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman or (…continued)
provide legal comfort to interrogators who engaged in harsh techniques, forced the President to disavow the use of torture during interrogations.

The second August 2002 memorandum—issued on the same day as the first and also authorized by Bybee—reinforced the administration’s view that the definition of torture was extremely narrow and required specific intent by interrogators to cause serious physical or mental harm, and that interrogators were protected from future prosecution because they had no such specific intent. A heavily redacted version of this memorandum was released by the administration on July 24, 2008 in response to a Freedom of Information Act request from the American Civil Liberties Union.

Tellingly, only the late 2004 OLC memorandum declaring that “torture is abhorrent both to American law and values and to international norms” was voluntarily made public by the administration. However, even this memorandum contained

(continued...)

(degrading treatment or punishment fail to rise to the level of torture.”). The Bybee Memorandum also stated that the proscriptions of the Convention Against Torture likely did not apply to the President’s execution of the war on terror, under the rationale that the Convention infringed upon the President’s executive authority as Commander-in-Chief, see id. at 36-39.

Additionally, Bybee offered two broad defenses to individuals who used techniques which would fall within the narrowed definition of torture: necessity, see id. at 39-41, and self-defense, see id. at 42-46.


Second Bybee Memorandum, supra note __, at 16-17.


Shane, et al., supra note __.
legal protection for CIA interrogators to reassure them that past practices were not prosecutable.67

Second, a 2002 executive order issued by President Bush68 authorized the National Security Administration to conduct warrantless surveillance programs over U.S. citizens, which were authorized by the OLC69 but not revealed to the judiciary, including the FISA70 court.71 This executive order was not disclosed until late 2005, at which point Congress immediately demanded to be briefed on the program and to understand its parameters.72

67 Shane, et al., supra note ____; December 2004 Memorandum.
68 Risen & Lichtblau, supra note ____.
69 Jack Goldsmith stated that the White House systematically undermined FISA protections using secret and “flimsy” legal opinions which were “guarded closely so no one could question the legal bans for the programs.” Rosen, Conscience of a Conservative, supra note ___. The OLC has also opined that Fourth Amendment protections against unlawful search and seizure do not apply to “domestic military operations.” Memo for William J. Haynes II, General Counsel of the Department of Defense from John C. Yoo, Deputy Assistant Attorney General, Military Interrogation of Alien Unlawful Combatants Held Outside the United States, Mar. 14, 2003, at 8, n. 10, (referring back to an earlier, still-secret OLC memorandum entitled, “Authority for Use of Military Force to Combat Terrorist Activities within the United States”).
Third, a March 2003 memorandum authored by Yoo (the Yoo Memorandum)\textsuperscript{73} provided additional legal comfort to interrogators by asserting that federal laws prohibiting assault, maiming and other violent crimes did not apply to military interrogators who questioned captives in the war on terror, based on the President’s wartime powers.\textsuperscript{74}

The Yoo Memorandum sought to insulate U.S. government agents from prosecution or other legal liability if they used highly coercive interrogation techniques, such as waterboarding, headslapping and exposure of prisoners to extreme temperatures.\textsuperscript{75}

The existence of this memorandum had been known outside of the administration for several years, despite the administration’s refusal to disclose it to the public or most members of Congress until April 1, 2008.\textsuperscript{76} The memorandum was initially classified by the Department of Justice to prevent disclosure, but was ultimately declassified after a review undertaken as part of a Freedom of Information Act lawsuit brought by the American Civil Liberties Union to gain access to the memorandum.\textsuperscript{77}

The initial classification of the Yoo Memorandum was made because of purported national security concerns associated with the release of the opinion;\textsuperscript{78} remarkably, however, the contents of the Yoo Memorandum were kept secret from the top lawyers for each branch of the military.\textsuperscript{79} Since the public release of the Yoo Memorandum, scholars have questioned why such an opinion—containing no sensitive personal information nor details about

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\textsuperscript{73} Memo for William J. Haynes II, General Counsel of the Department of Defense from John C. Yoo, Deputy Assistant Attorney General, Military Interrogation of Alien Unlawful Combatants Held Outside the United States, Mar. 14, 2003 (the Yoo Memorandum).
\textsuperscript{75} Eggen & White, \textit{supra} note __.
\textsuperscript{76} Eggen & White, \textit{supra} note __.
\textsuperscript{78} Eggen & White, \textit{supra} note __.
\textsuperscript{79} Eggen & White, \textit{supra} note __.
\end{flushright}
specific intelligence-gathering programs—was ever withheld from public view.  

Fourth, a still-secret 2005 opinion authorized harsh techniques, such as waterboarding, and the use of such techniques in combination with each other, for the interrogation of persons designated as enemy combatants. This opinion was issued soon after Alberto Gonzales began his tenure as Attorney General in February 2005, and over the objection of then-deputy attorney general James Comey.  

Fifth, a late 2005 opinion—also still secret—was drafted after Congress passed the Detainee Treatment Act of 2005, which had specifically outlawed some harsh interrogation techniques. This opinion confirmed that the CIA practices could be reconciled with the Detainee Treatment Act’s restrictions, once again providing legal cover for CIA interrogators, should later decision-makers conclude that the practices were illegal.  

Finally, an unpublished 2006 executive order—reviewed and approved by the OLC—confirmed authorization for the use of “enhanced” interrogation techniques. Additional memoranda regarding interrogation techniques have been issued, but not made public.  

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81 Shane, et al., supra note ____.  
82 Shane, et al., supra note ____. It was later revealed that certain members of Congress were briefed on the use of waterboarding of prisoners as early as 2002, but that they were forbidden from taking written notes on the brief, or from disclosing their knowledge to anyone, including their own staff members. Joby Warrick and Dan Eggen, Hill Briefed on Waterboarding in 2002, Wash. Post, Dec. 18, 2007, p. A01. Rep. Jane Harman noted that she filed a classified letter objecting to the program, but was prevented from speaking publicly due to the rules of secrecy governing her role on an intelligence committee. Id.  
84 The Senate followed up on September 26, 2006 by voting 53-46 not to ban waterboarding as an interrogation technique. Oversight Hearing Transcript, supra note ____, at 4.  
85 Shane, et al., supra note ____.  
86 Shane, et al., supra note ____.  
87 Shane, et al., supra note ____.
Much of the substantive criticism of these memos has turned on the expansive assertion of executive power,\textsuperscript{88} the resulting erosion of due process and human rights protections for persons designated as “enemy combatants,”\textsuperscript{89} and the weakening of privacy and civil liberties protections of U.S. citizens.\textsuperscript{90} Procedurally, the current administration has exploited a structural flaw, leveraging the lack of a requirement to disclose its legal policy to make the OLC an administration tool to provide legal comfort for controversial actions for government actors and private cooperators.\textsuperscript{91}

II. \textbf{Process Concerns at the OLC During Times of Politicization}

Critics of the George W. Bush administration have argued that the OLC in previous administrations was able to maintain a culture of non-politicization in order to provide the most sound legal advice possible, within some political constraints.\textsuperscript{92} In contrast, the OLC in the current administration, particularly after the terrorist attacks of September 11, 2001, appears to have given political goals primacy over the best possible legal advice.\textsuperscript{93}


\textsuperscript{89} Eggen & White, \textit{supra} note __; \textit{There Were Orders To Follow}, N.Y. Times editorial, Apr. 4, 2008 (noting that the Yoo Memorandum was “81 pages of twisted legal reasoning to justify President Bush’s decision to ignore federal law and international treaties and authorize the abuse and torture of prisoners”). \textit{See also} Yoo Memorandum, \textit{supra} note __.

\textsuperscript{90} \textit{See generally} Sims, supra note __.

\textsuperscript{91} Katyal, \textit{supra} note __, at 2337 (noting that when the high-ranking officials at OLC “become advocates…the system breaks down. The decisions of that Office begin to look suspect, resembling a courtroom flush with political influence rather than law”); Goldsmith, \textit{supra} note __, at 64-68 (noting that then-White House Counsel Alberto R. Gonzales began, in early 2002, looking for ways to provide legal comfort for government actors in light of the restrictions of the Geneva Conventions, War Powers Resolution, FISA and other statutes).

\textsuperscript{92} \textit{See generally} Best Practices, \textit{supra} note __; Goldsmith, \textit{supra} note __, at 33.

\textsuperscript{93} Goldsmith, \textit{supra} note __, at 33.
The marked lack of information disclosure from the current administration regarding legal policy\textsuperscript{94} has served to enable and increase the politicization, as there exist few external checks on the content and quality of the legal opinions, and little public or congressional knowledge of the use and reliance upon these policies.\textsuperscript{95}

A. *Culture of the OLC Under Previous Administrations*

The OLC, at least in times of peace, historically has maintained its reputation for high-quality legal analysis and executive branch constitutional interpretation due to its longstanding culture of independence from the political motivations of any given administration.\textsuperscript{96} The fact that memoranda drafted during previous administrations, in which the President was of a different political party, are still cited with approval by OLC lawyers in a different administration with different political goals evidences this impartiality.\textsuperscript{97}

Even though the career lawyers at OLC report to political appointees, common OLC practice under previous administrations prioritized the quality and impartiality of the legal opinions over their political utility.\textsuperscript{98} To further this goal, OLC strove to avoid political advocacy whenever possible.\textsuperscript{99} Further, there was an

\textsuperscript{94} Scheppele, *supra* note ___, at 858-59 (calling the lack of disclosure regarding executive branch legal policy “unprecedented and not in keeping with the general American approach to emergency powers”).

\textsuperscript{95} Eggen & White, *supra* note ___ (noting that the top lawyers in the different military branches were not involved in the development of the Yoo Memorandum, nor were they given copies of the Memorandum once it had been prepared and implemented).

\textsuperscript{96} Goldsmith, supra note __, at 33, 145.


\textsuperscript{98} Johnsen, *supra* note ___, at 1577.

\textsuperscript{99} Shane, et al., *supra* note __.
understanding that without the belief that the OLC was setting forth objective legal policy, the credibility of the OLC would be severely jeopardized in the eyes of the public and the other parts of government.\(^{100}\)

\section*{B. Changes in OLC Procedures During the Current Administration}

OLC cultural norms and processes during the current administration have changed significantly, and are a result of the war-time outlook of the administration and its desire for the maximum possible presidential authority in constitutional decision-making during the war on terror.\(^{101}\)

First, the administration severely limited information disclosure on many levels: within the Department of Justice, within the administration as a whole, and to other branches of government and the public.\(^{102}\) Second, the nondisclosure of legal opinions and the opacity of the OLC created an environment in which other changes could be effected without outside oversight, including political influence on content and conclusions of the legal opinions drafted by the OLC.\(^{103}\) Third, the lack of information disclosure

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\(^{100}\) Moss, \textit{supra} note \_, at 1311-12.

