Justice at the Department of Justice

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Introduction

President George W. Bush left office in January 2009, but his administration’s efforts to expand executive power continue to impact the balance of power between the executive, legislative, and judicial branches of the United States government. The federal judiciary continues to wrestle with executive power issues that first arose during the Bush administration’s “War on Terror.” Some of President Bush’s most controversial practices persist under President Barack Obama.

During his presidential campaign, Obama criticized many of the Bush administration’s efforts to expand executive power. Since taking office, however, President Obama’s record on executive power issues is a mixed one. Critics point to the fact that Obama has retained many of the wartime powers claimed by the Bush administration, including the power to indefinitely detain terrorism suspects. As President Obama is on the verge of preserving some of the Bush administration’s...

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1 In a 2002 interview, Vice President Richard Cheney discussed his perception that the powers of the executive branch had been curtailed in recent decades. Transcript, Interview with Vice President Richard B. Cheney, This Week (Jan. 27, 2002), available at http://georgewbush-whitehouse.archives.gov/vice-president/news-speeches/speeches/vp20020127.html. Cheney cited the War Powers Act, the Budget Anti-Impoundment Act, and other instances where “it’s demanded that Presidents cough up and compromise on important principles.” Id. Cheney said that because the executive branch had been weakened by such compromises, the Bush administration felt that it had “an obligation . . . to pass on our offices in better shape than we found them to our successors.”

2 See John Schwartz, Court Backs War Powers Over Rights of Detainees, New York Times, January 5, 2010 (discussing a recent ruling by the D.C. Court of Appeals that “the presidential war power to detain those suspected of terrorism is not limited even by international law of war”), available at http://www.nytimes.com/2010/01/06/us/06detain.html; Robert Barnes, Supreme Court to Hear Uighurs’ Case, Washington Post, October 21, 2009 (discussing the Court’s decision to hear a case involving whether judges can release Guantanamo Bay detainees if they decide they are not “enemy combatants”), available at http://www.washingtonpost.com/wp-dyn/content/article/2009/1-0/20/AR2009102001289.html.

3 See Peter Baker, Obama’s War Over Terror 5 (stating that President Obama has “left the [Bush administration’s warrantless] surveillance program intact, embraced the Patriot Act, retained the authority to use renditions and embraced some of Bush’s claims to state secrets”), available at http://www.nytimes.com/2010/01/17/magazine/17Terrort.html; Jan Crawford, Legal Terrain Unchanged in Obama’s First Year, CBS News, January 17, 2010 (criticizing the Obama administration for asserting “nearly the identical authority as the Bush Administration for detaining terror suspects”), available at http://www.cbsnews.com/blogs/2010/01/19/crossroads/entry6117823.shtml.

4 See James Risen, The Executive Power Awaiting the Next President, New York Times, June 22, 2008 (quoting candidate Obama as saying that the Bush administration had put forth “a false choice between the liberties we cherish and the security we demand”), available at http://www.nytimes.com/2008/06/22/weekinreview/22risen.html.

5 For example, the Obama administration intervened in a lawsuit against a company that was allegedly involved in the rendition of a suspected terrorist, but the Ninth Circuit rejected its assertion of the state secrets privilege. Mohamed v. Jeppesen Dataplan, 579 F.3d 943 (9th Cir. 2009). The Ninth Circuit said the government’s state secrets argument would “require dismissal, any time a complaint contains allegations, the truth or falsity of which has been classified as secret by a government official.” Id. at 955. See also Glenn Greenwald, Civilian Trials and the So-Called Rule of Law, Salon.com, January 5, 2010 (“[T]he most significant consequence of [Obama’s] first year in office, in the area of civil liberties, is that - - with a few exceptions (most notably torture) -- he has transformed what were once highly controversial Republican ‘assaults on the Constitution’ into bipartisan consensus which both parties now embrace”), available at http://www.salon.com/opinion/greenwald/2010/01/05/rule_of_la-w/index.html.
expansions of executive power, Congress is still deciding how to react to some of the Bush administration’s most controversial actions.

Critics of the Bush administration have pointed to two problems as particularly deserving of scrutiny: legal analysis from the Department of Justice asserting that the President had extremely broad wartime powers and the possibility that political considerations influenced the Bush administration’s prosecutorial decisions. A former Bush Department of Justice official said the Department engaged in a “destructive pattern of partisan political actions,” including political prosecutions, during Bush’s tenure.6 Another Department official criticized the legal analysis in the “Torture Memos” because the analysis contained “extravagant and unnecessary claims of presidential power.”7

Because both of these problems concerned the President and his relationship with government lawyers in the Department of Justice, this paper will begin with a history of the Department and a discussion of the relationship between the White House and government lawyers. The paper then discusses the two problems in detail, and the analysis section discusses proposals to address the problems. The first proposal discussed is an independent Department of Justice free from Presidential control. Any attempt by Congress to promote independence within the Department raises questions about the separation of powers in our government, and the first proposal would likely violate principles established by the Supreme Court. The second proposal, a Truth Commission to examine the Bush administration, does not raise such constitutional concerns, but it is an imperfect solution because it merely helps us look back. To address the underlying problem of unchecked executive power, some have proposed new statutes to ensure more independence and transparency in the Department’s actions. The final part of the analysis section discusses some of these statutory reforms. The paper concludes by recommending that Congress act on those proposals that would be most effective in ensuring that the public learns the truth about the President’s abuses—in the past and going forward.

When the President acts to expand his or her authority, the public should be aware of those efforts so the President can be held accountable.8 The most effective check on executive power is a political one.9 If the political check on executive power is to be effective, the actions of the executive branch must be transparent.

History of the Department of Justice

Just as the powers of the federal government have grown since the framing of the Constitution, the Attorney General’s duties have grown considerably since the office was created. In 1789, Congress established the office of United States Attorney General and assigned him the responsibility to represent the United States before the Supreme Court and to “give his advice and opinion upon questions of law when required by the

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7 Interview with Jack Goldsmith, Frontline, Cheney’s Law (August 22, 2007).
8 See Jack Goldsmith, The Terror Presidency 80-81 (2007) (arguing that “the leader who disregards the law should do so publicly, throwing himself at the mercy of Congress and the people so that they could decide whether the emergency was severe enough to warrant extralegal action”).
9 See Morrison v. Olson, 487 U.S. 654, 729 (Scalia, J., dissenting) (arguing that “the primary check against prosecutorial abuse is a political one”).
President” or the heads of cabinet agencies. The Framers of the Constitution assigned the President the duty to faithfully execute federal law, U.S. Const. art. II § 3, and early Attorneys General were charged with advising the President on the constitutionality of executive branch action. The Judiciary Act of 1789 also created positions for federal prosecutors in each federal court district. The Act did not specifically grant the President the authority to remove the Attorney General or the federal prosecutors.

During the Civil War, Congress explicitly granted the Attorney General the authority to supervise federal prosecutors. After the war, the Attorney General became the chief law enforcement officer of the United States and the head of the newly created Department of Justice. Congress also gave the Attorney General the option to refer questions of law to his subordinates and require their written opinions. “[T]he Attorney General shall from time to time cause to be edited and printed an edition . . . of such opinions of the law officers . . . as he may deem valuable for preservation.”

The Office of Legal Counsel (OLC) was created to help the Attorney General fulfill his advisory role. The OLC renders opinions on a variety of legal questions involving the executive branch, and it drafts the Attorney General’s formal opinions. The published opinions of the Attorneys General and the OLC have formed “a body of law” that “offers powerful testimony to . . . the Department of Justice’s profound tradition of respect for the rule of law.”

The modern Attorney General represents the United States in legal matters, and “[i]n matters of exceptional gravity or importance, the Attorney General appears in person before the Supreme Court.” The Department of Justice has exclusive authority to bring criminal prosecutions on behalf of the United States, but Congress has delegated some of the power to bring civil suits on behalf of the United States.

10 Judiciary Act of 1789, ch. 20 § 35, 1 Stat. 73, 93.
11 Since the time of its inception, the Supreme Court has stated that the Constitution does not give it the power to issue advisory opinions to Presidents facing constitutional dilemmas. Letter from John Jay to George Washington, August 8, 1793, quoted in 4 The Founders’ Constitution 258 (Philip B. Kurland & Ralph Lerner, eds. 1987). See also Poe v. Ullman, 367 U.S. 497, 508 (1961) (“[N]o justiciable controversy is presented . . . when the parties are asking for an advisory opinion . . . .”).
13 Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870); U.S. Department of Justice, Office of the Attorney General, http://www.usdoj.gov/ag/.
14 Act to Establish the Department of Justice, ch. 150 § 5, 16 Stat. 162, 163 (1870).
15 Id. at § 18, 16. Stat. at 165.
The Role of Government Lawyers

Two features of the modern American presidency – the vesting of prosecutorial discretion in the executive branch and the obligation to faithfully execute the laws – mean that lawyers in the executive branch play a special role in our constitutional system. Although federal prosecutors are subject to removal by the President, the Supreme Court has said that U.S. Attorneys have responsibilities beyond the White House:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is . . . that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.22

The government lawyers in the Office of Legal Counsel also play a crucial role in advising the President on how to faithfully execute the law.23 The President often needs such advice, and judicial precedent does not always provide a clear answer.24

Several federal laws support the idea that government lawyers should maintain some measure of independence from the President and other political actors. Federal law prohibits the use of political considerations in executive branch employment decisions.25 Federal regulations prohibit government lawyers from participating in a criminal prosecution if the lawyer “has a personal or political relationship with . . . any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.”26


Notwithstanding these modest statutory limits, the President exercises a great deal of control over the Attorney General and other government lawyers. The President needs the Senate’s consent to appoint U.S. Attorneys but can remove them at will.27 Early statutes vested control over the Attorney General in the President. In drafting the Judiciary Act of 1789, Congress considered granting the Supreme Court the power to appoint the Attorney General, “an approach that would have reinforced substantially the

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23 See Dawn Johnsen, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power, 54 UCLA L. Rev. 1559, 1576 (2007) (“OLC’s core function is to provide the legal advice that the President--and, by extension, the entire executive branch--needs to faithfully execute the laws.”).
24 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952) (Jackson, J.,concurring) (“[A]n executive adviser, may be surprised at the poverty of really useful and unambiguous [judicial] authority applicable to concrete problems of executive power as they actually present themselves. . . .”).
25 5 U.S.C. § 2302(b)(1); 28 C.F.R. § 42.1(A) (codifying the Department of Justice policy forbidding discrimination on the basis of political affiliation).
26 28 C.F.R. § 45.2 (a)(2).
27 28 U.S.C. §§ 541(a) and 541(c) (1994).
Attorney General’s independent status as an officer of the court.” The decision to vest appointment power in the President “suggests that Congress endorsed political accountability (to the President for appointment and removal, and to Congress for confirmation, salary, budget and oversight) as the primary method of ensuring faithful execution of the office.” Thus, Attorneys General have been closely associated with the Presidents they served. Since the establishment of the Office of Attorney General, “the mechanisms for encouraging or enforcing independence have been decidedly informal, interstitial, and indirect.” This lack of formal mechanisms for ensuring independence means that control over the Department of Justice is largely vested in the office of the President.

