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The Unfulfilled Promise of the Constitution in Executive Hands

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THE UNFULFILLED PROMISE OF THE CONSTITUTION IN EXECUTIVE HANDS

*Cornelia T.L. Pillard**

INTRODUCTION

Many leading constitutional scholars now argue for greater reliance on the political branches to supplement or even supplant judicial enforcement of the Constitution. Responding to our national preoccupation with the judiciary as the mechanism of constitutional enforcement, these scholars stress that the executive and legislature, too, bear responsibility to think about the Constitution for themselves and to take steps to fulfill the Constitution's promise. Joining a debate that goes back at least as far as *Marbury v. Madison*, current scholars seek to reawaken the political branches to their constitutional potential, and urge the Supreme Court to leave the other branches room to find their constitutional voices.

Anyone contemplating taking the Constitution away from the courts, or claiming that the executive has power to act on a different view of the Constitution from the Court's, or even those who merely recognize a role for judicial deference to the political branches, must closely consider the political branches' actual practices. Yet the new theoretical scholarship has largely overlooked questions of how the political branches effectuate the Constitution, or how they might do a better job of it. Constitutionalism within the executive branch has been particularly ignored. One of my aims here is to illuminate that dim corner of our national constitutional practice.

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The executive, in my view, has failed fully to meet the challenges of interpreting and applying the Constitution on its own. My focus here is on questions of individual rights that evade judicial review. As the Office of Legal Counsel's "torture memos" illustrate, there are substantial risks associated with executive decisionmaking on fundamental questions of executive power and individual rights.¹ My basic analysis is also relevant to the executive's approach to federalism and separation of powers, but the principal focus here is on how the executive understands and fulfills its constitutional obligations with respect to individuals.²

This Article builds on two bodies of literature that, thus far, have not significantly engaged one another: writings about executive-branch legal processes, and about the Department of Justice's Solicitor General ("SG") and Office of Legal Counsel ("OLC") in particular (the institutional literature), and a recent round of theoretical scholarship about extrajudicial constitutionalism (the theoretical literature). The institutional literature typically projects confidence that the SG and OLC provide the highest quality legal advice and representation to the executive, and that they scrupulously protect the Constitution against executive officials distorting the law to advance personal, partisan, or institutionally parochial agendas. These writings routinely point to the special character and traditions of those offices in representing not only the president and the executive branch, but also the United States and its people. The descriptions seem at first blush to support the enthusiasm of the extrajudicial constitutionalists, inasmuch as they highlight

1. See Memorandum from the Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A 1 (Aug. 1, 2002), at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>. This article was drafted before the OLC torture opinion became public in summer 2004, and I have not sought comprehensively to address it here. The opinion does, however, vividly illustrate some of the themes of this article. The OLC torture opinion offered an aggressively narrow interpretation of a federal criminal statute prohibiting torture, a breathtakingly sweeping view of the president's Commander-in-Chief power, and interpreted potential defenses to criminal liability in unprecedentedly broad ways. As such, it highlights various risks discussed below that are associated with executive interpretation of law in areas largely beyond judicial review — risks of, for example, apparent failure to draw on the wealth of practical expertise of various entities within the executive (e.g. the military and the State Department), nonpublic decisionmaking, and willingness to give narrowly client-driven advice that fails adequately to address consequences for individual rights.

2. I recognize that, at bottom, federalism and separation of powers are not neatly divisible from individual rights, and some power-allocation questions accordingly enter into my analysis. The examples in this article, however, deal mainly with individual rights. The states and Congress ordinarily openly compete with the president for authority, so that institutional, partisan and public pressures are brought to bear in enforcing the constitutional allocation of powers in ways they often are not with respect to individual rights. When there is no judicial review of executive treatment of individuals, the executive's constitutional self-restraint depends critically on the nature and extent of its own internal constitutional processes and orientation, which are the principal subject of this article.

offices within the executive branch dedicated to high-quality constitutional analysis.