\(^{101}\) \textit{Oversight Hearing Transcript, supra} note \_, at 2 ("[Senate oversight] efforts revealed a Department of Justice gone awry…. [investigating] the United States Attorney firing scandal, a confrontation over he legality of the administration’s warrantless wiretapping program, the untoward political influence of the White House at the Department of Justice, and the secret legal memos excusing all manners of excess. And the crisis of leadership has taken a heavy toll on the tradition of independence that’s long guided the Justice Department, provided it with safe harbor from political interference") (Sen. Patrick Leahy).

\(^{102}\) \textit{See Philip Shenon and Eric Lichtblau, Justice Nomination Seen as Snub to Democrats}, N.Y.Times, Jan. 24, 2008 (noting that the nomination of Steven G. Bradbury to head up the OLC had stalled repeatedly as the Department of Justice refused to provide Congress copies of OLC opinions on various terrorism issues); \textit{Oversight Hearing Transcript, supra} note \_, at 3 (noting the practices of the Justice Department leading it to be a “department of cloaking misguided policies under veiled secrecy, leaving Congress, the courts, but especially the American people in the dark.”) (Sen. Leahy). \textit{See Eggen & White, supra} note

\(^{103}\) \textit{Oversight Hearing Transcript, at 72} ("I’m worried we’re not getting enough clarity on critical issues. We have heard reference to legal opinions, to (…continued)
led to the breakdown of other norms, such as appropriate supervision within the OLC\textsuperscript{104} and the use of external checks, including consultation with the general counsels for relevant administrative departments, in developing legal policy.\textsuperscript{105}

Relying on secret legal policy has lowered the quality of legal analysis, compromised the credibility of the OLC and denigrated its ability to give legal comfort that would withstand congressional or public scrutiny.

\subsection{Lack of Information Disclosure}

One major shift from previous administrations is the degree to which information regarding legal policy is not shared with other members of the administration, or with Congress, despite specific requests for that information.\textsuperscript{106}

\begin{quote}
justifications, facts that remain hidden from the Congress, the American people. And it’s a hallmark of our democracy that we say what our laws are and what conduct they prohibit. We’ve seen what’s happened when hidden decisions are made in secret memos and that’s held from the American people, held from their representatives here in Congress. It erodes our liberties, but in undermines our values as a nation of laws.”) (Sen. Leahy).
\end{quote}

\textsuperscript{104} Goldsmith, supra note ___, at 167.
\textsuperscript{105} Eggen & White, supra note ___.

Additionally, the most visible examples of stonewalling by the Justice Department do not relate to the OLC opinions themselves: instead, they involve issues such as the Justice Department’s failure to comply with Congressional subpoenas for documents related to the potentially politically motivated firings of certain U.S. Attorneys, as well as then-Attorney General Alberto Gonzales refusing to answer questions about the firings. \textit{See} Oversight Hearing Transcript, supra note __, at 3 (Sen. Leahy). \textit{See also} Carrie Johnson, Justice Officials Repeatedly Broke Law on Hiring, Report Says, Wash. Post, July 28, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/07/28/AR2008072801007.html?hpid=topnews (visited July 28, 2008) (reporting on the findings of the Department of Justice Inspector (…continued)
Many of the controversial OLC opinions that relate to national security would likely remain unknown to the public, but for leaks of the relevant memoranda or other key documents, or protracted litigation demanding disclosure. Without a leak or voluntary administration disclosure, the Congress and the public remain unaware of executive branch legal policy. As of this writing, a number of OLC memoranda that delineate the administration’s view on the legal parameters of the war on terror are known to exist, but have not been publicly disclosed.

This lack of disclosure by the OLC is consistent with the attitude of the administration as a whole. Whereas under previous administrations, the disclosure of legal opinions and other documents was routine, the current Bush administration has

[107] See Johnsen, supra note ___, at 1563, 1599.
[108] See ACLU FOIA Order, supra note ___.
[109] Johnsen, supra note ___, at 1563; Oversight Hearing Transcript, supra note ___, at 72 (Sen. Leahy).
[110] Shenon & Lichtblau, supra note ___; Lederman, Full Employment Memo, supra note ___; Eric Mink, supra note ___.
[111] One significant shift in information disclosure is the difference in treatment of requests under the Freedom of Information Act (FOIA) between the Clinton administration and the Bush administration. Compare Memorandum from John Ashcroft, Attorney General, on the Freedom of Information Act to the Heads of all Federal Departments and Agencies (Oct. 12, 2001), available at http://www.usdoj.gov/oip/011012.htm (stating that “[w]hen you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis”), with Memorandum from Janet Reno, Attorney General, on the Freedom of Information Act to the Heads of Departments and Agencies (Oct. 4, 1993), available at http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm (noting that “[t]he Department [of Justice] will no longer defend an agency’s withholding of information merely because there is a ‘substantial legal basis’ for doing so. Rather, in determining whether or not to defend nondisclosure decisions, we will apply a presumption of disclosure”). Congress’s attempts to strengthen FOIA in December 2007 were undermined by the Bush administration’s efforts to have
taken a dramatically different view. Reliance on secret laws, albeit anathema to the rule of law, has become routine.

The administration’s stance, although subject to considerable criticism, does not violate the rules or codified procedures of the OLC. The processes for developing and publicizing legal policy—within the OLC, within the Department of Justice, or even within the administration as a whole—have historically operated according to uncodified and informal customs and cultural norms.

Although those customs and norms were adhered to by many prior administrations, the Bush administration chose to alter the processes by which legal policy is developed and disseminated: first, in how the OLC opinions are used for political purposes; second, in whose input was sought in the development of legal disputes mediated by the Department of Justice, as opposed to the less partisan National Archives. See Editorial, The Cult of Secrecy at the White House, N.Y. Times, Feb. 7, 2008.


113 See Walter E. Dellinger, et al., Guidelines for the President’s Legal Advisors, 81 Ind. L.J. 1345, 1350-51 (2006); Lederman, Full Employment Memo, supra note ___.

114 Johnsen, supra note ___, at 1578-79 (discussing the need for the OLC to adhere to internal guidelines); Goldsmith, supra note ___, at 33. This lack of mandated disclosure of OLC memoranda in properly viewed in the context of the statutory requirement to disclose intelligence programs to congressional intelligence committees. See 50 U.S.C. §§ 413, 413a, 413(b),(c),(e).

115 Johnsen, supra note ___, at 1578-79; Although this lack of structure has been the norm through numerous administrations since the OLC was founded, the significant shift in culture and the politicization of the OLC under the current administration has exposed that many of the customary practices and procedures used by OLC lawyers and the Department of Justice in previous administrations was not required by any kind of internal or external control. Therefore, the Bush administration viewed those norms as non-binding, and chose not to enforce them. Goldsmith, supra note ___, at 33, 74-87.

116 Goldsmith, supra note ___, at 166-67.

117 Goldsmith, supra note ___, at 87-97.
policy,\textsuperscript{118} and third, in not sharing the legal opinions with administration actors directly affected by the opinions.\textsuperscript{119}

This is particularly evident in certain OLC opinions involving issues of national security and the administration’s conduct in the war on terror. The Bybee Memorandum and Yoo Memorandum authorizing extremely harsh interrogation techniques are examples of how the processes by which legal policy is developed changed considerably, and how external controls are not used to ensure that the legal opinions being generated reflected the best thinking of individuals familiar with the relevant areas of law.\textsuperscript{120}

2. \textit{Political Pressure on OLC}

Attempts to convince the administration to follow the precedent set by Lincoln and Roosevelt, which turned on publicizing the administration’s desired policy position and lobbying for Congress’s and public support, have been limited and ultimately unsuccessful.\textsuperscript{121}

Yet the route of Lincoln and Roosevelt was consistently rejected, and process-oriented secrecy brought additional political pressure to bear on OLC. This pressure transformed the OLC into an advocate that “lost its ability to say no” to the White House,\textsuperscript{122} a transformation underscored by those who referred to Yoo as “Dr.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{118} Goldsmith, supra note ___ at 82-85, 116; Johnsen, \textit{supra} note ___, at 1564.
\item \textsuperscript{119} Goldsmith, supra note ___, at 166-67; Johnsen, \textit{supra} note ___, at 1600.
\item \textsuperscript{120} Goldsmith, supra note ___, at 166-67.
\item \textsuperscript{121} Goldsmith, supra note ___, at 81-85 (Goldsmith recounts that his attempts to restore process controls at OLC were rejected by David Addington, counsel to Vice-President Dick Cheney and an influential voice in shaping executive branch legal policy). In another exchange, Goldsmith recalls offering his opinion to Addington as to whether the Geneva Conventions protected individuals captured by U.S. troops. Addington reportedly disagreed, telling Goldsmith that the President had made up his mind that the Geneva Conventions did not protect the detainees, and then told Goldsmith, “you cannot question his decision.” \textit{Rosen, Conscience of a Conservative, supra} note ___. Goldsmith left his post after nine months, due in part to his unwillingness to provide the administration legal comfort for all of its proposed national security programs. \textit{Id.}
\item \textsuperscript{122} Shane, \textit{et al., supra} note ___, (citing Douglas Kmiec, head of OLC under Presidents Reagan and George H. W. Bush).
\end{enumerate}
\end{footnotesize}
Yes” for acquiescence to any and all White House requests for legal justifications. 123

Additionally, decisions about hiring, promotion and resignation in the OLC appeared to turn on perceptions of loyalty to the administration and its preferred legal positions. Career lawyers who tried to remain politically neutral in their legal analyses were ostracized124 or passed over for promotion,125 while OLC lawyers perceived to be sympathetic to the White House legal agenda were promoted and supported,126 with the implication that White House support would be withdrawn if that loyalty were brought into question.127

Political pressure, combined with OLC opinions shrouded in secrecy from inception through issuance, undermined the credibility and quality of legal reasoning found in OLC opinions.128 The lack of self-policing by the OLC and the

123 Shane, et al., supra note ___ (referring to then-Attorney General John Ashcroft’s private nickname for John Yoo).
124 James Comey, former deputy Attorney General, was ostracized by the administration and eventually resigned after refusing to sign off on a memo that claimed that an even more aggressive version of the administration’s warrantless wiretapping program was legally sound, and while then-Attorney General John Ashcroft was hospitalized. Dan Eggen & Paul Kane, Gonzales Hospital Episode Detailed, Wash. Post, May 16, 2007, at A1.
125 Shane, et al., supra note ___ (noting that when Alberto Gonzales sought to fill the vacancy left after Goldsmith’s resignation, he rejected the candidacy of Daniel Levin, who had supported Goldsmith’s views on curtailing the expansive views of presidential power outlined in some OLC opinions).
126 Shane, et al., supra note ___ (noting that Steven G. Bradbury, perceived to be sympathetic to the White House desire for legal justification for its preferred course of action, was put in the role of acting head of OLC after Goldsmith’s departure. Bradbury was not, however, immediately nominated to the Senate for confirmation to the post. Instead, he was put on probation by the White House at the suggestion of Harriet Miers, then White House counsel).
127 Shane, et al., supra note ___ (citing Charles J. Cooper, head of OLC under President Reagan, as viewing the probationary period as problematic from a partiality perspective. Bradbury was later nominated by President Bush, but has yet to be confirmed as head of OLC, due in part to administration rejection of the Senate request for the release of OLC memoranda authored by Bradbury). See also Philip Shenon & Eric Lichtblau, Justice Nomination Seen as Snub to Democrats, N.Y. Times, Jan. 24, 2008.
128 Peter Margulies, True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers, at 2, available at (…continued)
administration was compounded by a lack of significant oversight from supervisors within the Justice Department, lawyers from other parts of the administration, and Congress.