Although there are few formal rules to guide him, the government lawyer’s duty to uphold the Constitution and the rule of law may sometimes conflict with his status as subordinate of the Attorney General and ultimately, the President. This gives rise to a complicated question: To whom does the government lawyer owe her highest loyalty? The aforementioned federal laws and the actions of modern Attorneys General suggest that the government lawyer has a duty to defend the rule of law in the face of Presidential attempts to subvert it. In recent decades, several Department of Justice officials have resigned or threatened to resign rather than sanction what they perceived as improper Presidential action.

Every lawyer working for the federal government takes an oath to “bear true faith and allegiance” to the Constitution and to “support and defend” it.

**The Bush Department of Justice**

Many critics of the Bush administration argue that its government lawyers failed to fulfill their role as guardians of the Constitution and the rule of law. These critics have pointed to two problems at the Bush Department of Justice: the possibility that political considerations influenced the Department’s prosecutions and legal analysis from the OLC asserting that the President had extremely broad wartime powers. Perhaps these problems can be attributed to the Bush administration’s view of the relationship between the Department of Justice and the White House.

In the waning days of the Bush administration, evidence emerged suggesting that the administration asked many executive branch officials to make decisions based on political considerations. A Washington Post article detailed Bush advisor Karl Rove’s...
“highly coordinated effort to leverage the government for political marketing.” 34 The article conceded that other Presidents similarly used their power to achieve political ends, but it asserted that Rove’s “effort to promote the President and his allies was unprecedented in its reach.” 35

Rove’s effort to enlist the executive branch in political efforts included the Department of Justice. Joseph D. Rich, chief of the voting section in the Department’s Civil Rights Division from 1999 to 2005, asserted that the Bush Department of Justice engaged in a “destructive pattern of partisan political actions,” including political prosecutions for voter fraud and other alleged infractions. 36 Rich alleged that “the Bush administration has rewarded loyalty over all else.” 37

This notion of “loyalty” to the President may have also played a part in the failure of the OLC to render sound legal opinions to President Bush. Critics of the Bush administration allege that government lawyers were pressured to provide the administration with the answers it wanted on executive power and national security issues. 38 The lawyers who did not provide those answers were perceived as disloyal. 39

Many former government lawyers, Democrat and Republican, lamented the Bush administration’s strong influence over the Department of Justice. Douglas Kmiec, who headed the OLC under Presidents Ronald Reagan and George H. W. Bush, said it seemed like the OLC had “lost its ability to say no” to the President, even before the Bush era. 40 This trend grew stronger as the OLC analyzed President Bush’s powers in the War on Terror, when the OLC “became an advocate for the president’s policies.” 41 Commenting on the Bush Department of Justice, Senator Charles Schumer stated that, during his two and a half decades in Congress, he had never “seen the Department more politicized and pushed further away from its mission as an apolitical arbiter of law.” 42

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37 Id. See also Office of the Inspector General, Department of Justice, An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General 135, July 28, 2008 (concluding that “Goodling improperly subjected candidates for certain career positions to the same politically based evaluation she used on candidates for political positions, in violation of federal law and Department policy”).
38 See Dawn Johnsen, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power 54 UCLA L. Rev. 1559, 1583 (2007) (criticizing an OLC memo for twisting the law to justify the Bush administration’s interrogation techniques).
41 Id. (quoting Kmiec).
Politicized Prosecutions

Perhaps the most blatant evidence of politicization at the Department of Justice was the dismissal of nine U.S. Attorneys in 2006. It is now clear that the firings were part of a Bush administration effort to encourage federal prosecutors to use political considerations in deciding whether to pursue certain prosecutions.  

A Department official asked each of the nine U.S. Attorneys to resign on December 7, 2006. The official explained that the Bush administration “was looking to move in another direction and give somebody else a chance to serve.” After the firings, one of the U.S. Attorneys publicly suggested that he was removed because Republican politicians complained to the White House that he was not prosecuting certain Democrats for voter fraud and corruption.  

After the firings caused a national controversy, the Office of the Inspector General at the Department of Justice (OIG) investigated the firings for impermissible political motivations. Although Bush administration officials claimed that the U.S. Attorneys were fired because of performance problems, the OIG report confirmed that Iglesias was removed because of complaints from Republicans “about Iglesias’s handling of voter fraud and public corruption cases.” The Inspector General dismissed the Department’s proffered reasons for Iglesias’ firing as “after-the-fact rationalizations.” Because key witnesses refused to cooperate in its investigation, OIG could not conclusively determine whether federal law was violated, and it suggested the Attorney General appoint counsel to further explore the matter.  

The OIG said the firings and the ensuing controversy “severely damaged the credibility of the Department and raised doubts about the integrity of Department prosecutive decisions.” Attorney General Alberto Gonzales resigned in...

45 Id.  
48 Id. at 187.  
50 Id. at 358.
the wake of criticism for the firings and doubts about whether he had offered misleading testimony to Congress.\textsuperscript{51}

The controversy led many to conclude that the Bush administration used the nation’s law enforcement apparatus for political purposes.\textsuperscript{52} The U.S. Attorneys who remained in their jobs after the firings were described by Department officials as “loyal Bushies.”\textsuperscript{53} Several members of the House of Representatives’ Committee on the Judiciary found that “serious allegations were made that some U.S. Attorneys who were not terminated engaged in selective and improper targeting of Democrats for prosecution.”\textsuperscript{54}

A letter from Rep. John Conyers to Attorney General Alberto Gonzales mentioned a study from Professors Donald Shields and John Cragan that supported these allegations. The study found that, from 2001 through 2006, “the Bush Department of Justice investigated Democratic office holders and candidates at a rate more than four times greater (nearly 80\% to 18\%) than they investigated Republican office holders and seekers.”\textsuperscript{55} The study found that the problem was more pronounced at the local government level, where Bush’s Department of Justice investigated seven times as many Democratic officials as Republican officials.\textsuperscript{56}

The politicization of federal prosecutions likely began before the nine U.S. Attorneys were fired. Conyers’ letter mentioned the plight of Don Siegelman, former Democratic Governor of Alabama. Siegelman was convicted of bribery, conspiracy, and mail fraud in 2006.\textsuperscript{57} Siegelman was accused of appointing former HealthSouth CEO Richard Scrushy to a state board in exchange for a campaign contribution.\textsuperscript{58} Rep. Conyers said that some questioned the integrity of the Siegelman prosecution because of several irregularities. Earlier charges against Siegelman were thrown out by a federal court.


\textsuperscript{52} See David Weiss, \textit{Nothing Improper? Examining Constitutional Limits, Congressional Act, Partisan Motivation, and Pretextual Justification in the US Attorney Removals}, 107 Mich. L. Rev. 317, 363 (2008) (“[T]he USAs were likely removed because they failed to follow not just political, but partisan, goals that the White House sought to implement through the DOJ.”).

\textsuperscript{53} Id. at 323.


\textsuperscript{56} Id. See also David Swanson, \textit{The Political Prosecutions of Karl Rove}, June 26, 2009, available at http://ww-w.democrats.com/node/19774.


judge who rebuked prosecutors for bringing the charges with little evidence of wrongdoing.  

Conyers’ letter mentioned an affidavit from Jill Simpson, a Republican who worked for Siegelman’s opponent in the 2002 gubernatorial election. Ms. Simpson swore in an affidavit that Bill Canary, a former protégé of Bush advisor Karl Rove, told a group of Republicans in 2002 that Rove and two U.S. Attorneys were planning to “take care of” Siegelman.  

Bill Canary’s wife, Leura Canary, was appointed to the office of U.S. Attorney in the Middle District of Alabama in 2001. Leura Canary recused herself from the Siegelman case, but evidence emerged that she continued to correspond with her subordinates about the case.  

Tamarah Grimes, a legal aide who worked with the team that prosecuted Siegelman, filed a complaint with the Department of Justice that accused her coworkers of misconduct. The Department investigated Ms. Grimes’ allegations and concluded that “the record does not support a finding that management officials in the [Middle District of Alabama] violated any law, rule, or regulation, or engaged in . . . an abuse of authority.” Siegelman’s supporters argued that the investigation was “poorly conducted,” and Siegelman has appealed his conviction to the U.S. Supreme Court, which has not decided whether to grant certiorari.  

 Despite the Department’s exoneration of the Siegelman prosecution team, 75 former state Attorneys General signed a letter asking Attorney General Eric Holder to investigate the Siegelman case for prosecutorial misconduct. Many of the same Attorneys General filed a brief with the Eleventh Circuit Court of Appeals supporting Siegelman. The letter to Holder said there were “gravely troublesome facts” about the Siegelman prosecution that warranted an investigation. In light of the evidence of political motives, Conyers’ letter requested information about Siegelman’s prosecution and other cases. 