Meanwhile, the theoretical literature on extrajudicial constitutionalism suggests that the political branches have the capacity to effectuate the Constitution in ways quite distinct from the familiar, judicial version, and that, in part because of that distinctiveness, extrajudicial constitutionalism provides a normatively attractive supplement to or substitute for judicial doctrines. Scholars have pinned on the political branches hopes for a more democratic, less crabbed and formalistic constitutionalism, and one that reflects the political branches' distinctive capacities. Larry Sager, for example, sees the gap between the Constitution's normative commands and their judicial enforcement as enabling "robust participation by popular political institutions in the constitutional project of identifying and implementing the elements of political justice."³ Robin West identifies congressional constitutionalism as potentially enabling the "the democratization — long overdue — of the Constitution itself," and as promising a less legalistic approach.⁴ Robert Post and Reva Siegel contend that "[q]uestions of constitutional law involve profound issues of national identity that cannot be resolved merely by judicial decree," and that, therefore, "a legitimate and vibrant system of constitutional law requires institutional structures that will ground it in the constitutional culture of the nation."⁵ Larry Kramer unearths an American historical tradition of popular constitutionalism that embraces "the democratic pedigree and superior evaluative capacities of the political branches" and that is resistant to the notion that the Constitution is mere ordinary law, formalistic and legalized to such an extent that only courts can be trusted with it.⁶ Bruce Peabody believes "a deeper consensus" could result from greater engagement by nonjudicial actors in constitutional interpretation.⁷ Mark Tushnet

3. Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 419 (1993) [hereinafter Sager, *Justice in Plain Clothes*].

4. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 317 (1994).

5. Robert Post & Reva Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1946, 1950 (2003).

6. Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4, 122 (2001); *id.* at 129 (referring to the Rehnquist Court's "casting aside [of] a century and a half of hard-earned experience in a spasm of 'law is law' formalism"); *id.* at 153, 162 (referring to "a Court driven by a formal understanding of the nature of the Constitution" even though "[w]e have never had the purely legal Constitution of the Rehnquist Court").

7. Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENT. 63, 72 & n.37 (1999) (identifying

champions a “populist constitutional law,” wrested from the courts’ unduly formalistic reliance on text, structure and history, and interpreted instead in light of “all-things-considered, more practical judgment.”⁸ As Christopher Eisgruber has explained, “[e]xperience and responsibility are invaluable teachers in the art of governance, and there may be times when Congress or the Executive, by virtue of their connection to the people or their knowledge of what government can do, have the best insight into how the Constitution balances competing principles.”⁹

Certain features stand out as normatively attractive to proponents of political-branch constitutionalism. As applied to the executive, the theoretical literature highlights the importance of democratic responsiveness and distinctive institutional capacities (e.g., the executive’s ability to investigate facts and take positive action) in shaping a constitutionalism that differs substantially from what the courts devise. Also central for those theorists, although often implicit, is a commitment to constitutional — as distinct from merely political — guidance for decisions left to political actors. The Constitution in the executive’s hands could be a counterweight both to a monopoly over constitutional meaning in the hands of judicial elites that is stunted by the courts’ limited practical capacities, and to a politics of raw competition among self-promoting interests divorced from the public-regarding underpinning our fundamental law provides. Viewed in this way, executive constitutionalism holds untapped potential as a more democratically engaged and institutionally versatile way of keeping the American polity true to its best self.

Notwithstanding those provocative suggestions, however, the theoretical literature leaves us to wonder what, in concrete terms, the executive does or could do to give voice to its own constitutional perspectives. With the exception of a few hints about the importance of actual practice, the theorists of extrajudicial constitutionalism do not offer concrete explanations of how the values they articulate might actually be achieved.¹⁰ We are left to contemplate whether and how

scholars who “have argued that a greater diffusion of interpretive responsibility might allow for what is ultimately a deeper consensus about constitutional meaning as a variety of political actors engage in and legitimate the interpretive process”).

8. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 7, 42 (1999) [hereinafter TUSHNET, *TAKING THE CONSTITUTION AWAY*].

9. See Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 *GEO. L.J.* 347, 355 (1994).

10. Some recognition of the importance of institutional analysis is voiced by Sanford Levinson, Mark Tushnet, Elizabeth Garrett, and Adrian Vermuele. As Levinson has noted, “[a]ny theory of presidential interpretation [of the Constitution] must, as a practical matter, address the *institutionalized* presidency rather than imagine some individual president carefully doing his or her own constitutional analysis in the Oval Office.” Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes*

the executive branch, controlled by an elected, democratically accountable president with many diverse, sometimes conflicting, goals and responsibilities, might also be counted on to fulfill constitutional obligations or abide by constitutional constraints at moments when popular sentiment might run the other way. There are reasons to question whether the executive branch is itself equipped to guide and constrain its own policy objectives by attending, for example, to the Constitution's allocation of some powers elsewhere, or its limitations on governmental power in recognition of individual rights. The routes to the more ambitious goals — such as bringing the executive's distinctive capabilities to bear on constitutional issues calling for mobilization of fact gathering, resource allocation, or other institutional capacities that courts lack — are even less apparent. How, we might wonder, does the executive develop its own understandings of any distinctly executive constitutional obligations on matters of poverty, discrimination, crime, abortion, information privacy, gun ownership, executive commitment of troops abroad, and even torture?

The theorists who praise the more democratic or politically responsive character of political-branch constitutionalism do not explain in any detail how the executive might police the boundary between constitutional principle and political opportunism. Was it executive constitutionalism, or just politics, when Solicitor General Charles Fried argued in the Supreme Court that *Roe v. Wade* was wrong and should be reversed,¹¹ or when, taking a rather different view in accord with the party of the president who appointed him, Solicitor General Seth Waxman argued against banning “partial-birth abortion” in *Stenberg v. Carhart*?¹² When the OLC's Walter Dellinger

Paulsen and One for his Critics, 83 GEO. L.J. 373, 380 (1994). Levinson, although acknowledging that it is the Office of Legal Counsel's responsibility to prepare official legal opinions for the executive branch, suggests that the Solicitor General, whom he views as relatively more independent, should take on that responsibility whenever the president proposes to decline to enforce a federal law or to comply with a decision of the Supreme Court. *See id.* at 380-82. Mark Tushnet, as part of his broader project preferring political-branch to judicial constitutionalism, *see* TUSHNET, *TAKING THE CONSTITUTION AWAY*, *supra* note 8, has identified OLC as one exemplar of extrajudicial constitutional process. Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453, 468-79 (2003) (examining OLC as one of three examples of institutional settings in which elected officials or their direct subordinates conduct constitutional review) [hereinafter Tushnet, *Non-Judicial Review*]. Elizabeth Garrett and Adrian Vermeule, in proposing a new congressional Office for Constitutional Issues to improve the capacity of Congress to engage in constitutional interpretation, rely by analogy on the executive branch's Solicitor General and Office of Legal Counsel. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1314, 1317 (2001).

11. *Compare* CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT* (1991), *with* LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

12. Brief for the United States as Amicus Curiae Supporting Respondent, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (No. 99-830); *see also* NARAL Pro-Choice America, *The*

opined that President Clinton had constitutional authority to send United States troops to Haiti,¹³ or that federal agencies could continue after *Adarand v. Peña* to engage in some race-based affirmative action?¹⁴ When Solicitor General Theodore Olson and OLC head Jay Bybee asserted sweeping new interpretations of executive power to combat terrorism?¹⁵ What about constitutional decisions on the thousands of matters that the executive deals with “below the waterline,” where neither the public nor the president is paying much, if any, attention?