For example, Jack Goldsmith notes that prior to his tenure as OLC head, even National Security Agency lawyers were denied access to OLC’s legal opinions governing National Security Agency activities. This attitude reflected the administration’s view that it has no obligation to share information with any agency within its own administration, even when the legal opinion in question directly bears on the activities of that agency.

Further, lawyers within the administration, including general counsels of the military, objected strongly to the substance of the Bybee Memorandum on torture, but their input was not recognized or considered in the drafting and promulgation of the Memorandum. Without such external checks, the environment was established for the OLC to become a “hothouse for rogue


129 In the case of the Bybee Memorandum, Jay Bybee signed off on John Yoo’s draft without making himself an expert in that area of law, or consulting someone who was an expert in national security, war powers and humanitarian law. Goldsmith, supra note ___, at 22. Then-Attorney General John Ashcroft did not provide such supervision, and was actually bypassed in the development of the Bybee Memorandum by virtue of Yoo’s close relationship with top White House officials. See Rosen, Conscience of a Conservative, supra note ___. Commentators have noted that the lack of impartiality and the overtly political nature of the Bybee Memorandum have compromised its utility and the integrity of the OLC generally. See Dorf, supra note ___ (“[T]he August 2002 memo can only be described as a serious departure from longstanding OLC practice. In content and tone, the memo reads much like a document that an overzealous young associate in a law firm would prepare in response to a partner’s request for whatever arguments can be concocted to enable the firm’s client to avoid criminal liability.”).

130 Rosen, Conscience of a Conservative, supra note ___.

ideological opinion, protected from the winds of scrutiny and peer review and other things by the classification shield.”

This highly insulated environment not only denigrates the quality of legal policy, but brings into question whether some OLC attorneys acted in violation of legal ethical standards. Given the significant overhaul of processes at the OLC, it is unsurprising that administration critics have called for mandatory disclosure of OLC memoranda.

III. IS MANDATORY DISCLOSURE REALLY THE SOLUTION?

Mandatory disclosure of OLC memoranda that articulates executive branch legal policy will increase the quality and integrity of OLC opinions. Further, the actions of the current administration demonstrate that internal practices of voluntary disclosure are not effective in maintaining transparency, and such voluntary practices may not work in future administrations. Disclosure should thus be mandated by Congress.

132 Oversight Hearing Transcript, supra note __, at 68 (Sen. Sheldon Whitehouse).
134 Dellinger, supra note __, at ___; Neal Katyal, Jack Goldsmith and Jamie Gorelick, A Conversation Regarding the Role of the Justice Department in the War on Terror, Apr. 10, 2008, available at http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=539, at minutes 28:00--38:00 (visited July 9, 2008) (noting that although there may be some legal objections to mandatory disclosure of OLC memoranda, it would be a sound policy for future administrations to follow).
135 Some have suggested overhauling the entire structure of the OLC to account for the political pressure on OLC attorneys. See Katyal, supra note ___, at 2337-38.
A. Greater Information Disclosure Increases the Integrity of OLC Opinions

A serious effect of nondisclosure is legal memoranda that reflect underdeveloped legal reasoning, a criticism that has been levied against previously secret OLC memoranda that were either leaked to the public or eventually declassified.\(^{137}\) Making disclosure the default standard encourages self-policing by OLC lawyers. Disclosure would also generate political and public sentiment regarding legal policies, the same way that Congressional lawmaking and judicial opinions are subject to public scrutiny.\(^{138}\) Obviously, public outcry could influence an administration to back away from a controversial policy, as has apparently occurred in the case of the Bybee and Yoo memoranda, or, as in the cases of Lincoln and Roosevelt, publication of legal policy could serve to garner public and Congressional support for controversial policies.

Although some disclosures were made after the inception of the surveillance program\(^{139}\) to certain members of Congress, the nature of those communications has been such that no benefit of

\(^{137}\) Jeffrey Rosen, *Conscience of a Conservative*, N.Y. Times, Sept. 9, 2007 (noting that when he started at OLC in 2003, Jack Goldsmith reviewed the Bybee and Yoo Memoranda and found them to be “tendentious, overly broad and legally flawed”).

\(^{138}\) Courts have long recognized the importance of transparency to ensure the accuracy of administrative decision making. E.g., *Air Transport Ass’n of America v. Dep’t of Transp.*, 900 F.2d 369 (D.C. Cir. 1990) (“These [notice-and-comment] procedures reflect Congress’s ‘judgment that...informed administrative decisionmaking require[s] that agency decisions be made only after affording interested persons’ an opportunity to communicate their views to the agency. Equally important, by mandating ‘openness, explanation, and participatory democracy’ in the rulemaking process, these procedures assure the legitimacy of administrative norms.”); *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098 (4th Cir. 1985) (“The purpose of notice-and-comment procedure is both ‘to allow the agency to benefit from the experience and input of the parties who file comments...and to see to it that the agency maintains a flexible and open-minded attitude toward its own rules.’ The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking.”)

\(^{139}\) Johnsen, *supra* note __, at 1563, 1600-01 (noting that after-the-fact disclosures to Congress do not help maintain best practices in crafting and implementing policy).
accountability was accrued.\footnote{Kitrosser, \textit{supra} note __, at 1058-59.} For example, limited aspects of the warrantless wiretapping program were disclosed to the “Gang of Eight,” a bipartisan group of members of Congress. However, that information was not a complete briefing, and the attendees were under the severe restriction of not being allowed to reveal the information learned in the meetings, including to members of their staffs or other members of the congressional intelligence committees.\footnote{Warrick & Eggen, \textit{supra} note __. Kitrosser, \textit{supra} note __, at 1058-59.}

If briefing attendees had any objection to the nature of the surveillance program, their only recourse was to complain to those providing the briefing, or discreetly communicate with the administration to voice their objections, with the hope that those objections would be considered.\footnote{Dan Eggan, \textit{Limited Spying is Inconsistent With Rationale, Critics Say}, Wash. Post, Feb. 8, 2006, at A5; David E. Sanger, \textit{Bush Says He Ordered Domestic Spying}, N.Y. Times, Dec. 18, 2005, at A1.}

This disclosure becomes meaningless unless the recipients of the information – here, individuals within Congress – evince the will to disregard the unreasonable secrecy limitations placed on them by the administration, or to leverage their power in Congress to exert strong and meaningful pressure on the administration to change its legal policies. The public debate that triggered by the disclosure would increase the likelihood that the administration would produce a more effective, lawful, policy.\footnote{See Lederman, \textit{supra} note ____ (Balkinization blog).} For example, because information recipients were not able to exercise meaningful oversight or develop a cogent legislative response to the wiretapping program,\footnote{Suzanne E. Spaulding, \textit{Power Play: Did Bush Roll Past the Legal Stop Signs?} Wash. Post, Dec. 25, 2005 at B1; Sheryl Gay Stolberg, \textit{Senators Left Out of the Loop Make Their Pique Known}, N.Y. Times, May 19, 2006, at A1.} Congress is still looking for ways to negotiate the exposure of classified information while still conducting useful, legitimate oversight of the Department of Justice.\footnote{To that end, it passed Senate Bill 274, The Federal Employee Protection Act of 2007 to protect whistleblowers who report abuses in the area of national security to Congress. In January 2008, Attorney General Mukasey and others (...continued)
In response to such criticisms, the administration has contended that briefings to a limited number of congresspeople, even with the significant restrictions on information flow in place, constituted an adequate check on executive branch legal policy making.\textsuperscript{146}

Mandatory disclosure would also force a higher level of self-policing by OLC and the administration because of the crucial offensive and defensive functions served by the memoranda. Offensively, the OLC memoranda in question lay out an expansive view of presidential power regarding the legality of certain national security programs.

Defensively, providing legal comfort to protect interrogators and others against future prosecution is one of the primary reasons for the existence of certain OLC memoranda.\textsuperscript{147} CIA agents referred to the immunity provisions of the Bybee Memorandum as the “Golden Shield” that protected them from future liability if the interrogation techniques were ever made public.\textsuperscript{148} Evidence suggests that CIA interrogators would not have conducted any “enhanced interrogations” without specific legal approval,\textsuperscript{149} and that the Bybee and Yoo memoranda’s blanket immunity for those involved in the decision-making on the

\textsuperscript{147}Eric Mink, \textit{The Torture Memos}, St. Louis Post-Dispatch, Apr. 9, 2008 (noting that both the Bybee and Yoo memoranda “provide excuses for interrogators and their military and civilian supervisors. These amount to variations of ‘I was just following orders,’ self-defense (of the nation) or necessity (to prevent a greater evil)”).
\textsuperscript{148}Jan Crawford Greenburg, Howard L. Rosenburg and Ariane de Vogue, \textit{Sources: Top Bush Advisors Approved ‘Enhanced Interrogation,’} ABCNews, Apr. 9, 2008; Editorial, \textit{There Were Orders to Follow}, N.Y. Times, Apr. 4, 2008 (noting that the Yoo Memorandum offered a “detailed blueprint for escaping accountability”).
\textsuperscript{149}Greenburg, \textit{et al.}, supra note ….
use of harsh techniques encouraged top White House officials to continue asking the CIA to use those techniques.\textsuperscript{150}

Because OLC opinions were essential to convince CIA operatives that they would not face prosecution or legal liability in the future, it is highly unlikely that such harsh techniques would ever have been used without the formal protection of an OLC opinion deeming the actions to be legal.\textsuperscript{151} If such memoranda were, as a default, made public, then the internal pressure to offer the best possible assessment of whether the use of harsh techniques is legal would increase dramatically.

B. Nature of the Mandatory Disclosure

A new disclosure requirement should apply to almost all OLC opinions and result in a timely disclosure to the public whenever possible.\textsuperscript{152} Exceptions should be made for limited purposes, including when a particular administrative agency requests confidentiality and does not actually rely on the advice given in a particular opinion.\textsuperscript{153}

Such a system would bring OLC’s disclosure practices into line with the exceptions to disclosure under the Freedom of Information Act,\textsuperscript{154} particularly Exemption No. 5,\textsuperscript{155} which protects the intra-agency deliberative process.\textsuperscript{156}

\textsuperscript{150} Lara Jakes Jordan and Pamela Hess, Cheney, Others OK’d Harsh Interrogations, Assoc. Press, Apr. 11, 2008. Goldsmith describes the defensive role of OLC memoranda as “free get-out-of-jail cards” being dispensed to the interrogators, and an “advance pardon” for controversial actions. See Rosen, Conscience of a Conservative, supra note ___.