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60 Affidavit from Jill Simpson (May 21, 2007) (stating that Canary told Siegelman’s Republican opponent, Bob Riley, “that he had already gotten it worked out with Karl [Rove] . . . and the Department of Justice was already pursuing Don Siegelman”), available at http://blog.al.com/bn/2007/07/affidavit.pdf.  
61 Id.  
63 Id.  
65 David Margolis, Associate Deputy Attorney General, Report of Investigation, Allegations Regarding the U.S. Attorney’s Office for the Middle District of Alabama 40, September 27, 2008.  
68 Id.  
69 Conyers’ letter also mentioned the case against Georgia Thompson, a Democratic procurement officer for the state of Wisconsin. Letter from Rep. John Conyers et al. to Attorney General Alberto Gonzales, July 17, 2007. Thompson was convicted of mail theft and corruption charges. United States v. Thompson, 484 F.3d 877 (7th Cir. 2007). Reversing the conviction, Judge Easterbrook noted that the prosecutor did not allege that any campaign contribution resulted in a quid pro quo, nor was there “so much as a whiff of a
Some may point out that politicians of both parties have found themselves the victims of overzealous federal prosecutors in recent years. Republican Senator Ted Stevens was convicted of lying on Senate ethics forms in October 2008, just before losing his reelection bid.\textsuperscript{70} The Department of Justice later dropped the charges against Stevens and acknowledged that federal prosecutors denied Stevens access to evidence that contradicted the testimony of a key government witness.\textsuperscript{71} In throwing out the charges, Judge Emmet Sullivan also appointed a non-government attorney to investigate possible misconduct by the federal prosecutors. “In nearly 25 years on the bench, I’ve never seen anything approaching the mishandling and misconduct that I’ve seen in this case,” Sullivan said.\textsuperscript{72} Stevens commented that he would advocate for legislation “to reform laws relating to the responsibilities and duties of those entrusted with the solemn task of enforcing federal criminal laws.”\textsuperscript{73} Despite these allegations of prosecutorial misconduct, there has been no evidence that Stevens’ prosecution was politically motivated, and any suggestion that Republicans were targeted for political prosecutions by the Bush Department of Justice is belied by statistical evidence.\textsuperscript{74} Several Department officials who worked on the Siegelman case also participated in the Stevens prosecution.\textsuperscript{75}

\textit{The Torture Memos}

The terrorist attacks of September 11, 2001, radically changed the national security priorities of the United States. The 9/11 Commission was created to study the government’s response to the attacks, and the commission concluded that, at the time it issued its report:

The national security institutions of the U.S. government [were] still the institutions constructed to win the Cold War. The United States confronts a very different world today. Instead of facing a few very dangerous adversaries, the United States confronts a number of less visible challenges that surpass the boundaries of traditional nation-states and call for quick, imaginative, and agile responses.\textsuperscript{76}

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\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.}
\end{flushright}
In the wake of the 9/11 attacks, the Office of Legal Counsel was asked for its advice about the legality of executive branch actions in combating terrorism. The CIA was holding Abu Zubaydah, and the agency suspected he was a high-ranking al Qaeda member who helped plan the 9/11 attacks. The CIA asked the OLC whether certain interrogation techniques would violate the federal law prohibiting torture if used against Zubaydah. In rendering its advice, the OLC noted that the CIA officers interrogating Zubaydah were “certain” that he was “withholding information regarding terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States.” The OLC also noted that, at the time of the CIA’s request for advice, there was a level of “chatter” among al Qaeda members similar to that which preceded the 9/11 attacks. The CIA told the OLC that Zubaydah “wrote al Qaeda’s manual” on resisting interrogation techniques. In light of these circumstances, the CIA requested the OLC’s advice on escalating its interrogation of Zubaydah to an “increased pressure phase.”

The CIA asked about 10 specific interrogation techniques, including slapping, stress positions, “cramped confinement,” sleep deprivation, waterboarding, and placing insects in a confinement box to exploit Zubaydah’s fear of insects. The CIA planned to “use these techniques in some combination to convince Zubaydah that the only way he can influence his surrounding environment is through cooperation,” and the interrogation team planned to employ the techniques “in some sort of escalating fashion, culminating with the waterboard.”

The OLC memo described the “waterboarding” technique in detail:

In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air now is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual’s blood. This increase in carbon dioxide level simulates increased effort to breathe. This effort plus the cloth produces the perception of “suffocation and incipient panic,” i.e., the perception of drowning. . . . [T]his procedure triggers an automatic physiological sensation of drowning that the individual cannot

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78 Id. at 1.
79 Id. at 1.
80 Id. at 7.
81 Id. at 1.
82 Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General 2 (August 1, 2002).
83 Id. at 2.
control, even though he may be aware that he may be aware that he is in fact not drowning. 84

The OLC memo also discussed a technique called “cramped confinement.” 85 The interrogators place the individual in dark “confined space, the dimensions of which restrict the individual’s movement.” 86 “The duration of confinement varies based upon the size of the container. . . . Confinement in the larger space can last up to eighteen hours; for the smaller space, confinement lasts for no more than two hours.” 87

Federal law prohibits torture. 88 Torture is defined as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody.” 89 The OLC construed “severe physical pain” as “pain that is difficult for the individual to endure and is of an intensity akin to the pain accompanying serious physical injury,” and it offered “severe beatings with weapons such as clubs, and the burning of prisoners” as examples. 90 The OLC concluded that none of the CIA’s interrogation techniques fell within its definition of torture. 91

The torture statute defines “mental pain or suffering” as harm resulting from one of the following acts: “(1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application . . . of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death . . . .” 92 The OLC conceded that “the use of the waterboard constitutes a threat of imminent death,” but the memo said “prolonged mental harm must nonetheless result to violate the statutory prohibition on infliction of severe mental pain or suffering.” 93 The CIA construed the memo as extending beyond the interrogation of Zubaydah. 94 The memo “provided the foundation” for the agency’s interrogation program. 95

Another OLC memo issued the same day construes “torture” as conduct causing physical pain “of an intensity akin to that which accompanies serious physical injury such as death or organ failure.” 96 The memo asserts that the anti-torture statute does not even apply to interrogations of combatants in the War on Terror. “Any effort by Congress to

84 Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General 3-4 (August 1, 2002).
85 Id. at 2.
86 Id. at 2.
87 Id. at 3.
88 18 U.S.C. § 2340A.
90 Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General 9-10 (August 1, 2002).
91 Id.
93 Id. at 15.
95 Id. at 4.
96 Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General 46 (August 1, 2002).
regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.” The memo provided many broad defenses for an interrogator accused of violating § 2340A.

Deputy Assistant Attorney General John Yoo was credited with much of the legal analysis in the Torture Memos. After Assistant Attorney General Jay Bybee was appointed to the Ninth Circuit Court of Appeals, some in the White House lobbied to have Yoo installed as head of the OLC. Attorney General John Ashcroft, however, opposed Yoo’s nomination because he thought Yoo worked too closely with the White House and failed to keep him “in the loop.” Former Department of Defense attorney Jack Goldsmith was named head of the OLC instead.

Goldsmith reviewed the memos justifying the executive branch’s activities in the War on Terror and concluded that “some of those opinions were deeply flawed.” Goldsmith acknowledged that his predecessors were under immense pressure after the 9/11 attacks, but he found “errors in some of the legal arguments, sometimes bad errors.” “I thought there were extravagant and unnecessary claims of presidential power that were . . . wildly overbroad to the tasks at hand and had implications for other laws that I just found way too extreme.” The tone of the opinions was “not really consistent with the norms of opinion writing in the Office of Legal Counsel. They were obviously stretching to reach a result . . . .” Goldsmith withdrew the August 2002 Torture Memos in June of 2004, but after Steven Bradbury assumed leadership of OLC, new memos were issued with similar reasoning and conclusions.

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97 Id. at 39.
98 The memo expounded on the “specific intent” requirement of § 2340(1). Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General 3-4 (August 1, 2002). The OLC concluded that “even if the defendant [in a prosecution under § 2340A] knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.” Id. at 4. The OLC opined that if an individual acted “with a good faith belief” that his conduct would not result in severe physical pain, the individual lacked the requisite intent. Id. at 4. The OLC’s “self-defense” theory said that the torture of detainees “would be justified under the doctrine of self-defense, because the combatant by aiding and promoting the terrorist plot ‘has culpably caused the situation where someone might get hurt.’ ” Id. at 44. See also Memorandum for William J. Haynes, II, General Counsel for the Department of Defense from Deputy Assistant Attorney General John Yoo 74-80 (March 14, 2003) (discussing the same “self-defense” theory, as well as a “necessity” defense).
100 See also Offices of the Inspectors General, Unclassified Report on the President’s Surveillance Program, July 10, 2009 (concluding that it was “extraordinary and inappropriate that a single DOJ attorney, John Yoo, was relied upon to conduct the initial legal assessment of the” Terrorist Surveillance Program), available at http://www.justi-ce.gov/oig/special/s0907.pdf.
102 Id.
103 Id.
104 Id.
Scholars and commentators have harshly criticized the memos. President Obama’s proposed head of the OLC, Dawn Johnsen, referred to one of the memos as an “advocacy piece,” through which the OLC “abandoned fundamental practices of principled and balanced legal interpretation.” Johnsen argued that the memo “relentlessly seeks to circumvent all legal limits on the CIA’s ability to engage in torture, and it simply ignores arguments to the contrary.” The memo “fails . . . to cite highly relevant precedent, regulations, and even constitutional provisions, and it misuses sources upon which it does rely.”

The former OLC attorneys have continued to defend their handiwork. Years after the Torture Memos were composed, Yoo argued that “the president’s power grows and changes based on circumstances, and that’s what the framers of the Constitution wanted. They wanted it to exist so the president could react to crises immediately.” Bybee was quoted as saying that he believed the memos “represented ‘a good-faith analysis of the law’ that properly defined the thin line between harsh treatment and torture.” The Times said that Bybee acknowledged that he “would have done some things differently, like clarifying and sharpening the analysis of some of his answers to help the public better understand the basis for his conclusions.”

The Office of Presidential Responsibility at the Department of Justice (OPR) is expected to release a report that is highly critical of Bybee, Yoo, and Bradbury. The OPR will reportedly ask state bar associations to consider disciplinary sanctions, possibly disbarment, for Yoo and Bybee. The report is described as faulting the OLC for “serious lapses of judgment in writing secret memorandums authorizing brutal interrogations.”

The OLC reasoned that the scope of the CAT was the same as the prohibition on “cruel, unusual, and inhumane treatment” prohibited by the Fifth Amendment to the U.S. Constitution. Id. at 2. The OLC concluded that the interrogation techniques did not “shock the conscience,” and thus, did not violate the CAT. Id. at 3 (citing County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)). See also Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, Re:Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value Al Qaeda Detainees, July 20, 2007 (concluding that six CIA interrogation techniques are lawful).


The flawed legal reasoning in the memos is alarming because the OLC’s decisions are considered binding within the executive branch. Upon releasing some of the previously undisclosed memos, the Obama administration stated that “intelligence community officials who acted reasonably and relied in good faith on authoritative legal advice from the Justice Department that their conduct was lawful, and confirmed their conduct to that advice, would not face federal prosecutions for that conduct.”