This Article speaks alike to those who favor and those who resist political-branch power to have the last word on constitutional meaning. Some of the extrajudicial constitutionalists go beyond championing the virtues of political-branch constitutionalism to argue for departmentalism and against judicial supremacy.¹⁶ Before the

Department of Justice and Reproductive Freedom 6, 8, at <http://www.naral.org/facts/agfacts.cfm> (last visited Jan. 10, 2005) (noting that the Office of the Solicitor General can promote the ideological agenda of the Administration, and that “pro-choice President Clinton’s Department of Justice filed amicus briefs five times in favor of protecting a woman’s right to choose”).

13. Deployment of United States Armed Forces Into Haiti, 18 Op. Off. Legal Counsel 173 (1994). Compare Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7 (arguing that Dellinger’s position accurately reflected constitutional law), with Lori Fisler Damrosch, *The Clinton Administration and War Powers*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 125 (2000) (noting that President Clinton’s “slightly more deferential attitude toward the role of Congress” regarding war powers “may be motivated as much by politics as by principle, since this President can ill afford to antagonize Congress unnecessarily”).

14. Legal Guidance on the Implications of the Supreme Court’s Decision in *Adarand Constructors, Inc. v. Peña*, 19 U.S. Op. Off. Legal Counsel 171 (1995), available at 1995 WL 835775 (O.L.C.) (June 28, 1995); see also William J. Clinton, Speech on Affirmative Action (July 19, 1995), at <http://www.washingtonpost.com/wp-srv/politics/special/affirm/docs/clintonspeech.htm> (arguing with respect to affirmative action, “[m]end it, but don’t end it”).

15. Compare Eric Posner & Adrian Vermuele, *A ‘Torture’ Memo and its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22, with Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department’s Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3.

16. Judicial supremacy is the view that “the Supreme Court’s interpretations of the Constitution should be taken by all other officials, judicial and non-judicial, as having an authoritative status equivalent to the Constitution itself.” Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000). In contrast, “departmentalism, or coordinate construction . . . denies that any single interpreter is supreme. Instead each branch, or department, of government has an equal authority to interpret the Constitution in the context of conducting its duties.” Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 783 (2002). Departmentalism charts a substantially broader scope for extrajudicial constitutionalism than does judicial supremacy. Only under departmentalism, for example, could the executive legitimately act on its own less-constraining constitutional interpretation. Compare Alexander & Schauer, *supra*; Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) [hereinafter Alexander & Schauer, *Extrajudicial Constitutional Interpretation*]; Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387;

debates over judicial supremacy and departmentalism can be fully joined, however, and before we hail the virtues of political-branch constitutionalism even within the range that judicial supremacy leaves it, I argue that we need to evaluate critically the specific mechanisms of executive-branch constitutionalism.¹⁷ I seek to do that here by provisionally accepting judicial supremacy (as the executive typically does), then considering how the executive branch currently approaches constitutional interpretation in the spaces that even a strongly supremacist court does not fully occupy. Judicial supremacy puts the executive on a one-way ratchet, able unilaterally to increase its vigilance against rights violations but needing the Court's approval for any curtailment of rights. My purpose here is not to defend judicial supremacy or necessarily to argue for expansion of individual rights. Rather, I aim to look at how the executive approaches constitutional interpretation even when it assumes only the relatively modest scope for its own constitutionalism that judicial supremacy assigns it. Understanding the realities and limitations of the executive's existing constitutional practice can inform our views on the more ambitious normative claims made in favor of broader extrajudicial constitutionalism, including claims about the quality, scope and level of autonomy of executive-branch constitutionalism vis-à-vis the Court's.