\textsuperscript{151} Scott Shane, Nominee’s Stand May Avoid Tangle of Torture Cases, N.Y. Times, Nov. 1, 2007.

\textsuperscript{152} Some OLC opinions involving classified information or particularly sensitive national security matters should not be disclosed to the public, but should be made available to Congress under the rubric set forth in the National Security Act of 1947. See supra at ___.

\textsuperscript{153} Compare Best Practices, supra note ___, at 4 (“OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor’s desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action”).

Mandatory disclosure—at least to Congress, if not to the public—for every OLC opinion which affirms the legality of policies which are then actually implemented by an administration would create a context in which legal comfort is available only from those opinions which are made public. This flexible standard would allow for retention of confidentiality when necessary (and when the opinion sought does not shape actual policy), and would minimize the chilling effect on those seeking legal advice within an administration. Courts have made clear that the administration should not be permitted “to develop a body of ‘secret law,’ used by it…but hidden behind a veil of privilege because it is not designated as ‘formal,’ ‘binding,’ or ‘final.’”

C. Potential Impact of New OLC Culture on Future Administrations

In times of both war and peace, OLC’s cultural norm under previous administrations allowed for some information disclosure and more internal and external controls; critics agree that this

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156 See, e.g., National Council of La Raza v. Dep’t of Justice, 411 F.3d 350, 356 (2d Cir. 2005) (the deliberative process privilege “is intended to promote candid discussion between agency officials and protect the quality of agency decisions”); Tigue v. United States Dep’t of Justice, 312 F.3d 70, 75 (2d Cir. 2002) (noting that the deliberative process privilege is “a sub-species of work-product privilege that covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”); Bronx Defenders v. U.S. Dep’t of Homeland Security, 2005 WL 3462725, at *2 (S.D.N.Y.) (same).
157 See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975) (holding that the deliberative process privilege ends when an originally deliberative document is adopted or incorporated by reference into a final agency policy or decision); Bronx Defenders, 2005 WL 3462725, at *2.
158 As the Supreme Court reasoned, “[t]he probability that an agency employee will be inhibited from freely advising a decision maker for fear that his advice if adopted, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend…. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports [disclosure].” NLRB v. Sears, 421 U.S. at 161.
159 Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d, 854, 867 (D.C. Cir. 1980).
previous norm is preferable to the lack of process controls and standard practices in the current administration.\footnote{See Johnsen, \textit{supra} note \textdontright, at 1564 (encouraging a return to old OLC norms and the use of internal executive branch constraints to maintain those old norms); Walter Dellinger, Dawn Johnsen, et al., \textit{Principles to Guide the Office of Legal Counsel} (2004), reprinted in 54 U.C.L.A. L. Rev. 1559 app. 2, at 1603.}

However, it is problematic to assume that internal constraints can be successfully re-established to maintain impartiality and best practices\footnote{Johnsen, \textit{supra} note \textdontright, at 1579 (noting that “the power of unwritten tradition alone plainly is inadequate” to maintain OLC best practices).} in the OLC if the interaction between the President and Congress remains highly politicized, as in the current Bush administration.\footnote{In rare instances, a minority party in Congress has exerted enough political pressure on majority leaders to heighten or maintain oversight. One such example is the Senate Intelligence Committee’s completion of its investigation into the flawed intelligence that was reported in the National Intelligence Estimate of 2002. See Patricia Wald & Neil Kinkopf, \textit{Putting Separation of Powers into Practice: Reflections on Senator Schumer’s Essay}, 1 Harv. L. & Pol’y Rev. 41, 48 (2007) (noting that political parties are more ideologically polarized than in previous eras). The completion of the Intelligence Committee’s work only occurred after Senate Democrats threatened to stall business on the Senate floor. \textit{See id.}} This is particularly true if both houses of Congress and the President belong to the same political party – if Congress does not have the political will to exercise at least some oversight of the OLC, mandatory disclosure can and will serve as a backstop.\footnote{See George C. Edwards III & Andrew Barrett, \textit{Presidential Agenda Setting in Congress}, in Polarized Politics 109, 112-16 (Jon R. Bond & Richard Fleischer eds., 2000); Mark Tushnet, Controlling Executive Power in the War on Terrorism, 118 Harv. L. Rev. 2673, 2679 (2005) (noting that under unified government, Congress tends to support the President without questioning the wisdom of his policies); Setty, \textit{supra} note \textdontright, at 262 (Congressional investigative function is limited in times of one-party government).} Further, politicization and political pressure\footnote{Oversight Hearing Transcript at 49-50 (Sen. Charles Schumer noting some changes in Department of Justice process since Michael Mukasey became Attorney General, including the limitation of contact between the White House and Justice Department employees, and other efforts to lessen political influence in Justice Department decision-making).} may be inevitable in times of war.\footnote{The examples of Lincoln and Roosevelt illustrate this point. \textit{See also} Kim Lane Scheppel, \textit{Small Emergencies}, 40 Ga. L. Rev. 835, 837 (2006).} Politicization that leads to self-interested actions, such as keeping...
secret potentially controversial legal policies, highlights the need for institutionalized checks and balances such as mandated disclosure.166

Finally, asking OLC lawyers to revert to a particular model of best practices is futile if those lawyers already believe that they are adhering to best practices in terms of their legal analysis.167 John Yoo, Jay Bybee and current Attorney General Mukasey have made clear that they believe that the legal opinions drafted by the OLC were done so in good faith and through the best possible interpretation of the law.168 Goldsmith, a strong critic of some tactics of the administration, stated that everyone he dealt with in the administration “thought they were doing the right thing” in developing OLC legal opinions.169

166 See Federalist Nos. 47, 51 (James Madison) (“Ambition must be made to counteract ambition. ... It may be a reflection on human nature, that such devices should be necessary to control the abuses of government”); Setty, supra note ___, at 251-52; Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2313 (2006).

167 John Yoo, who drafted at least part of the Bybee Memorandum, maintains that his advice was not politically motivated, and that it represented an impartial, accurate reading of the law:

“It is very important not to put in an opinion interpreting a law on what you think the right thing to do is, because I think you don’t want to bias the legal advice with these other considerations. Otherwise, I think people will question the validity of the legal advice. They’ll say, ‘Well, the reason they reached that result is that they had certain moral views or certain policy goals they wanted to achieve.’ And actually I think at the Justice Department and [the OLC], there’s a long tradition of keeping the law and policy separate.”


168 John Yoo, Testimony Before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Civil Liberties, June 26, 2008, available at http://judiciary.house.gov/media/pdfs/Yoo080626.pdf, at 2 (visited July 3, 2008) (“we in OLC were determined…to interpret the law, in good faith….by operating within the bounds drawn by the laws and the Constitution of the United States. Now as then, I believe we achieved this goal.”); Oversight Hearing Transcript, supra note ___ (remarks of Attorney General Mukasey).

169 Rosen, Conscience of a Conservative, supra note ___.
The belief that a different set of principles will once again prevail in the OLC and the administration, without further measures to ensure greater information disclosure, inherently assumes that the breakdown of previous OLC norms is peculiar to the current administration.\textsuperscript{170}

The question that remains after all of the hand-wringing over the politicization of the OLC is whether the next President will seek to re-establish those OLC norms, in which case the information disclosure problems highlighted here may not need to be addressed further. However, the next President may find it helpful and self-serving to use the current administration as precedent to cement the aggregation of executive power\textsuperscript{171} and limit access to OLC legal policy,\textsuperscript{172} in which case we must consider whether additional structural or institutional measures will be helpful to improve the quality of OLC opinions while maintaining the integrity of sensitive national security programs to which some legal opinions relate.\textsuperscript{173} As one administration critic has put it, “What was once shocking and unacceptable in America has now been internalized as the new normal.”\textsuperscript{174}

D. Compensating for a Lack of Checks and Balances

It is clear that the lack of effective oversight by the courts and Congress has, to some extent, enabled the administration’s unwillingness to disclose OLC opinions.\textsuperscript{175} This issue is

\begin{itemize}
\item \textsuperscript{170} In fact, Attorney General Mukasey has pointed out that nobody at the OLC ever though that they were promulgating a bad opinion or that they were breaking the law. Oversight Hearing Transcript, \textit{supra} note ___ at 68.
\item \textsuperscript{171} \textit{See} Bruce Ackerman, \textit{Terrorism and the Constitutional Order}, 75 Fordham L.R. 475, 477-78 (2006) (noting that “whatever new powers are conceded to the President in this metaphorical war [on terror] will be his forever”).
\item \textsuperscript{172} Adam Cohen, \textit{Honey, They Shrunk the Congress}, N.Y. Times, Oct. 30, 2007 (noting that “the issue of reining in presidential power is beginning to gain traction among conservatives…as they contemplate the possibility of a Democrat…as president”).
\item \textsuperscript{173} Kitrosser, \textit{supra} note ___, at 1050.
\item \textsuperscript{175} Editorial, \textit{Secrets and Rights}, N.Y. Times, Feb. 2, 2008 (citing refusal of the courts to question seriously any administration claim of state secrets).
\end{itemize}
significantly more problematic in times of unified government—that is, when Congress is aligned politically with the President, as it was from 2000 to 2006. However, lack of oversight often persists even in divided government during wartime, when Congress often acquiesces to executive requests with little opposition. As such, additional institutionalized safeguards, such as mandatory disclosure of opinions, are necessary to offset a lack of effective oversight.

Congressional leaders have admitted the failure of Congress to extract meaningful concessions from the administration in terms of disclosing legal policy or responding to congressional requests for witnesses and documents that would shed light on administration activities.

IV. How Valid Are Administration Justifications for Nondisclosure?

176 Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2371 (citing Joel D. Aberbach, Keeping a Watchful Eye: The Politics of Congressional Oversight, 59-75 (1990)) (concluding that congressional committees exercised over 26% more oversight in times of divided government than unified government between 1961 and 1977). Levinson and Pildes use a simple majority to assess whether a party is able to exert control in the legislature. Id. at 2368-71. See also Setty, supra note __, at 260-262 (addressing the limits of Congress’s investigative function).

177 Barron & Lederman, supra note __, at 702-03; Neal Kumar Katyal, Internal Separation of Powers: Checking Today’s Most Dangerous Branch From Within, 115 Yale L.J. 2314, 2321-22 (“A Congress that conducts little oversight provides a veneer of legitimacy to an adventurist President. The President can appeal to the historic sense of checks and balances, even if those checks are entirely compromised by modern political dynamics. With this system in place, it is no surprise that recent calls for legislative revitalization have failed”).