In addition to errors in legal analysis, many of the factual assumptions underlying the Zubaydah Torture Memo have been refuted. It is now acknowledged that Zubaydah provided useful information to his interrogators during traditional interrogation sessions, including information about the role of Khalid Sheik Mohammed in planning the 9/11 attacks. Despite his initial cooperation, CIA officials believed Zubaydah was holding back. Some alleged that the interrogation techniques and the practice of extraordinary rendition were instituted because the Bush administration believed the detainees were withholding information linking Iraq and al Qaeda. Many military officials and members of the intelligence community argue that torture is counterproductive. Human rights organizations have condemned the use of torture.

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116 Although the CIA alleged that Zubaydah was a high-ranking member of al Qaeda, the New York Times reported that CIA officials later realized he was merely “a helpful training camp personnel clerk who would arrange false documents and travel for jihadists, including Qaeda members.” Scott Shane, Divisions Arose on Rough Tactics for Qaeda Figure, New York Times, April 17, 2009. Bybee’s memo discussed the CIA’s psychological profile of Zubaydah, and it mentioned that the CIA had advised OLC that it did not “anticipate that any prolonged mental harm would result from the use of the waterboard.” Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General 15 (August 1, 2002). It was later revealed that the waterboard was used on Zubaydah 83 times. Scott Shane, Waterboarding Used 266 Times on 2 Suspects, New York Times, April 19, 2009. In an op-ed for the L.A. Times, Zubaydah’s attorney said that Zubaydah “suffers blinding headaches and has permanent brain damage.” Joseph Margulies, Abu Zubaydah’s Suffering, L.A. Times, April 30, 2009. “He has an excruciating sensitivity to sounds, hearing what others do not. The slightest noise drives him nearly insane.” Id. Margulies said that Zubaydah is losing his memory and has trouble recalling his mother’s face and his father’s name. Id.


118 Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General 15 (August 1, 2002).


Analysis

After the public learned of the Torture Memos and the possibility of political prosecutions at the Bush Department of Justice, commentators and legal scholars began to ask how the United States should address these problems. These suggestions have varied widely. At one end of the spectrum, some have called for prosecuting former OLC attorneys. Attorney General Eric Holder has appointed a special prosecutor to investigate whether CIA interrogators went beyond the guidelines established by the OLC memos. Senator Patrick Leahy has suggested that high-profile prosecutions usually result in convicting “the small guys while the top people get away,” citing the investigation into torture at Abu Ghraib.

Others argue that Bush’s government lawyers should be individually sanctioned outside of the criminal justice system. In the wake of alleged political prosecutions, some called for investigating U.S. Attorneys for prosecutorial misconduct. Some torture victims have filed civil suits against the Bush administration’s government lawyers. Some commentators insist that Bybee should not sit as a federal judge and should be impeached.

In stark contrast to those arguing for prosecutions or individual sanctions, some have said that the country should not take any action to investigate former Department

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Scott Horton, Six Questions for Matthew Alexander, author of “How to Break a Terrorist,” Harper’s Magazine, December 18, 2008. “The number-one reason foreign fighters gave for coming to Iraq to fight is the torture and abuse that occurred at Abu Ghraib and Guantánamo.” Id.

121 The International Committee of the Red Cross (ICRC) studied the conditions of confinement for several terrorist suspects in 2006. The ICRC’s report concluded that “the ill-treatment to which [the detainees] were subjected while held in the CIA program . . . constituted torture.” International Committee of the Red Cross, ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody 26, February 2007. “In addition, many other elements of the ill-treatment . . . constituted cruel inhuman or degrading treatment.” Id. The detention of terrorist suspects “effectively amounted to an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law.” Id. Human rights organizations allege that at least 100 detainees have died while in the custody of the United States at prisons in Iraq, Afghanistan, and Guantánamo Bay. Nicholas D. Kristof, A Prison of Shame, and It’s Ours, New York Times, May 4, 2008.

122 See Glenn Greenwald, John Yoo’s war crimes, Salon.com, April 2, 2008 (arguing that Yoo “was a government official who, in concert with other government officials, set out to set out to enable a brutal and systematic torture regime”), available at http://www.salon.com/opinion/greenwald/2008/04/02/yoo.


officials.\textsuperscript{128} Some who take this position argue that investigating the officials would be a distraction from the Department’s important functions, and any action perceived as punitive would risk “chilling” the OLC’s ability to give candid legal advice or the US Attorneys’ exercise of prosecutorial discretion.\textsuperscript{129}

The possibility of inquiries into the conduct of individual government lawyers is beyond the scope of this paper, which will focus on suggestions along the spectrum between inaction and individual sanctions or prosecutions. Some have suggested that the remedy for improper Presidential influence over government lawyers is to insulate the Department from Presidential control. Others argue that Congress should more actively assert its oversight authority by establishing an investigatory commission or legislating more transparency in the executive branch. Thus, the first part of the Analysis section in this paper will discuss the constitutionality of an independent Department of Justice and the merits of such a system. The second part will discuss the proposal for a “Truth Commission” to study the Bush administration’s abuses. The final part of the Analysis section will discuss proposals for new statutes governing the Department of Justice and its relationship with the President.

**Independent Department of Justice**

After President Nixon abused his authority over the Department of Justice,\textsuperscript{130} some called for establishing the Department as an independent agency, free from presidential influence. During his presidential campaign, Jimmy Carter embraced this idea.\textsuperscript{131} Senator Sam Ervin, Chairman of the Senate Select Committee to Investigate Campaign Practices, also advocated an independent Department of Justice.\textsuperscript{132}

President Carter abandoned his proposal after his Attorney General, Griffin Bell, advised him that a statute creating an independent Department of Justice would be unconstitutional.\textsuperscript{133} Former special prosecutor Archibald Cox also believed such a law would be unconstitutional because it would deprive the president of authority to remove executive officers.\textsuperscript{134} Cox also doubted the constitutionality of giving independent

\textsuperscript{128} See David Broder, Stop Scapegoating: Why Obama Should Stick to His Guns on Torture Prosecutions, Washington Post, April 26, 2009 (arguing that President Obama should oppose the prosecution of OLC attorneys because they would result in “endless political warfare”); Jon Meacham, The Editor’s Desk, Newsweek, April 25, 2009 (arguing that a congressional probe into Bush-era wrongdoing would “encourage—demand, really—dramatic plays for attention from lawmakers”).

\textsuperscript{129} See Michael Isikoff, Friendly Fire at the White House, Newsweek, May 21, 2009 (quoting Obama as rejecting the idea of a Truth Commission because it would be “too time-consuming” for members of his administration), available at www.newsweek.com/id/1987.

\textsuperscript{130} For example, Nixon fired special prosecutor Archibald Cox during his investigation into the Watergate scandal. See Seven Tumultuous Days, Time, November 5, 1973, available at http://www.time.com/time/magazine/article-0,9171,9080901,00.html.

\textsuperscript{131} Griffin B. Bell & Ronald J. Ostrow, Taking Care of the Law, 28 (1982) (describing Carter’s 1976 interview on Meet the Press in which he advocated an independent Department of Justice).

\textsuperscript{132} Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary on S.2803 and S.2978, 93d Cong. 3 (1974).

\textsuperscript{133} Proposals Regarding an Independent Attorney General, 1 Op. Off. Legal Counsel 75 (1977) (explaining Bell’s “serious doubts as to the constitutionality of such legislation”).

\textsuperscript{134} Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary on S.2803 and S.2978, 93d Cong. 3 (1974).
officials responsibility for faithfully executing federal law. “Civil suits and criminal
prosecutions are major weapons in the execution of the laws.”

After his initial proposal was criticized, Carter signed the Ethics in Government
Act of 1978. The Act created a system whereby a panel of judges could appoint an
Independent Counsel (IC) to investigate high-level wrongdoing in the executive
branch. The Attorney General could only remove the IC if his ability to perform was
impaired or for “good cause.” The Act was upheld by the Supreme Court.

In the wake of the scandals at the Bush Department of Justice, some have
resurrected the idea of an independent Attorney General. Proponents argue that placing
the Department beyond the President’s control would allow government lawyers to focus
on their duty of ensuring that executive branch action is lawful. Prof. Garrett Epps
asserts that an independent Department of Justice would mean that “the next time a White
House advisor wanted to oust prosecutors for partisan aims, or secure a legal-sounding
blank check for lawless executive action, he or she would have to call across town to an
attorney general who had an independent constitutional role and who could not be fired
for refusing to toe the administration line.”

**Faithfully Executing the Law**

Advising President Carter on the constitutionality of an independent Department
of Justice, Attorney General Griffin Bell said the Constitution demands that the President
bear “the constitutional obligation to execute the laws.” Bell said that *Myers v. United
States*, 272 U.S. 52 (1926), established that “the President’s freedom to remove executive
officials cannot be altered by legislation.” Bell felt this was particularly true with
respect to the Attorney General. Because the Attorney General is the nation’s chief
law enforcement officer, any limit on the President’s choice of Attorney General would
“impair the President’s ability to execute the laws.” Bell said that an independent
Attorney General would not be accountable to the President, but since the President has

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135 Id.
137 Id.
138 Id.
also U.S. Const. art. II § 1, cl. 1 (“The executive Power shall be vested in a President of the United States
of America”); U.S. Const. art. II § 3 (stating that the President “shall take Care that the Laws be faithfully
executed”).
142 Id. at 76. Bell analyzed the proposal before the Supreme Court’s seminal decision in *Morrison v. Olson*,
487 U.S. 654 (1988). *Morrison* changed the Court’s approach to separation-of-powers issues, but Bell’s
analysis is still relevant because *Morrison* did not overrule *Myers*. *Id.* at 690 (noting that although the
Court was departing from its prior separation-of-powers tests, “*Myers* was undoubtedly correct in its
holding, and in its broader suggestion that there are some ‘purely executive’ officials who must be
removable by the President at will”). President Carter’s proposal would be unconstitutional under either
*Morrison* or *Myers*. See analysis of *Morrison*, supra at ___.
143 Id. at 76-77.
144 Id. at 76.
the constitutional obligation to execute federal law, the President would remain “constitutionally responsible” for the Attorney General’s actions.\textsuperscript{145}