The Department of Justice's Office of the Solicitor General and Office of Legal Counsel are the principal constitutional interpreters for the executive branch. The choice to centralize responsibility for executive constitutional interpretation in those two offices, and the ways those offices carry out that responsibility on a day-to-day basis, are largely determinative of the extent and quality of constitutional rights protection by the executive branch. The institutional literature identifies two principal models of the relationships between those legal offices and their executive clients: one model casts the SG and OLC as advocates for the executive, reflecting "constitutional conscience" to the extent that their client does; the other model celebrates those lawyers as independent of the president's or administration's immediate preferences, almost as if they were constitutional judges within the executive branch. The SG might seem

and Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991 (1987), with Whittington, *supra*; TUSHNET, *TAKING THE CONSTITUTION AWAY*, *supra* note 8; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993); and Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

17. This article starts from the premises that our national constitutional culture is still largely wedded to judicial supremacy, but that there are substantial constitutional arguments on both sides over whether that position is constitutionally required, or even permissible, as well as deep debate over whether it is normatively attractive.

to fit the advocacy model and the OLC the objective one, but various commentators have found each model relevant to both offices.

Each model for different reasons fails to produce the distinctive and normatively attractive executive constitutionalism that the theoretical literature contemplates — one because it routinely speaks for the prerogatives of government at the expense of its limits, and the other because its constraints are borrowed from judicial doctrine and method and thus do not fully elaborate constitutional obligations of the executive that might go beyond those the judiciary enforces.¹⁸ The SG's and OLC's formal doctrinalism and their courtlike insulation from the day-to-day functioning of government mean that they lack the insight into executive practical experience and varied institutional capabilities or limitations that distinguish the executive from the courts. To the extent that the SG and OLC are effectively shielded from politics or policy preferences in order to foster dispassionate analysis, they are unlikely to speak with the "populist" voice that many commentators claim for political-branch constitutionalism. When the lawyers are responsive to political or institutional exigencies, on the other hand, their decisions can seem opportunistic and unprincipled.

I conclude that our current executive constitutionalism is underdeveloped even for the modest role that judicial supremacy leaves it. It is unrealistic under current circumstances to expect that the executive will play a significant generative role in elaborating a distinctive executive vision of constitutional obligation that could supplement, let alone supplant, the Court's. Existing approaches leave a systemic shortfall in fulfillment of the Constitution's promise of principled constraint, and muffle a potentially distinctive executive, as opposed to judicial, approach to such constraint. Those shortcomings should give us pause in embracing the more ambitious claims of extrajudicial constitutionalists.

The critique points to avenues for reform that might better serve the extrajudicial constitutionalists' rich and complex aspirations for the executive branch by opening up the spaces where executive-branch constitutionalism might develop. Reforms should focus, for example, on supplying the executive's constitutional approach with firmer empirical footing, greater institutional and popular insight, and more vigilant scrutiny of constitutional risk areas. Such reforms, while well worth contemplating, are not without difficulties. Concerns about adding to the institutional mechanisms of an already complex government machinery, risks of interest-group capture of such mechanisms, challenges to linking the executive's frontline personnel with its constitutionally trained analysts, the difficulty of resisting the

18. *See infra* Part III.

gravitational pull of a too court-centered analysis, and deep questions about the line between policy and constitutional law will bedevil any such project. It is difficult even to imagine executive-branch constitutional processes that could fulfill the high aspirations that so many ascribe to the political branches, and we will really only recognize them when they arise. Inspired by the theoretical scholars' visions of a democratically and empirically rooted, prospective and affirmative American constitutionalism, this article seeks to point to ways to start to make such vision real.

A ROADMAP

This article is organized in five parts. Part I maps the surprisingly large scope for executive constitutional decisionmaking beyond the reach of judicial review. It identifies the many ways in which opportunities and obligations arise for the executive branch alone to interpret and effectuate the Constitution, even with respect to individual-rights questions that are traditionally at the heart of the judicial function. The existence, though not the precise scope, of the need for extrajudicial constitutional decisions is uncontroversial even where judicial pronouncements are taken as fully exhaustive of the substance of constitutional norms — space that expands with recognition of judicial underenforcement, and extends to its maximum under departmentalism.