178 When the President looks to leverage his position to gain more power, the legislature is obliged to exercise oversight to control executive overreaching. See Akhil Reed Amar, America’s Constitution: A Biography 111 (2005) (noting that although Congress’ oversight function is not specifically enumerated in Article I of the Constitution, it most definitely was an expectation of the framers of the Constitution that Congress would exercise oversight of the executive branch, based on the traditional powers exercised by the English parliaments and the colonial legislatures). See generally Michel Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, 74 S. Cal. L. Rev. 1307 (2001).

179 Oversight Hearing Transcript, supra note ___ (comments of Sen. Charles Schumer).
National security interests demand a heightened awareness of how sensitive information is treated, since the President has legitimate needs to act quickly and discreetly in times of war. Equally legitimate is the need for the public and Congress to understand the country’s legal policy vis-à-vis national security matters.\textsuperscript{180}

The administration justifies its nondisclosure of legal policy in two ways: first, through pragmatic arguments, namely that national security concerns demand that the administration strictly limit access to legal policies and interpretations by the executive branch. Second, the administration uses the unitary executive theory to claim that the President can determine unilaterally how the executive branch conducts war.\textsuperscript{181} Both of these arguments are not compelling reasons to forego mandated disclosure.

A. Pragmatic Arguments Justifying Non-Disclosure

Recent attempts by Congress to garner information regarding national security issues have met with mixed results,\textsuperscript{182} depending on the political pressure brought to bear on the administration and whether underlying documents or information was already leaked to Congress.\textsuperscript{183}

The administration has consistently insisted that nondisclosure of legal policy is necessary to maintain the integrity

\textsuperscript{180} Kitrosser, supra note ___, at 1050.
\textsuperscript{181} See Jack N. Rakove, Original Meanings 356 (1996) (noting that the current debate over the scope of the executive power during wartime can be traced back to discussions between Alexander Hamilton and James Madison over President George Washington’s proclamation of neutrality in 1793).
\textsuperscript{182} See, e.g., Bob Egelko, Mukasey Asked to Explain Terror Call Remarks, S.F. Chronicle, Apr. 11, 2008 (reporting that the DOJ refused a Congressional request for elaboration on the necessity of maintaining a warrantless surveillance program).
\textsuperscript{183} Attempts of Congress to get information related to intelligence gathering, which are mandated under the National Security Act of 1947, should be distinguished from covert operations for the purpose of effecting a military strike against a foreign power, which the President is not under obligation to disclose to Congress. 50 U.S.C. § 413(b)(e)(1).
of U.S. national security interests. The administration often offers the defense that additional information as to the content of OLC opinions would empower terrorists planning to attack the U.S. Former Attorney General Alberto Gonzales testified that “widespread briefings would pose an unacceptable risk to the national security.”

To that end, the administration has deviated from the prescribed procedure for disclosure of sensitive information to Congress, laid out in the National Security Act of 1947. Whereas the Act mandates briefings to an eight-person subset of Congressional intelligence committees for particularly sensitive issues, the Bush administration limited briefings to four people – the top Republican and Democrat on the two committees. The reason offered for this deviation was based on national security concerns: namely that the interrogation program should stay secret for fear that al-Qaeda operatives might find out what to expect if captured by the US.

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185 Carol D. Leonig & Eric Kich, U.S. Seeks Silence on CIA Prisons, Wash. Post, Nov. 4, 2006, at A1. See Kitrosser, supra note __, at 1056 (“the administration has offered no explanation of the purported dangers of revealing the program’s very existence beyond the vague assertion that, while terrorists surely already know that the United States can survey their conversation, knowing about the program would remind them of this fact and might lead them to infer that surveillance is broader than they had assumed”). See Gonzales Testimony, supra note ___, at 107. See also Ackerman, supra note ___, at 478-79 (arguing that the rhetoric surrounding the war on terror encourages a public and congressional overreaction of ceding powers to the President).


188 Warrick & Eggen, supra note ___.

189 Warrick & Eggen, supra note ___. Critics have offered a second, perhaps more important reason for the desire for secrecy: to avoid public and international censure over the use of the harsh interrogation techniques. When the interrogation program because known more widely in late 2006, the uproar (…continued)
Attorney General Michael Mukasey has used the fact that national security is the Justice Department’s top priority to support extensive nondisclosure. For example, when considering the complicity of telecommunications companies in the administration’s warrantless wiretapping programs, Mukasey refused a Senate request to discuss the actual role of the companies, testifying in a January 2008 hearing that it could compromise national security interests to publicize the “means and methods” used by the administration.\(^{190}\)

Mukasey also refused to disclose whether and under what possible circumstances waterboarding could be used lawfully by U.S. interrogators, because of his fear that such disclosure would embolden terrorists by letting them know what to expect while imprisoned by the United States.\(^ {191}\)

The administration supports this pragmatic argument with the theory that the President is authorized to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons,” without disclosure of the program to Congress or the public, by the Authorization to Use Military Force (AUMF).\(^ {192}\)

The administration has argued that whatever obligation it had to share information with Congress related to the development of legal policy, whether under previous Justice Department norms

\(^{190}\) Oversight Hearing Transcript, supra note \(\_
\_\_\_\_\_\_\_\_\_\_\_\_\_, at 7, 14, 40 (Sen. Orrin Hatch agrees with Mukasey’s assessment, saying that “the reason for classification is to prevent the information from getting into the hands of the wrong people”).

\(^{191}\) Oversight Hearing Transcript, supra note \(\_\_\_\_\_\_\_, at 16.

\(^{192}\) Public Law 107-40 [S. J. RES. 23] (Sept. 18, 2001) (emphasis added). The AUMF was passed by Congress one week after the terrorist attacks of September 11, 2001.
or the information-sharing rubric of the National Security Act of 1974,\footnote{50 U.S.C. §§413a(a)(1), (b), 413(a).} was obviated by the passage of the AUMF.\footnote{See AUMF, at Sec. 2(a) (legislating that “the President is authorized to use all necessary and appropriate force… to prevent any future acts of international terrorism against the United States…. “); George W. Bush, Presidential Radio Address of December 17, 2005, available at http://www.whitehouse.gov/news/releases/2005/12/20051217.html (visited March 3, 2008); Prepared Remarks of Hon. Alberto R. Gonzales, supra note ___} The view that the AUMF provides a blanket justification for whatever action the administration deems necessary as part of the war on terror was squarely rejected by the Supreme Court in \textit{Hamdi v. Rumsfeld}.\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 533, 539, 124 S.Ct. 2633 (2004).}

Despite the reclassification and release in April 2008 of the Yoo Memorandum, numerous OLC opinions remain secret, supposedly for reasons of national security—the same reason offered for the initial nondisclosure of the Yoo Memorandum that was eventually declassified in response to a FOIA request.

\paragraph{1. Critiques of the Pragmatic Justification}

The claim that disclosure of legal policies is unnecessary and unwise because it would jeopardize U.S. national security interests is questionable, given both the experiences of the U.S. and other nations, as well as serious concerns about the maintenance of the rule of law.

First, the administration has offered no credible evidence that disclosure will harm U.S. national security interests; in fact, it has offered no evidence that the disclosure of the OLC memoranda that were initially withheld from public scrutiny—such as the Bybee and Yoo Memoranda—have negatively impacted U.S. national security programs, other than bad publicity and embarrassment for administration. Repeated claims of a need for secrecy based on national security concerns ultimately undermine administration’s claim, with more evidence pointing to secrecy being maintained...
primarily for partisan purposes or because of an unmitigated belief in the unitary executive theory.\textsuperscript{196}

Further, the administration fails to make its case as to why legal policies governing the war on terror must be afforded more secrecy than domestic criminal laws and procedural rules.\textsuperscript{197} If the U.S. or any democratic nations chooses to rely on secret laws and thus deviate so substantially from the general edicts of the rule of law, the public deserves a credible and clear explanation as to why that deviation is necessary.

\textit{(a) Comparative Perspectives: Greater

\textit{Transparency of Legal Policy Is the Norm}}

Other countries that face serious national security issues have no mechanism or allowance for secret legal policies to govern national security matters; instead, several nations publicize, disseminate and publicly debate the same type of legal policy that is being withheld from public scrutiny by the OLC.\textsuperscript{198} A comparative perspective, even of nations with significant different governmental structures,\textsuperscript{199} provides some context to evaluate the U.S. administration’s pragmatic justification for non-disclosure.

\begin{footnotesize}
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\item \textsuperscript{197} Senators involved in administration oversight have noted that domestic criminals are entitled to understand criminal laws and their related punishments; this serves to uphold the rule of law and does not appear to undermine the integrity of the criminal justice system. The administration, however, views the context of national security as fundamentally different than the domestic criminal context and, therefore, not prone to the same conclusions or restrictions as domestic criminal law. Oversight Hearing Transcript, \textit{supra} note ___, at 36 (colloquy between Sen. Russell Feingold and Attorney General Michael Mukasey).
\item \textsuperscript{198} Kim Lane Scheppele, \textit{We Are All Post-9/11 Now}, 75 Fordham L. Rev. 607, 609 (2006) (noting the value of considering other countries’ experiences with balancing national security with other constitutional interests).
\item \textsuperscript{199} Even countries with similar structural arrangements to the U.S. have different balances of power with regard to the authorization of wartime actions. See, \textit{e.g.}, Article 29 of the Mexican Constitution, which requires Congressional approval for emergency measures if Congress is in session at the time. If Congress is not in session, it must be convened as soon as possible to make a decision on emergency measures. Constitucion Politica de los Estados Unidos Mexicanos [Const.], art. 29, as amended, Diario Oficial de la Federacion [D.O.], 5 de Febrero de 1917 (Mex.). This grant of Congressional oversight into questions of (…continued)
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\end{footnotesize}
(i) India

India has been coping with serious national security concerns, both internal and external, for the last 60 years. By some accounts, India is the nation that has faced the highest number of terrorist acts in recent years.

The similarities with the U.S. national security landscape are noteworthy. The central government of India has the responsibility to develop laws and policies to preserve the national security of India, and the country goes through periods of conflict in which its otherwise supposedly impartial and unbiased legal policy becomes politicized and prone to government overreaching in the areas of civil rights and civil liberties.

India passed a number of strong antiterrorism laws in recent years which grant additional authority and power to the central

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(continued…)

the legality of proposed measures is particularly striking considering the historic strength of the Mexican presidency. See generally Jeffrey Weldon, Political Sources of Presidencialismo in Mexico, in Scott Mainwaring & Matthew Sobert Shugart, eds., Presidentialism and Democracy in Latin America (Cambridge U. Press 1997). Although the Mexican Constitution of 1917 is structured similarly to the U.S. Constitution, Mexican politics has shaped the federal government into one that, until the mid-1990s, was a one-party system in which the President could set his own agenda, likely to be rubber-stamped by the Congress and the courts. Martinez, supra note __, at 2508; Kenneth F. Johnson, Mexico’s Authoritarian Presidency, in Presidential Power in Latin American Politics 33, 49 (Thomas V. DiBacco, ed., 1977).