Even if Congress cannot completely remove the Department from the President’s control, it can create federal law enforcement offices with some degree of independence. Through the Ethics in Government Act, Congress established a mechanism to appoint an independent federal prosecutor to investigate wrongdoing in the executive branch.\textsuperscript{146} Under this system, a panel of judges could appoint an Independent Counsel (IC), and the Attorney General could only remove the IC in limited circumstances.\textsuperscript{147} When an IC appointed under the Act subpoenaed several officials in the Reagan administration, some of those officials challenged the Act as unconstitutional.\textsuperscript{148}

The Supreme Court asked whether the Act violates separation-of-powers principles. The Court found that the Act did not impermissibly burden the President’s power to supervise the IC in enforcing federal law:

This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the “faithful execution” of the laws. Rather, because the independent counsel may be terminated for “good cause,” the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act . . . Here, as with the provision of the Act conferring the appointment authority of the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.\textsuperscript{149}

The Court used a flexible approach in its separation of powers analysis. The Framers considered the system of three separate branches to be a “self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”\textsuperscript{150} The Court noted that the Act was not an attempt by Congress to augment its own powers at the President’s expense, and the IC’s jurisdiction is limited by the terms of the Act.\textsuperscript{151} The Court upheld the Act because it left the President with “sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”\textsuperscript{152} The Court also concluded that the IC

\begin{itemize}
\item \textsuperscript{145} Id. at 76.
\item \textsuperscript{146} Pub. L. No. 95-521, 92 Stat. 1824.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Morrison v. Olson, 487 U.S. 654 (1988).
\item \textsuperscript{149} Morrison v. Olson, 487 U.S. 654, 692-93 (1988).
\item \textsuperscript{150} Morrison, 487 U.S. at 693 (quoting Buckley v. Valeo, 424 U.S. 1 (1976)).
\item \textsuperscript{151} Id. at 694-96.
\item \textsuperscript{152} Id. at 696.
\end{itemize}
was an “inferior officer,” and thus, could be appointed by someone other than the President without violating the Appointments Clause.\footnote{153}{Id. at 671-73 (applying U.S. Const. art. II § 2, cl. 2).}

Justice Scalia dissented, relying on the Article II Vesting Clause. “The executive Power shall be vested in a President of the United States.”\footnote{154}{U.S. Const. Art. II § 1, cl. 1.} “[T]his does not mean some of the executive power, but all of the executive power.”\footnote{155}{Morrison, 487 U.S. at 705.} Scalia characterized the power to conduct a criminal investigation and prosecution as a “purely executive power,” and he argued that since the Act conferred this power on someone other than the President, the Act was unconstitutional.\footnote{156}{Id. at 706.} The “whole object of the statute” is to deprive “the President of exclusive control over that quintessentially executive authority.”\footnote{157}{Id. at 699.} Scalia’s dissent was concerned about the erosion of Presidential power and the disruption of “the equilibrium the Constitution sought to establish” by creating separate branches of government.\footnote{158}{See 28 U.S.C. § 599 (1994).}

The Independent Counsel provisions in the Ethics in Government Act expired in 1999, and they have not been reinstated.\footnote{159}{Saikrishna Prakash, The Chief Prosecutor, 73 Geo. Wash. L. Rev. 521, 524 (2005).} Independent Counsel Kenneth Starr was widely seen as abusing his authority during his investigation of President Bill Clinton, and a bipartisan consensus emerged that the IC provisions should be allowed to lapse.\footnote{160}{See United States v. Lara, 541 U.S. 193, 216 (2004) (Thomas, J., concurring) (“The power to bring federal prosecutions . . . is a manifestly and quintessentially executive power.”); Hamdi v. Rumsfeld, 542}

As recent precedent, *Morrison* should inform any inquiry into how today’s Supreme Court might view a statute creating an independent Department of Justice. The *Morrison* Court upheld a statute creating a single federal law enforcement official who operates free of Presidential influence. If Congress attempted to transform the entire Department into an independent agency, such a structure would likely not provide “sufficient control . . . to ensure that the President is able to perform his constitutionally assigned duties.”\footnote{161}{Morrison, 487 U.S. at 696.} An attempt to insulate the Attorneys General and, presumably, the U.S. Attorneys, from Presidential influence would seem to “interfere impermissibly with [the President’s] constitutional obligation to ensure the faithful execution of the laws.”\footnote{162}{Id. at 693.} Archibald Cox noted that federal law enforcement constitutes “a very large part of the duty . . . ‘to take care that the laws be faithfully executed.’ ”\footnote{163}{Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary on S.2803 and S.2978, 93d Cong. 3 (1974).}

Some have even questioned whether the independent council provisions, if reinstated, would be upheld by today’s Supreme Court.\footnote{164}{See Thomas W. Merrill, Beyond the Independent Counsel: Evaluating the Options, 43 St. Louis U. L.J. 1047 (1999) (arguing that the Court in *Edmond v. United States*, 520 U.S. 651, 663 (1997), adopted the test for “inferior officers” that Justice Scalia proposed in his *Morrison* dissent).} Although no other Justice joined his dissent in *Morrison*, Justice Scalia is likely to find more support among today’s Court for his unitary executive theory.\footnote{165}{See United States v. Lara, 541 U.S. 193, 216 (2004) (Thomas, J., concurring) (“The power to bring federal prosecutions . . . is a manifestly and quintessentially executive power.”); Hamdi v. Rumsfeld, 542}
Some scholars disagreed with Justice Scalia’s characterization of federal law enforcement as a “quintessentially executive function.” These scholars pointed to historical evidence that state prosecutors enforced federal law, and they suggested that early Presidents did not have the authority to fire the Attorneys General or federal prosecutors. Other scholars countered with evidence that early Presidents “publicly directed district attorneys and the attorneys general to start and stop prosecutions.”

Even if early Presidents lacked control over federal prosecutions, the duties of the modern Attorney General and Department of Justice are inseparable from the President’s obligation to enforce federal law. If the Founders assigned the President the exclusive responsibility to enforce federal law, then a statute stripping the President of all control over federal law enforcement would be unconstitutional. Attorney General Griffin Bell argued that such a law would mean that the Attorney General is not accountable to the President, yet the President would remain “constitutionally responsible” for the execution of federal law. Moreover, domestic law enforcement has become more closely intertwined with national security since the terrorist attacks of September 11, 2001. See National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report 412-14 (2004) ( Recommending that the FBI’s counter-terrorism efforts be combined with those of the Central Intelligence Agency and Department of Defense under a new National Intelligence Director). This link to national security lends support to the argument that an independent Department of Justice would impermissibly impair the President in fulfilling his or her constitutional responsibilities.

A Divided Executive

Regardless of the constitutionality of such a proposal, an independent Department of Justice could ensure that the President cannot improperly politicize the Department. If the Department was independent, its employees presumably would not be hired or fired on the basis of political allegiance, but on the basis of their qualifications. An OIG report concluded that a Bush Department of Justice official “improperly subjected candidates for certain career positions to the same politically based evaluation she used on


166 Morrison, 487 U.S. at 706.
candidates for political positions, in violation of federal law and Department policy.\textsuperscript{170} If a federal prosecutor’s highest superior was an independent Attorney General, then the President and his political advisers would have trouble influencing prosecutorial decisions. Moreover, it is unlikely that an unbiased Office of Legal Counsel, regardless of legitimate differences as to the scope of executive authority, would have rendered the same kind of advice provided by the Bush OLC.\textsuperscript{171} An independent Department would ensure that government lawyers act in the interests of the public, not the President or his political party.

However, the country’s experience with independent federal law enforcement suggests that such a proposal could be impractical. The statute creating the Independent Counsel expired, and although concerns remain that Presidents can improperly politicize federal law enforcement, Kenneth Starr’s investigation demonstrated that independent law enforcement can also be politicized. Scalia’s dissent in \textit{Morrison} presaged the controversy over Starr’s investigation. Scalia asked what would happen if the judges selecting the IC are “politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration.”\textsuperscript{172} These same concerns would arise if Congress or the judiciary appointed the Attorney General, and a myriad of problems could arise if the President and Attorney General had opposing policy priorities or different views on interpreting the Constitution.

These concerns suggest that the benefits of independent law enforcement may not be worth the risks, but it must be noted that nearly every state government in America has rejected the “unitary executive” model adopted by the Framers. Most state Constitutions vest executive authority in more than one executive officer, including a state Attorney General free of the Governor’s influence. “[T]he states tended to reject the federal model because they were concerned with the concentration of too much power in one executive officer.”\textsuperscript{173} Forty-eight states have Attorneys General who cannot be removed by their state’s Governor.\textsuperscript{174} Forty-three states afford their Attorneys General even more independence by making the position an elected office.\textsuperscript{175}

Having multiple independently elected executive officers naturally gives rise to conflicts. The Governor and the Attorney General may have competing policy preferences. For example, Georgia Governor Sonny Perdue sued Georgia Attorney General Thurbert Baker in 2003 over a state reapportionment plan.\textsuperscript{176} Many state


\textsuperscript{171} See Dawn Johnsen, “Faithfully Executing the Laws; Internal Legal Constraints on Executive Power” 54 UCLA L. Rev. 1559, 1583-84 (2007) (criticizing one of the Torture Memos for its one-sided analysis).

\textsuperscript{172} \textit{Morrison}, 487 U.S. at 730.


\textsuperscript{174} Id. at 2448.

\textsuperscript{175} Id. at 2449.

\textsuperscript{176} \textit{Perdue v. Baker}, 586 S.E.2d 606 (Ga. 2003). A federal court had held that the state legislature’s plan violated the Voting Rights Act, and the Georgia legislature passed a back-up plan in case the lower court’s decision regarding the first plan was upheld. \textit{Id.} at 607-608. Perdue favored the back-up plan and sued Baker, seeking to force him to drop an appeal to the U.S. Supreme Court. \textit{Id.} at 608. The Georgia Supreme Court held that both the Governor and Attorney General could represent the state of Georgia in litigation, and thus, Perdue could not force Baker to withdraw his appeal. \textit{Id.} at 616.
Supreme Courts have recognized that Attorneys General can reject the Governor’s proposed course of action based on the Attorney General’s judgment regarding the legality of such action. Many courts to consider the issue have recognized that Attorneys General have broad authority to initiate civil and criminal actions on behalf of the state, regardless of the Governor’s views. A few states do not permit such actions by their Attorneys General.

Prof. William Marshall concludes that, despite the potential for disputes between Governors and Attorneys General, “debilitating conflict has not materialized.” Marshall argues that a Governor faces political pressure to comply with an Attorney General’s positions “on matters for which the public expects that the Attorney General, as chief legal officer, will have greater expertise.” “On the other side, the Attorney General may also be restrained from overreaching because she is aware that her role is, in large part, defined by public expectations that her primary obligation is to defend, not contradict, the policies of state officers or agencies, except when those policies violate the law.” Prof. Marshall discerns important benefits from having a chief legal officer beyond the Governor’s influence. “[B]y insulating the Attorney General’s legal authority from gubernatorial control, the divided executive protects against executive branch overreaching by dedicating an executive officer to uphold the rule of law.”

Yet Marshall acknowledges difficulty in delineating the boundary between policy judgments made by the Governor and legal judgments made by the Attorney General. Marshall concedes that the divided executive “undermines the virtues of energy and efficiency, political accountability, and separation of powers that the Framers . . . associated with the unitary executive model.” Marshall notes a crucial distinction between state and federal executives that could make an independent federal Attorney General problematic. “[S]eparating the Attorney General’s powers from the President may infringe upon the President's ability to execute foreign policy and promote national security because questions of legal authority are so critical in this area.” Marshall nevertheless concludes that the state model is “an attractive candidate for adoption at the federal level.”

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177 Compare Secretary of Administration & Finance v. Attorney General, 326 N.E.2d 334 (Mass. 1975) (“[W]hen an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency.”) with Santa Rita Mining Co. v. Department of Property Valuation, 530 P.2d 360 (Ariz. 1975) (ruling that the Attorney General is required to represent the position of the executive branch rather than exercising independent judgment).


181 Id.

182 Id.

183 Id. at 2468.


185 Id. at 2448.

186 Id. at 2473.

187 Id. at 2478.
Marshall’s conclusion that the divided executive offers important benefits and has proven workable at the state level is a sound one. However, many practical difficulties would arise in implementing such a system at the federal level. Because a President may be unlikely to seek legal advice from an Attorney General with whom he does not agree, any statute creating an independent Attorney General would have to require that the President consult with the Attorney General on certain issues. If it were otherwise, would the President ever seek the advice of an Attorney General when the President thinks he or she might not provide the desired answer? The Bush administration sought legal advice from government lawyers who espoused broad views of executive power, and it avoided seeking the advice of government lawyers who might disagree. Marshall suggests that a divided executive would be helpful in checking presidential excesses in the area of national security. But if the President and Attorney General have differing views on the scope of presidential authority, the President may avoid seeking the Attorney General’s advice, making it impossible for him or her to reign in the President.

Some argue that an Independent Attorney General would frustrate the President’s attempts to implement his preferred policies in law enforcement. Goldsmith points out that Presidents can appropriately “set a legal agenda” that emphasizes or de-emphasizes law enforcement for certain offenses. Democratic presidents may emphasize civil rights cases, and Republicans may favor immigration cases.” However, “[p]ermitting policy priorities to inform law enforcement is not the same thing as permitting partisanship to do so.”

Regardless of whether an independent Department of Justice is a feasible option, such a system would likely be ruled unconstitutional by the current Supreme Court. But Americans would be left with another effective mechanism for ensuring fair law enforcement—the power of American citizens to elect the person charged with faithfully executing federal law.

Truth Commission

Many have argued that if the Bush administration’s government lawyers are not sanctioned for misconduct, Congress should establish some other process for ensuring

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188 Offices of the Inspectors General, Unclassified Report on the President’s Surveillance Program, July 10, 2009 (concluding that it was “extraordinary and inappropriate that a single DOJ attorney, John Yoo, was relied upon to conduct the initial legal assessment of the” Terrorist Surveillance Program), available at http://www.justice.gov/oi-g/special/s0907.pdf; Josh Meyer, Report: Bush-era Surveillance Went Beyond Wiretaps, L.A. Times, July 11, 2009 (discussing a government report that concluded that the Bush White House rejected the advice of high-level Department officials and instead relied on individual OLC attorneys in assessing national security questions).


190 Id.

191 Id. See also James Eisenstein, The U.S. Attorney Firings of 2006: Main Justice’s Centralization Efforts in Historical Context, 31 Seattle U. L. Rev. 219, 222 (2008) (“[A] democratically elected administration must decide how much to emphasize a variety of law enforcement goals and policies, such as fighting organized crime syndicates, pursuing the death penalty, reducing gun violence, enforcing immigration laws, prosecuting corporate crime, combating terrorism, or attacking healthcare fraud.”).

192 See Morrison, 487 U.S. at 729 (Scalia, J., dissenting) (“Under our system of government, the primary check against prosecutorial abuse is a political one.”).
that the public is fully informed about the OLC’s role in condoning torture and the Bush administration’s politicization of the Department of Justice. Advocates of such processes argue that a “Truth Commission” or something akin to it is required to ensure that such abuses do not occur in future administrations.

Others argue that such a commission is not an appropriate way to address the Bush administration’s abuses. Senator Arlen Specter said a commission is not needed because President Barack Obama’s Department of Justice can thoroughly investigate the problems. President Obama has not pushed for the creation of a truth commission, saying that he prefers to “look forward.” However, a February 2009 Gallup poll found that a majority of Americans supports an independent panel to investigate wrongdoing in the Bush era.

Congress should create a Truth Commission to investigate the Bush administration and its Department of Justice. Many of the Bush Administration’s most controversial national security policies—warrantless wiretapping, torture, extraordinary rendition, the indefinite detention of terrorism suspects—have been criticized by politicians and commentators across the political spectrum. Government lawyers played a key role in implementing these policies. By engaging in political prosecutions and providing cover for illegal national security programs, government lawyers in the Department of Justice helped the Bush administration evade laws created to check the President’s authority.

The Bush administration was renowned for the secrecy with which it operated, and a Truth Commission could help unearth any abuses that remain concealed. Many of the problems at the Bush Department of Justice did not emerge until Bush’s second term. The administration’s stonewalling frustrated the Inspector General’s effort to determine if laws were broken in the firings of the U.S. Attorneys. The public did not even know

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195 Scott Shane, Administration is Debating Release of Interrogation Memos, New York Times, March 31, 2009; Michael Isikoff, Friendly Fire at the White House, Newsweek, May 21, 2009 (quoting Obama as rejecting the idea of Truth Commission because it would be “too time-consuming” for members of his administration).
that the Torture Memos existed until the summer of 2004. The Bush administration concealed information from the public and Congress about its most controversial national security programs. If the full extent of the problems at the Bush Department of Justice remains concealed, a future President may believe that he or she can engage in similar conduct with impunity.

Proponents have offered different ideas for the scope of a Truth Commission. Senator Patrick Leahy has proposed a commission to investigate a wide range of Bush administration actions, including politicized prosecutions, the wiretapping of American citizens, the use of torture, and the “flawed intelligence used to justify the invasion of Iraq.” Leahy would model the commission on the Truth and Reconciliation Commission that investigated Apartheid in South Africa. Like that commission, Leahy’s commission would have subpoena power, but it would not bring criminal charges and would allow those who testified to seek immunity.

Representative John Conyers has proposed a “National Commission on Presidential War Powers and Civil Liberties.” Conyers’ commission would be charged with investigating “the broad range of policies of the Administration of President George W. Bush that were undertaken under claims of unreviewable war powers.” Such policies include detention, “enhanced interrogation techniques,” extraordinary rendition, domestic warrantless wiretapping, and other policies that the Commission may deem relevant.

Any commission investigating the Bush administration’s abuses should be charged with investigating a broad range of issues. Some have argued that the committee should be modeled on the Church Committee, which investigated misconduct by America’s intelligence apparatus during the Cold War. Among other things, the Church Committee’s responsibilities included inquiries into the CIA’s domestic intelligence operations, the extent of executive branch oversight of intelligence operations, and the “violation or suspected violation of any State or Federal statute by any intelligence agency.” The Committee sought to “illustrate the problems before Congress and the country,” so that Congress could improve oversight and remedy the statutory framework governing intelligence activities.

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203 Id.
205 Id. at § 1.
206 Id. at § 1.
208 Church Committee, Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities 2-3 (1976).
209 Id. at 4-5.
The Church Committee’s broad inquiry resulted in stronger oversight and comprehensive reform of intelligence activities, and the extent of the Bush administration’s transgressions warrants similarly extensive reforms. Representative Rush Holt said that, “The intelligence community has not undergone comprehensive examination since [the Church Committee], and it needs it.”

Former White House counterterrorism czar Richard Clarke said that the government needs a “comprehensive checkup.” Bush’s government lawyers undermined many of the reforms ushered in by the Church Committee, and a new commission with a broad mandate could help Congress shore up those reforms.

It is not clear whether a Truth Commission would investigate the Bush administration’s politicized prosecutions, but any investigation of the Bush Department of Justice would be incomplete if it did not. Rep. John Conyers said that “honest and well-performing U.S. Attorneys were fired for petty patronage, political horse-trading, and, in the most egregious case of political abuse of the U.S. attorney corps -- that of U.S. attorney Iglesias -- because he refused to use his office to help Republicans win elections.” During the confirmation hearings for Attorney General Eric Holder, Senator Byron Dorgan spoke of the “long, dark shadow that was cast for a period of time over the Justice Department.” Dorgan asserts that, during Attorney General Alberto Gonzales’ tenure, “there were grave questions of what was happening to justice at the Department of Justice.” The politicization of law enforcement undermines the rule of law and fundamental principles of democratic government.

The use of the executive branch’s prosecutorial authority for political purposes flies in the face of the Founders’ notion of democracy. “[T]he very definition of a republic is ‘an empire of laws and not of men. . . . [T]hat form of government which is best contrived to secure an impartial and exact execution of law, is the best of republics.” Criticizing the Alien & Sedition Acts, Thomas Jefferson warned that if prosecutions under the Acts should continue, the federal government could “place any act . . . on the list of crimes . . . .” Jefferson warned of the consequences for those who “may be obnoxious to the views, or marked by the suspicions of the President, or be through dangerous to his or their election, or other interests . . . .” Attorney General

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211 Id. (quoting Clarke).
215 Id.
218 Id.
Robert Jackson said that “the most dangerous power of the prosecutor [is] that he will pick people that he thinks he should get, rather than cases that need to be prosecuted.”