201 E.g., Arun Venugopal, India Worst Hit by Terrorism in 2004, India Abroad, Aug. 19, 2005 at A14.
202 India Const., 7th sched., List I (Union List), §§ 1-2, 2A, List III (Concurrent List), §§ 1-2.
203 For example, the Defence of India Act of 1962 authorized the central and state governments to broaden their use of preventative detention beyond ordinary laws as a means to quell potential uprisings against the government and in response to hostilities in the Jammu and Kashmir region. See Kalhan, supra note __, at 132-33 (citing Venkat Iyer, States of Emergency: The Indian Experience 109 (2000)).
government to maintain national security. In the wake of the September 11, 2001 terrorist attacks and attacks on Indian government buildings soon afterward, the Indian Parliament enacted the Prevention of Terrorism Act, 2002 (POTA). Under POTA, the government, in conducting antiterrorist activities and in case of a self-determined emergency, was authorized to set aside ordinary legal protections with regard to wiretapping any person within India without authorization, extend the duration and scope of preventative detention measures and deny arrested suspects access to counsel. Some antiterrorist activities legally authorized under POTA parallel what was initially authorized under the USA Patriot Act, particularly in terms of allowing for enhanced surveillance of U.S. citizens and increasing authority for other intelligence-gathering efforts.

However, major structural differences exist as to how a parliamentary nation such as India handles the creation of legal policy related to national security measures: one primary difference is that the responsibility for the creation of legal policy is diffuse, with the parliament having the ultimate ability to set the law, while the prime minister and administrative departments play a central, but not decisive, role.

For example, an early iteration of some of the POTA policies was a 2000 report drafted by the Indian Law Commission, a

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206 Id. at § 43. The admissibility of evidence garnered in this manner is established in § 45.
207 Id. at § 49.
208 Id. at § 52.
210 Patriot Act, Title II, § 218.
211 Patriot Act, Title IX, § 901.
nonpartisan commission of respected lawyers and jurists who respond to government requests for legal recommendations. The 2000 report contained recommendations that the parliament strengthen the central government’s power to conduct antiterrorism operations, primarily in light of ongoing domestic unrest that could provoke a national crisis.\textsuperscript{214} The Law Commission, in accordance with its own policies, circulated the report to the public for review and comments.\textsuperscript{215}

After the September 11 terrorist attacks, the Indian parliament began debate on whether to pass the Law Commission’s recommendations from the 2000 report into law. In the meantime, because of the perceived immediacy of the need for the intelligence-gathering tools outlined in the Law Commission’s report, the executive branch issued the Prevention of Terrorism Ordinance of 2001, a temporary ordinance which put into place the recommended tools.\textsuperscript{216} POTA was enacted in March, 2002,


\textsuperscript{214} 17\textsuperscript{th} Law Commission Report (2000), at Chapter II (The Security Situation in the Country) (describing unrest in Jammu & Kashmir, Punjab, Assam and other regions of India).

\textsuperscript{215} \textit{How Does the Commission Function?}, available at http://www.lawcommissionofindia.nic.in/main.htm#HOW DOES THE COMMISSION FUNCTION? (visited May 5, 2008) (noting that the proposed reform is “sent out for circulation in the public and concerned interest groups with a view to eliciting reactions and suggestions. Usually a carefully prepared questionnaire is also sent with the document. The Law Commission has been anxious to ensure that the widest section of people [is] consulted in formulating proposals for law reforms. In this process, partnerships are established with professional bodies and academic institutions. Seminars and workshops are organised in different parts of the country to elicit critical opinion on proposed strategies for reform“). \textit{Id.}

\textsuperscript{216} Prevention of Terrorism Ordinance, 2001, No. 9 of 2001 (enacted Oct. 24, 2001). Under the Indian Constitution, the executive branch has the power to issue ordinances for a short duration to meet unforeseen or urgent challenges to
containing the same provisions that were in the temporary ordinance.\(^{217}\)

POTA was met with a great deal of opposition from human rights advocates and opposing political parties, even prior to its enactment.\(^{218}\) In response, the Home Minister of India claimed that opponents to the measure were assisting the terrorists,\(^{219}\) rhetoric that mirrors the public discourse within the United States in response to the Patriot Act, as well as the legal policy developed by the U.S. executive branch.

POTA became a driving issue in the 2004 parliamentary election. The Congress party, then a minority party, ran on the promise to repeal POTA because of the law’s enabling of abuses of human rights and civil liberties.\(^{220}\) When the Congress Party won the 2004 parliamentary elections, POTA was repealed almost immediately.\(^{221}\)

No secret law exists in terms of Indian antiterrorism policies; instead, they are generated with a significant level of publicity and public accountability.\(^{222}\) This publicity led to public and parliamentary support for POTA in 2002; that same publicity and public accounting led to the repeal of the Act in 2004. The content of anti-terror policies is likely a reflection of the law, politics, culture and history of a nation. Transparency and public accountability, however, demonstrate that nations are able to

\(\text{(continued...)}\)


\(^{217}\) The Prevention of Terrorism Act, 2002, Act No. 15 of 2002, was enacted March 28, 2002


\(^{219}\) Kalhan, supra note __, at 152.

\(^{220}\) Kalhan, supra note __, at 152, 190.

\(^{221}\) Prevention of Terrorism (Repeal) Act, No. 26 of 2004 (Dec. 21, 2004).

\(^{222}\) \textit{See also} Right to Information Act, 2005 (containing provisions similar to FOIA, including an exemption for a deliberative privilege, but not for adopted policies).
maintain national security programs without operating under undue secrecy.\textsuperscript{223}

(ii) Israel

Israel has dealt with serious national security issues since its founding in 1948, with scores of people dying each year in various types of attacks, including suicide bombings, car bombs and kidnappings.\textsuperscript{224}

Israel’s antiterrorism efforts, including the techniques used by Israel’s General Security Service in interrogating detainees suspected of terrorist activities, are authorized broadly by Article 2(1) of the Criminal Procedure Statute and the government’s general and residual powers under Article 40 of the Basic Law (Government).

The legal treatment of specific interrogation techniques used by the General Security Services is fundamentally different than how OLC memoranda treat the same issue. The authority of the General Security Service to employ certain interrogation techniques was examined by the Israeli Commission of Inquiry,\textsuperscript{225} which concluded in 1995 that the General Security Service had the authority to interrogate suspects using some physical techniques,\textsuperscript{226} and established the availability of a post factum defense of

\textsuperscript{223} Although a number of acts of terrorism have occurred in India in the last several years, no credible argument has been made that the publication of India’s legal policies surrounding national security is one of the bases for attacks occurring.


\textsuperscript{225} The Commission of Inquiry, which undertakes investigations of government actions, was convened under the authority of the Commission of Inquiry Statute (1968).

\textsuperscript{226} The techniques at issue included harsh shaking which, in one instance, led to the death of the detainee; prolonged detention in stress positions; exposure to extreme temperatures; and covering the detainee’s head with a vomit-covered hood. H.C. 5100/94, Public Comm. Against Torture in Isr. v. Government of Israel, 53(4) P.D. 817, ¶¶ 8-13 (1999).
“necessity” for interrogators who engaged in what would otherwise be considered criminal actions.227

The General Security Service interpreted the necessity defense broadly; like the Bybee and Yoo memoranda, the necessity defense was interpreted internally such that interrogators were given broad legal comfort that they could not be prosecuted for torturing terrorism suspects so long as they were doing so in an effort to preserve national security.228 But unlike the Bybee and Yoo memoranda, this interpretation of the necessity defense was not kept secret from the public, courts or detainees themselves.

In Public Committee Against Torture in Israel v. Government of Israel229 human rights groups and individual detainees challenged the blanket reading of the necessity defense based on rule of law and human rights concerns. The court, with some reservations given Israel’s national security issues, unanimously held that broad legal comfort to protect interrogators who torture suspects230 was unacceptable under Israeli Basic Law.231

230 The Israeli Penal Code (1977) prohibits the use of force or violence against a person for the purpose of extorting from him a confession to an offense or information relating to an offense. Further, Israel has signed and ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, at ¶ 4 (Feb. 17, 1997).
231 H.C. 5100/94, Public Comm. Against Torture in Isr. v. Government of Israel, 53(4) P.D. 817, ¶¶ 38-40 (1999). The court struggled with several national priorities: “[w]e are aware that this decision does not ease dealing with that harsh reality [of Israel’s security issues]. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual’s liberty constitutes an important component in its understanding of security.” Id. at ¶ 39. See also Israel Supreme Court Bans Interrogation Abuse of Palestinians, cnn.com, Sept. 6, 1999, available at http://www.cnn.com/WORLD/meast/9909/06/israel.torture/ (visited June 3, 2008).
The High Court, however, affirmed the availability of a necessity defense for individual interrogators being prosecuted for using such techniques during a perceived national security emergency, but rejected the argument put forth by the Israeli government, which parallels the Bybee and Yoo memoranda, that blanket immunity ought to apply to the interrogators’ actions.232

The Public Committee Against Torture decision illustrates how Israel navigated the tension between adhering to the rule of law and maximizing national security efforts, particularly with respect to making public the legal policies and parameters under which the General Security Service interrogators were acting. As in the case of India, Israel’s legal policy vis-à-vis national security is developed by numerous bodies,233 justiciable,234 and open to public scrutiny.235

233 Decisions of the Israeli Attorney General in terms of legal policy or prosecution of the law, are judicially reviewable. See H.C. 935/89, Ganor v. Attorney General, 44(2) P.D. 485. The Israeli Supreme Court stated that, “[i]n a country ruled by law, where the rule of law governs, there is no justification for using special criteria to assess the validity of the discretion of the person who heads the public prosecution service. Note that this conclusion does not mean replacing the discretion of the Attorney General with the discretion of the court. This conclusion does not mean invalidating a ‘wrong’ decision of the Attorney General – that is, one in which he chooses an undesirable but lawful decision. This conclusion means only that all governmental actors are equal in the eyes of the law.” Id. at 527-28.
234 Aharon Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 Harv. L. Rev. 16, 153 (2002) (noting that any complaint against the executive branch and its actions is considered justiciable by the Israeli Supreme Court, regardless of the standing of the complainant); see also Schulhofer, supra note __, at 1923 (noting that the Israeli Supreme Court dismantled various doctrinal barriers to judicial review, such as standing and justiciability, in the 1990s). Schulhofer also notes that Israeli government and military leaders seem to accept the judicial safeguards that have been put into place to modify the conduct of the administration. Id. at 1931.
The United Kingdom has dealt with significant internal and external threats to national security for many decades. A central influence on the development of the UK’s modern national security regime was the violent conflicts, known as “The Troubles,” in Northern Ireland, which escalated in the late 1960s and were largely resolved only in 1998, with the signing of the Belfast Agreement. During The Troubles, almost 3,000 people were killed and over 30,000 were seriously injured.