“It is in this realm-in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.”

Because the practice is at odds with the basic principles of democracy, the American public must obtain all the information it can about the Bush administration’s political prosecutions. The President cannot be allowed to prosecute Americans merely because they belong to a different political party. Without a full accounting, there is a greater chance that future Presidents will abuse their prosecutorial authority for political gain.

Some members of Congress believe a Truth Commission would help Congress reassert its waning oversight authority. Sen. Charles Schumer of New York asserts that, during the Bush era, “Congressional power [was] at its lowest ebb in memory.” Schumer argues that stronger Congressional oversight is “especially necessary given the Executive branch’s purge of internal checks and the over-politicization of institutions like the Department of Justice.” Schumer argues that Congress should more often create “inter-branch, bipartisan commissions that can provide a check through public reports when one branch exceeds its power,” and that Congress should make it “easier to convene independent commissions . . . to transcend the partisan gridlock of Congress . . .”

Senator Schumer acknowledges that any investigation could be perceived as a means for Congressional Democrats “to embarrass or to score political points.” But some argue that the commission can be set up to avoid such concerns.

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219 Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940.
220 Id.
221 Many of the Bush administration’s OLC opinions relied on an almost limitless view of executive power. See Memorandum for William J. Haynes, II, General Counsel for the Department of Defense from Deputy Assistant Attorney General John Yoo 81 (March 14, 2003) (finding that “generally applicable criminal laws do not apply to the military interrogation of alien unlawful combatants held abroad”); Dawn Johnsen, What’s a President to do? Interpreting the Constitution in the Wake of Bush Administration Abuses, 88 B.U. L. Rev. 395, 400 (2008) (arguing that the Bush administration’s constitutional interpretations were “outside the mainstream of legal thought” and based on “a generalized desire to expand presidential power”). A former Department official said the administration engaged in a concerted effort to enlarge the scope of the President’s authority. “[Vice President Richard] Cheney and the President told top aides at the outset of the first term that past presidents had ‘eroded’ presidential power, and that they wanted ‘to restore’ it so that they could ‘hand off a much more powerful presidency’ to their successors.” Jack Goldsmith, The Terror Presidency 89 (2007) (citing Interview with Vice President Richard B. Cheney, This Week (Jan. 27, 2002).
222 Id. at 22.
223 Id. at 37.
Given the concern that it could be viewed as political gamesmanship, the commission should be as free from political influence as possible. This independence would give the commission credibility in the eyes of the American public, and it would deflate arguments that the commission is being used for political purposes. Conyers proposed an inter-branch, bipartisan commission with members appointed by the President and Republicans and Democrats from both houses of Congress. Unlike the 9/11 Commission, however, Conyers’ commission would consist of 5 Democrats and 4 Republicans.

Any commission that investigates Bush administration abuses should be composed of equal numbers of Democrats and Republicans. The balanced composition of the 9/11 Commission contributed to its credibility. If the public perceives a Truth Commission as too politically partisan, it is less likely to believe that the commission is acting in the country’s best interests.

A bipartisan commission would help ensure that Congressional Democrats do not escape scrutiny. Although House majority leader Nancy Pelosi suggested that she was not briefed on the Bush administration’s “enhanced interrogation” techniques, the CIA contradicted her account. Pelosi was quoted as saying, “We were not . . . told that waterboarding or any of these other enhanced interrogation methods were used. What they did tell us is that they had . . . the Office of Legal Counsel opinions [and] that they could be used, but not that they would.” Any commission investigating Bush-era abuses must hold Democrats accountable for their lack of oversight. The commission must be as free from partisan influence as possible.

While President Obama has yet to sign on, Leahy and others continue to push for the establishment of a Truth Commission. Given the possibility that Democrats will be called to task for their lack of oversight, it may be difficult for Leahy or Conyers to garner support among their Democratic colleagues. However, Pelosi has continued to support the idea, and Republicans seem to be encouraged by the possibility that Congressional Democrats may also be implicated in the investigation.

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228 Id. at § 3.
229 The 9/11 Commission was composed of five Democrats and five Republicans, and its members were appointed by both the President and Congress. National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report xv (2004), available at http://www.gpoaccess.gov/911/pdf/fullreport.pdf. See Philip Shenon, Panel Chiefs are Seen as Candidates for Post, New York Times, July 26, 2004 (discussing a poll from the Pew Research Center finding that 61 percent of respondents believed the 9/11 Commission “had done a good job, and that the support was nearly equal among Democrats and Republicans”).
New Department of Justice Statutes

The government lawyers in the Bush administration’s Department of Justice were criticized for their roles in implementing constitutionally suspect policies. The OLC attorneys enabled torture, and federal prosecutors may have engaged in politicized prosecutions. Critics argue that the government lawyers had a duty to protect the Constitution that trumped their loyalty to the President or his political party. The question of whether the government lawyer’s client is the President or the American public is far from settled. In the wake of the Bush administration’s abuses, many have called for new rules to clarify the role of the OLC within the executive branch and prevent improper Presidential influence over federal prosecutors.

Guiding the OLC

The subtext of the Torture Memo controversy is the question of whether the government lawyer’s job is to serve the President, the entire U.S. government, or the American public. John Yoo has acknowledged this dilemma while defending his legal analysis. “It was my job. As a lawyer, I had a client. The client needed a legal question answered.” Yoo explained that his client was “the president, but also the U.S. government as a whole,” but he acknowledged that “if there’s a conflict between the president and the Congress, then you have to pick one or the other.”

After the first Torture Memo was leaked to the press, many former Department attorneys and others in the legal community called for stricter or more definite guidelines for the Office of Legal Counsel. Nineteen former OLC Attorneys authored a document entitled “Principles to Guide the Office of Legal Counsel” (“The Principles”). The first Principle suggests that “When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired

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236 Id.

policies.” The Principles reject the “advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients’ desired actions.” If OLC attorneys act as advocates for the President’s policies, the OLC is not helping the President fulfill his duty to faithfully execute federal law. An advocacy model would “deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action.”

Before the OLC was established as an independent office within the Department of Justice, it was part of the Office of the Solicitor General. Like the OLC, the Solicitor General has been regarded as an office requiring some degree of independence from Presidential influence. While discussing the role of the Solicitor General within the Department, the OLC recognized that the Attorney General faces the difficult task of balancing his job as policy advisor to the President with the responsibility for “the objective and evenhanded administration of justice.” Because the President and Attorney General are required to “execute the laws faithfully,” the OLC said the executive branch is “well served by a subordinate officer who is permitted to exercise independent and expert legal judgment essentially free from extensive involvement in policy matters that might, on occasion, cloud a clear vision of what the law requires.” This reasoning applies with equal or greater force to the OLC itself.

During President Bush’s tenure, the OLC failed to supply objective legal advice. Instead, the office rubber-stamped many of the Bush administration’s most controversial national security programs. Yoo’s legal analysis relied on very broad interpretations of executive authority to justify these national security programs. For example, an OLC memo that examined the Bush administration’s “Terrorist Surveillance Program” said that Congress cannot restrict the President’s ability to conduct electronic surveillance through the Foreign Intelligence Surveillance Act (FISA).

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239 Id. at 1.
240 Id. at 2. The Principles do not suggest that the OLC should always apply settled law in a totally objective manner. The OLC’s analyses “should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.” Walter Dellinger et al., Principles to Guide the Office of Legal Counsel 3, December 21, 2004. When the law on an issue is open to more than one interpretation, OLC’s legal advice can appropriately rely on interpretations from within the executive branch.
241 Id. at 2.
243 Id. at 707-10.
245 Id.
246 See Dawn Johnsen, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power, 54 UCLA L. Rev. 1559, 1583 (2007) (arguing that one of the Torture Memos “relentlessly seeks to circumvent all legal limits on the CIA’s ability to engage in torture, and it simply ignores arguments to the contrary”).
247 See Interview with Jack Goldsmith, Frontline, Cheney’s Law (August 22, 2007) (criticizing Yoo’s memos for relying on “extravagant and unnecessary claims of presidential power”).
248 See Offices of the Inspectors General, Unclassified Report on the President’s Surveillance Program 11, July 10, 2009 (quoting Yoo’s memo), available at http://www.justice.gov/oig/special/s0907.pdf. Despite the restrictions in FISA, the OLC concluded that the only restrictions on the President’s power to conduct such surveillance for national security purposes is the Fourth Amendment, and it found the surveillance program was not unconstitutional. Id. at 12-13.
Some commentators defend Yoo’s memos and argue that the OLC should promote any plausible argument to defend the President’s preferred policies. Some proponents of this idea point out that the Solicitor General has an obligation to defend an arguably unconstitutional statute if there is a “professionally responsible” argument available to defend it.

While it is true that government lawyers are ultimately subordinate to the President, these arguments seem to overlook the crucial fact that opinions of the OLC are binding within the executive branch and thus can have drastic ramifications. If OLC opinions are going to bind future Presidents, some degree of independence in constitutional interpretation is vital. Without this independence, Presidents can request that government lawyers provide legal cover for any actions they wish to take.

The most compelling reason for requiring objective legal analysis from the OLC is the President’s constitutional obligation to faithfully execute federal law. The need for some independence from Presidential influence is obvious when one considers that the executive branch’s decisions will often escape judicial review. Dawn Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power* 54 UCLA L. Rev. 1559, 1562 (2007). When this happens, the executive branch alone bears the responsibility of ensuring that the President’s actions are constitutional. Walter Dellinger et al., Principles to Guide the Office of Legal Counsel 2, December 21, 2004. If the obligation to faithfully execute federal law means anything, the President must receive objective legal advice from someone.

While the former government lawyers’ first principle is specific to OLC, the second principle could serve to guide any government lawyer. “OLC’s advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of . . . the courts and Congress—and constitutional limits on the exercise of governmental power.” It may seem elementary that a government lawyer’s analysis should be thorough, but several OLC memos issued in Bush’s first term failed utterly in this regard. President Obama’s proposed head of the OLC argues that Bush’s OLC “abandoned fundamental practices of principled and balanced legal

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249 See Eric Posner & Adrian Vermuele, A ‘Torture’ Memo and its Tortuous Critics, Wall St. J., July 6, 2004, at A22 (arguing for a client-driven model for the OLC under which the office would avoid giving “moral or political advice” and instead provide a plausible justification for executive branch conduct); Geoffrey Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. Chi. L. Rev. 1293, 1294 (1987) (arguing that government lawyers should interpret the law to serve the interests of their “clients” within the executive branch).