More recently, the UK has been confronted with international terrorist threats, including an attack on the London mass transit system in July 2005 which killed 56 people including the attackers, and injured over 700 others.

UK law has vacillated in terms of trying to maintain a balance among the interests of national security, civil rights and liberties, and the rule of law. Complicating matters is that the UK is under the jurisdiction of the European Court of Human Rights (ECHR), and that detainees have the right to appeal domestic legislation and judicial decisions to the ECHR.

As in India, Israel and the United States, the British Prime Minister is endowed with war-making power as a legacy of a historical Crown prerogative; nevertheless, he or she almost always seeks authorization of the Parliament to act. Additionally, UK law and
constitutional norms require that emergency powers be exercised in a legal framework involving the Parliament and the courts, a striking contrast to the Bush administration’s vision of wartime decision-making as solely within the purview of the President.

The Prime Minister exerts significant control over the parliament by virtue of being able to set the legislative agenda for the House of Commons, and his or her power is commensurate with his or her ability to exercise discipline over Members of Parliament from the same party.

The mandatory involvement of the legislature has ensured that executive branch legal policy does not unilaterally determine how national security interests are going to be balanced with constitutional constraints. Instead, the role of Parliament has forced the Prime Minister to pass legislation in order to deal with particular situations in the war on terror, for example, in military actions. Martinez, supra note __, at 2491. Matthew Tempest, Government Kills Short’s War Bill, Guardian (London), Oct. 21, 2005, http://politics.guardian.co.uk/iraq/story/0,12956,1597883,00.html.


244 Martinez, supra note __, at 2500; A (FC) & Others (FC) v. Sec’y of State for the Home Dep’t [2005] UKHL 71, [12] (noting that although the Crown had historically used torture without legislative or judicial permission, such powers were rejected with the move toward parliamentary supremacy in the late-1600s).


246 Canada has followed international best practices in establishing an even more powerful legislative oversight mechanism in order to increase accountability: the creation of a National Security Committee of Parliamentarians that would have full access to classified national security information. See Rouch, supra note __, at 2169-2170 (noting that in April, 2005, the Canadian government accepted that such a committee should review the “ability of departments and agencies engaged in security and intelligence activities to fulfill their responsibilities,” including identifying “required ongoing improvements to the effectiveness of Canada’s national security system.”

247 Schulhofer, supra note __, at 1936-39 (Parliament’s central role in developing legal policy on national security matters).
November 2005 former Prime Minister Tony Blair was unable to pass legislation that would allow the government to detain terrorism suspects for up to 90 days without being charged because the House of Commons, led by Blair’s own Labour Party, voted down the proposed legislation.\(^{248}\)

Further, the judicial check on executive exercise of national security powers is a robust one: judicial review is available for all national security-related legal policy, even in times of war, and including the treatment of individual detainees.\(^{249}\) The 2004 decision of \(A v. \) Secretary of State for the Home Department,\(^{250}\) illustrated that British courts will act decisively to counteract national security laws—in that case, the Anti-Terrorism, Crime and Security Act, 2001 Part IV—if they deem it to be disproportionate and discriminatory under ECHR standards.\(^{251}\)

Finally, UK accountability on national security law and policy is bolstered by a series of independent reviews in which a member of the House of Lords was granted the necessary security clearance and a mandate to make independent reports on the operation of the Terrorism Act, 2000 and the Prevention of Terrorism Act, 2005.\(^{252}\)

Of course, valid questions can be raised as to the overall effectiveness of the national security policies in these countries compared to the United States,\(^{253}\) and there is always the


\(^{249}\) Schulhofer, supra note __, at 1940-43. See also Kent Roach, Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain, 27 Cardozo L. Rev. 2151, 2163 (2006).


\(^{251}\) See Alexandra Chirinos, Finding the Balance Between Liberty and Security: The Lords’ Decision on Britain’s Anti-Terrorism Act, 18 Harv. Hum. Rts. J. 265 (2004). Notably, the legislation in question had been reviewed and criticized by Parliament’s Joint Committee on Human Rights and the Privy Counsellor Review Committee prior to being heard in court. Id. at 267.

\(^{252}\) Roach, supra note __, at 2171 (noting the need for such a measure to ensure against “[w]idespread public suspicion about national security activities [which] could eventually compromise the effectiveness of security activities”).

\(^{253}\) E.g., Somini Sengupta, Terror Attacks Unsettling India, N.Y. Times, July 29, 2008, available at (...continued)
possibility that despite our understanding—through court decisions, governmental statements and legislative oversight—that nations are adhering to the rule of law, a nation is secretly developing contrary national security policies. However, if such secret policy exists in other countries, there is no indication that those policies would provide legal comfort against future prosecution. Even this limited overview of the anti-terror legal rubric in three nations facing significant threats to national security suggests that in terms of process, transparency and accountability to safeguard civil rights, the reliance in the United States on secret law may be singular.\footnote{254}

B. Unitary Executive Theory Justifying Non-Disclosure

The second prong\footnote{255} of the administration’s justification turns on a unilateralist reading\footnote{256} of the unitary executive theory:

\\[\text{(continued…)}\]

\footnote{254}{Many valid objections based on human rights grounds have been levied against the substance of the antiterrorism policies in India, Israel and the UK, but are beyond the scope of this paper.}

\footnote{255}{The administration has also, on occasion, put forth a secrecy justification based on attorney-client privilege. Jordan & Hess, supra note __ (discussing Attorney General Mukasey’s refusal to disclose a 2001 OLC memorandum on interrogation techniques based on attorney-client privilege); Yoo, Prepared Testimony before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, supra note ___, at 1-2.}

\footnote{256}{The unilateralist reading promoted by Yoo and Addington, see infra, is distinguishable from a more modest reading of the unitary executive theory, which argues the unconstitutionality of insulating administrative departments from the President’s control, based on the President’s removal power. See, e.g., Saikrishna Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021, 1069-70 (2006) (arguing that the President’s inherent executive power allows him to have control over all executive branch subordinates, including the Attorney General); see also Bowsher v. Synar, 478 U.S. 714 (1986) (affirming President’s unilateral removal power); Myers v. United States, 272 U.S. 52 (1926) (same). Compare Morrison v. Olson, 487 U.S. 654 (1988) (affirming the (…continued)}}
the theory, evident in numerous OLC memoranda issued during the current administration, that the President alone has the authority to decide how the administration will fulfill its constitutional obligations.257 This view is particularly evident in the Bybee and Yoo memoranda, which specifically exclude Congress or any other group outside of the administration from influencing the President’s decisionmaking on national security matters: “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.”258

Numerous presidential signing statements further illustrate the administration’s rejection of the authority of Congress to influence—let alone regulate—the parameters of the war on terror, and the administration’s belief that Congress has no constitutional right even to understand the details of executive branch legal policy.259 The signing statements issued by the current administration often evidence the intent to change fundamentally the nature of the legislation itself, particularly with regard to what information related to antiterror activity Congress is entitled to have.260 Notably, many of the signing statements issued by

(continued…)

constitutionality of the independent counsel statute despite the lack of presidential control over the independent counsel).
257 See Balkin & Levinson, supra note __, at 499-500; Goldsmith, supra note __, at 97 (recalling that Yoo asserted that all military power vests in the President, a derivation of executive power from the crown prerogative of the English monarchs); see, e.g., Yoo Memorandum; Bybee Memorandum. Although several of these memoranda deal with U.S. conduct on national security issues, their scope may allow for purely domestic application in a non-national security context as well. See James Rise & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times, Dec. 16, 2005, at A1.
258 Bybee Memorandum, supra note __, at 35.
259 Cohen, supra note __ (noting that the Government Accountability Office issued a report concluding that in nearly one-third of the cases it examined, after President Bush issued a signing statement, his administration did not implement the legislation as written).
260 E.g., Presidential Signing Statement for the Intelligence Authorization Act for Fiscal Year 2002, 37 Weekly Comp. Pres. Doc. 1834, H.R. 2883 (Dec. 28, 2001) (stating that the legislated requirement that the President, under the rubric of the National Security Act of 1974, report in writing to congressional intelligence committees violated the President’s constitutional authority to act in a way to protect foreign relations or national security).
President George W. Bush object to certain provisions of the legislation based on the multiple grounds of unitary executive theory, national security and separation of powers more generally.\textsuperscript{261}

When national security concerns are peeled away, a continued and consistent priority of the current administration\textsuperscript{262} appears to be to leverage the power that comes with having a complete understanding of U.S. national security policy, when Congress—tasked with oversight of the executive branch—patently does not.\textsuperscript{263}

The current administration’s reliance on textual arguments\textsuperscript{264} based in the Commander-in-Chief clause and the Vesting Clause\textsuperscript{265} of the


\textsuperscript{262} Although many administration critics believed that Attorney General Mukasey would represent a softening of the administration reliance on unitary executive theory, Mukasey himself has relied on it. \textit{See} Oversight Hearing Transcript at 37 (Mukasey refuses to discuss the legality of the U.S. interrogation program with the Senate, claiming that the Senate’s questions were inappropriate and unanswerable on separation of powers grounds); \textit{see also} Oversight Hearing Transcript at 19 (another example of Mukasey’s adherence to the theory is that he acknowledged that the administration’s objection to the whistleblower provisions in S. 274 were not based on concern over national security issues, but rather on the right of the President to operate in a manner unfettered by Congress on national security matters).

\textsuperscript{263} \textit{Cite to Rozell, supra note ___, at 43-46, 112-13; Kitrosser, supra note ___, at 1050, 1058-59, 1065; Peter M. Shane, \textit{Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information}, 44 ADMIN. L. REV. 197, 199–200 (1992).}

\textsuperscript{264} \textit{See John C. Yoo, \textit{The Continuation of Politics by Other Means: The Original Understanding of War Powers}, 84 Cal. L. Rev. 167 (1996) (making a (…continued)
Constitution that the Executive branch alone has jurisdiction over war-related decisions is subject to numerous critiques.\textsuperscript{266}

First, there is little evidence that the framers of the Constitution concurred with each other as to the nature and extent of an inherent executive power.\textsuperscript{267} The framers of the Constitution and early administrations illustrate an emphasis on pragmatic approaches to power-sharing; this is particularly true with regard to the Attorney General, an office adopted from the British and state colonial governments, and with the goal of providing counsel to both the President and Congress.\textsuperscript{268} Even if the framers of the Constitution did agree on these points when the Constitution was being drafted, the Department of Justice was not established until after the Civil War, as a means for the federal government to enforce the post-Civil War constitutional amendments,\textsuperscript{269} making an Article II defense of Justice Department activities weaker and more convoluted.

Second, the framers expressed a tremendous interest in establishing a system of checks and balances to counteract any one branch maintaining a concentration of power.\textsuperscript{270} Even Alexander Hamilton, a framer of the Constitution and an ardent proponent of presidential power, noted that in a republican government, the

\textsuperscript{265}U.S. CONST., Art. 2, Sec. 1, Cl. 1.

\textsuperscript{266}Prepared Statement of Alberto R. Gonzales, \textit{supra} note \(\_\_\) (citing \textit{The Prize Cases}, 67 U.S. (2 Black) 635, 668 (1803) (the President has whatever authority is necessary to fulfill the “solemn duty” of national security)); Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 Mich. L. Rev., 545 (2004) (describing lack of historical basis for inherent executive power argument); Johnsen, supra note \(\_\_), at 1560.


\textsuperscript{268}Baker, \textit{supra} note \(\_\_), at 37-38.

\textsuperscript{269}Rakove, supra note \(\_\_), at 344-356 (?).

\textsuperscript{270}E.g., The Federalist No. 51 (James Madison) (arguing that the checks and balances among the branches of government are such that “ambition would counteract ambition”).
President would have to defer to the legislative will much of the time. Hamilton also argued that ease of oversight was one of the benefits of an executive branch headed by an individual President, who “will be more narrowly watched and most readily suspected.”

Third, this unilateralist unitary executive theory inappropriately discounts Congress’s constitutionally granted war powers, including Congress’s right to regulate captures during war, and Congress’s ability to exercise oversight of the Executive, even with regard to matters of national security.

Further, it ignores the structure set discussed by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, which acknowledges Congress’s role in oversight, including oversight in the areas of intelligence and national security. Justice Jackson noted that unilateral executive power is at its “lowest ebb” when the President “takes measures incompatible with the express or implied will of Congress.” This assessment of presidential power is long-standing and consistent; from the earliest years of U.S. history, courts have rejected the notion that the President can ignore duly enacted statutes.

A unitary executive theory that holds that executive branch interpretation of the Constitution has primacy over the interpretations made by the Judiciary and Congress lacks historical

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271 The Federalist No. 71 (Alexander Hamilton); *see also* Setty, *supra* note ___, at 281-287 (discussing the expectations of the framers of the Constitution regarding executive and legislative power dynamics).

272 The Federalist No. 70 (Alexander Hamilton).

273 U.S. Const., Art. 1, sec. 8, cl. 11, 14.

274 U.S. Const., Art. 1, sec. 5, cl. 2.

275 David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine and Original Understanding*, 121 Harv. L. Rev. 689, 691-92 (2008) (noting that “there is surprisingly little historical evidence supporting the notion that the conduct of military campaigns is beyond legislative control”).


277 *Id.* at 637.

278 *E.g.*, Little v. Barreme, 6 U.S. 170 (1804); Schroeder, *supra* note ___, at 5.
and legal bases. 279 In prior administrations—both Republican and Democratic—the OLC has consistently found that the President must subordinate his actions to duly enacted statutes. 280

Fourth, Congress has mandated disclosure of executive branch decision making in other contexts. Provisions of the Administrative Procedure Act and the Freedom of Information Act make clear that an administration cannot conduct itself according to a system of “secret law.” The Court in NLRB v. Sears, Roebuck made clear when mandating disclosure that the FOIA requirement of “indexing of ‘final opinions,’ ‘statements of policy and interpretations which have been adopted by the agency,’ and ‘instructions to staff that affect a member of the public,’ represents a strong congressional aversion to ‘secret (agency) law,’ and represents an affirmative congressional purpose to require disclosure of documents which have ‘the force and effect of law.’” 281

Nonetheless, a President who subscribes to a robust view of the unitary executive theory may dispute legislative efforts to mandate disclosure of executive branch legal policy. 282 This dispute may

279 See U.S. v. Nixon, 418 U.S. at 703-07; Powell, supra note __., at 1315 (arguing that executive branch avoidance should never be used in the context of the separation of powers or when dealing with the President’s powers under the Commander-in-Chief clause); Charlie Savage, Bush Challenges Hundreds of Laws: President Cites Powers of His Office, Boston Globe, Apr. 30, 2006, at A1. See also Oversight Hearing Transcript, supra note __., at 55 (Attorney General Mukasey acknowledges the history of executive avoidance of Congress’s oversight).

280 Schroeder, supra note ___, at 4-5.

281 42 U.S.C. at 155 (citations omitted).

282 See Balkin & Levinson, supra note ___, at 499 (“[t]he OLC, and the DOJ more generally, have been crucial in creating and providing constitutional interpretations justifying the President’s robust assertions of Article II power to disregard congressional statutes that he believes hamper his inherent authority as Commander-in-Chief”). It is also questionable whether such a check would be effective in practice, considering the historical pattern of Congress not exercising its oversight function during wartime. The passage by Congress of the Military Commissions Act of 2006 illustrates Congress’s deference to the President during wartime. Pub. L. No. 109-366, 120 Stat. 2600; see Johnsen, supra note __., at 1575. See also Martinez, supra note ___, at 2511. Such an effect is also compounded in times of unified government, when the Congress (…continued)
manifest itself in a refusal to comply with the legislated disclosure requirements based on the theory of constitutional avoidance. 283

If Congress attempts to mandate information disclosure related to national security, the President may choose to “avoid” a potential constitutional question by refusing to enforce the legislation mandating the sharing of information. 284 Further, an administration may argue that the question of mandatory disclosure to be a political one, and therefore not justiciable. 285 However,

(continued…)

and the President are of the same political party. See Daryl Levinson & Richard Pildes, supra note __, at __.

283 Constitutional avoidance commonly refers to as been used to mean that the President can “avoid” a constitutional dispute by asserting his own view of his constitutional obligations any time the actions of another branch make an incursion onto the constitutional right of the executive to exert its decision-making primacy in certain areas, such as in the conduct of war. See Morrison, supra note __, at 1218-19 (critiquing the OLC’s use of avoidance to assert more presidential power than is granted under law). Congress has attempted to address the question of constitutional avoidance through 2002 appropriations legislation that included a provision mandating notification to Congress whenever the executive branch chooses not to enforce a law as written. See The 21st Century Department of Justice Appropriations Authorization Act, § 202, Pub. L. No. 107-273, 28 U.S.C. § 530(D) (2002). Unfortunately, the administration appears to have engaged in “meta-avoidance” by refusing to comply with the congressional notification requirement in the Act. See Presidential Signing Statement for 21st Century Department of Justice Appropriations Authorization Act, 38 Weekly Comp. Pres. Doc. 1971, H.R. 2215 (Nov. 2, 2002) (noting that section 530D “purports to impose on the executive branch substantial obligations for reporting to the Congress activities of the Department of Justice involving challenges to or non-enforcement of law that conflicts with the Constitution. The executive branch shall construe section 530(D)...in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch....”).

284 Morrison, supra note __, at 1250-58; Johnsen, supra note __, at 1563.

Members of Congress, acknowledging the ineffectiveness of Congressional oversight in the face of the heightened use of executive privilege and constitutional avoidance, have voiced the belief that the Courts are the last safeguards of separation of powers. Oversight Hearing Transcript at 5, 13-14 (Specter, citing Rasul). Sen. Specter has objected to this meta-use of constitutional avoidance, noting that even if enforcement of a statute is “avoided” by the administration, that avoidance needs to be reported to the appropriate committee in the Senate and House of Representatives. Oversight Hearing Transcript, supra note __, at 12.

courts have made clear that although “decision-making in the fields of foreign policy and national security is textually committed to the political branches of government,”\(^{286}\) questions that pertain only to the disclosure of policies related to national security matters and not to the substance of those policies do not implicate the political question doctrine and are, therefore, justiciable.\(^{287}\)

Recent court decisions have further shown that the judiciary sees some limits on the President’s use of the unitary executive theory and the expansion of presidential power under the Commander-in-Chief clause,\(^{288}\) even in times of war.\(^{289}\) For example, *Hamdan v. Rumsfeld* squarely rejected the assertion of the Yoo Memorandum that “Congress cannot exercise its authority to make rules for the Armed Forces to regulate military commissions.”\(^{290}\) However, the Court’s acquiescence to most administration claims of state secrets,\(^{291}\) brings into serious question the effectiveness of the courts in safeguarding checks and balances in the area of national security.

Since the Democrats took control of both houses of Congress in 2006, there has been a significant increase in oversight efforts.\(^{292}\)

\(^{286}\) *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

\(^{287}\) *Wilson*, No. 07-5257, Aug. 12, 2008, at 8 (D.C. Cir.).

\(^{288}\) U.S. CONST., Art. 2, Sec. 2.


\(^{290}\) Yoo Memorandum, *supra* note ___, at n. 13; Hamdan, 126 S. Ct. at 2798; Schroeder, *supra* note ___, at 6.

\(^{291}\) *See* *United States v. Reynolds*, 345 U.S. 1 (1953) (establishing the standard by which courts should evaluate government claims of state secrets); *see also* *el-Masri v. United States*, 479 F.3d 296 (4th Cir.), *cert. denied*, 128 S. Ct. 373 (2007) (dismissing a claim of extraordinary rendition and gross human rights abuses based on the administration’s claim of state secrets).

\(^{292}\) *See* *Setty*, *supra* note ___, at 261-62, n. 70 (discussing the desire for congressional oversight of the administration as one reason for the shift in party control of the Senate and House of Representatives in 2006).
However, administration refusal to comply with Congressional information requests persists. By some accounts, at least eight OLC final opinions related to CIA interrogation practices and secret prisons still have not been disclosed. As such, mandatory disclosure of OLC opinions would put greater pressure on the administration to follow through with disclosure, particularly if the defensive use of the opinions would be rendered invalid without such disclosure.

Underscoring the mechanics of mandatory disclosure of OLC legal policy is the need to restore the rule of law and the standing of the U.S. as a nation that is a standard bearer for democratic principles. Eliminating the existence of secret laws and restoring the democratic principles of the application of law are two important means of doing so. As the court in Ex Parte Milligan explained,

“[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence....”

CONCLUSION

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295 See generally Harold Hongju Koh, On American Exceptionalism, 55 Stan. L. Rev. 1479 (2003) (addressing the idea that the U.S. is unique in its global reach for promoting democratic ideals).
296 71 U.S. (4 Wall.) 2, 209 (1866).
OLC memoranda, as a general rule, should be disclosed by the administration. The politicization of the Office of Legal Counsel over the last seven years, when combined with the predictable self-interest of the administration in not voluntarily disclosing its own legal policies, means that institutional steps must be taken to ensure greater transparency and adherence to the rule of law. To that end, Congress should require publication of OLC-generated legal policies by future administrations.