251 See Press Release, U.S. Department of Justice, Department of Justice Releases Four Office of Legal Counsel Opinions (April 16, 2009) (stating that CIA interrogators who “acted reasonably and relied in good faith on authoritative legal advice from the Justice Department that their conduct was lawful, and conformed their conduct to that advice, would not face federal prosecutions for that conduct”).

252 U.S. Const. art. II § 3.

253 The Principles suggest that judicial review may be unlikely when Presidential action does not give rise to a justiciable case or controversy. Walter Dellinger et al., Principles to Guide the Office of Legal Counsel 2, December 21, 2004. Some Presidential actions, particularly actions concerning war powers or national security, are likely to be reviewed under a “standard of extreme deference.” Id. In those situations, the President “has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.” Id.

interpretation.” Johnsen said the memo “fails . . . to cite highly relevant precedent, regulations, and even constitutional provisions, and it misuses sources upon which it does rely.”

She argued that the memo misconstrued the law to avoid any limits on the CIA’s interrogation program and failed to discuss any contrary arguments. The Principles state that “regardless of OLC’s ultimate legal conclusions concerning whether proposed executive branch action lawfully may proceed, OLC’s analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.”

The Principles call for the OLC to “publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.” “Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority.” Others have called for legislation that requires the Attorney General to disclose the Department’s legal opinions to Congress. “The Attorney General currently issues detailed reports on the fiscal state of the Department of Justice and its accomplishment of law enforcement goals, but its disclosures to Congress about important matters of legal policy are done on an ad hoc basis.” Such a requirement would cause OLC attorneys to think twice before twisting legal doctrine to justify the President’s preferred policies. Though such a requirement could “reduce the President’s ability to rely on advice from attorneys,” OLC opinions should not be above Congressional oversight, not if the OLC’s legal analysis is of such import that it binds the entire executive branch.

The Principles suggest several internal OLC processes to “help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive authority.” The Principles recommend that OLC should not provide legal advice regarding actions that the executive branch has already taken. “OLC should recruit and retain attorneys of the highest integrity and abilities.”

If the Bush administration’s OLC had been guided by similar principles, it may not have produced the substandard legal reasoning found in the Torture Memos. It is encouraging that Johnsen’s OLC will likely be guided by the Principles, and in this respect, the Principles may be a worthwhile means of ensuring sound legal advice from the OLC. It seems unlikely that President Obama’s Department of Justice will twist legal doctrines to reach the result the President desires. Yet there is nothing binding future

256 *Id.* at 1583-84.
257 *Id.*
259 *Id.*
256 *Id.*
257 *Id.*
262 *Id.*
263 *Id.*
264 *Id.*
265 *Id.* at 5.
266 *Id.*
267 *But see* Carrie Johnson, *A Split at Justice on D.C. Vote Bill*, Washington Post, April 1, 2009 (discussing the controversy over Attorney General Eric Holder’s decision to override the OLC’s determination that a
Presidents to the Principles. Because the identity of the government lawyer’s “client” remains unclear, future Presidents could reestablish the type of relationship that the Bush administration had with its Department of Justice. There is nothing to ensure that future administrations will not ask the OLC to provide legal cover for illegal policies. Unless Congress passes legislation codifying the Principles, future Presidents are free to discard them.

Federal Prosecutors

Some have argued that Congress should institute new rules governing the President’s relationship with U.S. Attorneys. One scholar suggests legislation requiring a report from the President whenever a U.S. Attorney is removed. Weiss argues that the Bush administration’s justification for the 2006 firings—that the prosecutors did not perform adequately—was a pretext designed “to subvert the political check and insulate the president from any accountability if the removals were unpopular.”

The Ethics in Government Act required a similar report if the President removed an Independent Counsel appointed under the Act. Both the Act and Weiss’ proposed legislation place some conditions on the President’s power to remove an executive officer. Weiss acknowledges that any legislation that actually restricts the President’s grounds for removing federal prosecutors may not survive scrutiny under Morrison, David C. Weiss, Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretexual Justification in the U.S. Attorney Removals, 107 Mich. L. Rev. 317, 357-59 (2008), but his proposal would not constitute such a drastic a restriction on the President’s removal power. Weiss notes that federal courts and the OLC have considered U.S. Attorneys “inferior officers” for purposes of the Removal Clause. Thus, Weiss’ proposal seems to leave the President with “ample authority to ensure that the [U.S. Attorney] is competently performing” his or her duties. As with the Ethics in Government Act, a court may defer to Congress’ determination that the condition on removal “was essential . . . to establish the necessary independence of the office.”

There are already laws forbidding politicized hiring, see 5 U.S.C. § 2302(b)(1), and politicized prosecutions, see 2 C.F.R. § 45.2(a)(2). These laws did not deter the Bush administration, but transparency in the removal process may have impeded the administration’s effort to abuse its prosecutorial authority. Congress and the Inspector General began asking questions about the U.S. Attorney firings as soon as they became public. But efforts to investigate were thwarted by the fact that some Bush
administration officials refused to discuss the events with the Inspector General. Without statutory guidelines imposing transparency in the removal process, future efforts to retroactively investigate the removal of U.S. Attorneys may again be frustrated by executive branch stonewalling.

**Conclusion**

In the wake of the Bush administration’s abuses of power, many proposals have arisen to restore the Department of Justice to its rightful status as guardian of the Constitution and neutral arbiter of the law. Some of the proposals are problematic. Legislation creating an independent Department of Justice would likely be held unconstitutional, and the Principles to Guide the Office of Legal Counsel are not yet binding on future administrations. The most effective means of avoiding Presidential abuse of the Department of Justice is to ensure transparency in executive branch actions. A Truth Commission can provide transparency, but only in hindsight.

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274 Bush administration officials did not formally assert executive privilege, because the privilege does not extend to requests from within the executive branch. Office of the Inspector General, U.S. Department of Justice, An Investigation into the Removal of Nine U.S. Attorneys in 2006 3 (2008). Memorandum from Rep. John Conyers, Jr., to Members of the Committee on the Judiciary, Re: Full Committee Consideration of Report on the Refusal of Former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten to Comply with Subpoenas by the House Judiciary Committee 1, July 24, 2007 (“Despite extensive efforts to secure voluntary cooperation, and despite Chairman Conyers’ issuance of compulsory subpoenas, Mr. Bolten and Ms. Miers have refused to produce documents and testimony necessary for the Committee’s continuing investigation of the U.S. Attorneys controversy and related matters.”); Office of the Inspector General, U.S. Department of Justice, An Investigation into the Removal of Nine U.S. Attorneys in 2006 2, 357-58 (2008) (“White House staff, including White House Counsel Harriet Miers, Assistant to the President and Deputy Chief of Staff and Senior Advisor Karl Rove, Deputy White House Counsel William Kelley, and Associate White House Counsel Richard Klingler, declined our request to interview them.”).

275 Because any regulation of the Department of Justice risks infringing on the President’s constitutional prerogatives, the views of the current Supreme Court on separation of powers issues should be noted. The views of at least a few Justices have been influenced by the “unitary executive” theory. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) (discussing the “structural advantages of a unitary Executive” in the fields of national security and foreign relations); *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring) (contrasting the structure of the three branches of the federal government and concluding that the Founders consciously chose “to vest Executive authority in one person . . . to focus, rather than to spread, Executive responsibility thereby facilitating accountability”); Response of the Department of Justice to the Application to the Court of the Independent Counsel for Referral of Related Matters Pursuant to 28 U.S.C § 594(e), *In re Sealed Case*, 665 F.Supp. 56 (February 11, 1987) at 18 (then-DOJ-attorney Samuel Alito asserting that “it cannot be disputed that an Independent Counsel performs functions that are purely and quintessentially executive”). Some proponents of the unitary executive theory argue that the President alone bears responsibility for certain executive functions—such as law enforcement or the President’s actions as commander in chief—and Congress has limited power to legislate in those areas. See e.g., Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 531 (2005) (“If government prosecutors help carry into execution the president's powers over law execution, those prosecutors must be subject to presidential control.”).

The Bush administration was frequently criticized for operating in secrecy.\(^{277}\) If the public had been aware of the abuses at the Bush Department of Justice before the 2004 election, the political check on the President’s power may have been more effective. Goldsmith argues that, throughout history, presidents have acted “extralegally” when it was necessary to protect the country, but “the leader who disregards the law should do so publicly, throwing himself at the mercy of Congress and the people so that they could decide whether the emergency was severe enough to warrant extralegal action.”\(^{278}\)

The Principles call for the OLC to publicly disclose its opinions unless there are “strong reasons for delay or nondisclosure.”\(^{279}\) To ensure political accountability, Congress should act now to enshrine the Principles into federal law. Since the Bush administration’s recalcitrance inhibited the investigations into politicized prosecutions, Congress should also demand transparency in the process of removing U.S. Attorneys.

During his presidential campaign, Barack Obama advocated greater transparency in government, and his release of previously undisclosed “Torture Memos” in April 2009 was an encouraging sign that he meant to keep his campaign promise. Since taking office, however, Obama’s actions have received mixed reviews from proponents of transparency and critics of overly broad executive power.\(^{280}\) With the Obama administration acting to preserve many of the Bush administration’s broad interpretations of executive power, Congress must act now to right the imbalance of power between the executive and legislative branches. Congress should more actively assert its oversight authority and pass legislation that imposes transparency on the executive branch.

The most effective check on executive power is a political one, and if this check is to be effective, the actions of the executive branch must be transparent. Justice Louis Brandes said, “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants.”\(^{281}\) Because of the political ramifications, the President is less likely to abuse his or her authority over the Department of Justice if the President knows that those abuses will be made public. Analyzing President Carter’s proposal for an independent Department of Justice, Attorney General Griffin Bell acknowledged Nixon’s abuse of power, but he concluded that “[i]t is the responsibility of the Chief Executive to make certain that the system, particularly including the Justice Department, is not subject to abuse for political purposes. That involves trust and integrity—two things no law can provide or guarantee.”\(^{282}\) While Congress cannot pass legislation bestowing integrity on the executive branch, it can help the American public hold the President accountable.

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\(^{281}\) Louis Brandeis, *Other People’s Money* 62 (National Home Library Foundation ed. 1933).