Part II describes the long-standing allocation of primary responsibility for executive-branch constitutional interpretation to two small, elite offices within the Department of Justice: the Office of the Solicitor General and the Office of Legal Counsel. The Solicitor General is the executive's top litigator who frames the executive's constitutional positions in disputes over past government conduct, and the Assistant Attorney General ("AAG") for the Office of Legal Counsel is the executive's top legal counselor who delineates constitutional and other legal constraints on future conduct. This Part briefly outlines the role and duties of each office, and identifies the ways in which opportunities for constitutional interpretation come to each. This Part begins to lay the ground for Part III's critique by describing those offices' doctrinal focus, relative disengagement from the day-to-day programmatic business of the executive, and generally court-centered orientation — characteristics that, as will be clear later, powerfully shape and limit the constitutionalism they produce.

Part II then sketches divergent conceptions of each office's lawyer-client relationship, suggesting that the lawyers' role in serving the sometimes divergent interests of the president, the executive branch, and the people is complex and not always very clear. It stakes out a spectrum of understandings of the SG's and OLC's roles within the executive branch by relating the two predominant models from the

institutional literature. One model characterizes executive-branch lawyering as closely analogous to private legal representation of institutional clients, both in the context of litigation and counseling. The SG or OLC, under this model, uses lawyers' judgment and craft to implement the interests of the executive, as expressed by the president and his programmatic subordinates. As applied to executive decisions not subject to judicial review and often beyond public scrutiny, the client-driven approach generates a rights-minimizing bias, because the government officials will not want to tie their own hands or pull punches in court in the name of individual rights if a different course of action would better enhance executive power, serve the public, or even merely advance their own political careers. Under the client-driven model, nonjusticiability is thus less likely to be construed as an invitation to employ the executive's institutional competencies in the service of a fulsome and distinctive executive-branch vision of individual rights than as a constitutional blank check for executive preferences.

The other principal model of SG and OLC lawyering found in the institutional literature maintains that we can trust the foxes to guard the henhouse because the foxes have consciences. Without disputing the president's ultimate constitutional authority over the SG and OLC, this second model holds that the lawyers act, not as mere advocates for executive power, but as proponents of the best view of the law. They, thus, can be counted on to be the executive's "constitutional conscience," insisting on respect for constitutional constraint even when politics, institutional self-interest, or the misguided or underdeveloped views of others might threaten them. Their arms-length client relations, and the many instances in which the SG and OLC have, in practice, questioned or rejected proposals of client agencies, support the appearance of such independence.

Part III critically evaluates claims about the "independence" of these executive branch lawyers, concluding that what is cast as independence actually relies overwhelmingly on a court-centered view of constitutional law. It is largely because the SG can backstop his judgments in judicial doctrine — and because his judgments are often subject to Supreme Court evaluation — that he speaks with a level of authority that his clients overwhelmingly respect. The OLC, too, attains authority to challenge client proposals principally by backstopping its constitutional judgments in Supreme Court doctrine. These offices' ability to act as meaningful constitutional checks on executive prerogative in the many areas in which the Court has not drawn limits is considerably more precarious, often depending on the ways in which they themselves very loosely and imperfectly mimic the courts: specializing in legal interpretation, remaining somewhat institutionally insulated from clients, passively waiting for matters to come to them, and generating and relying on a body of precedent.

Thus, to the extent that the SG and OLC play an “independent” role in enforcing the Constitution against the executive branch, that role rests largely on both the substance and methods of judicial constitutionalism.

Part IV summarizes the implications of the foregoing analysis for the theoretical literature about extrajudicial constitutionalism, including the current debate about judicial supremacy versus departmentalism. Because the independence of the SG and OLC is largely derivative of or mimics the Court’s, it powerfully draws on and reinforces a tradition of judicial supremacy. Given the paucity of non-court-centered executive constitutionalism, current practices hardly warrant abandoning judicial supremacy.

Part V briefly considers how to improve the abilities of the SG’s Office and OLC both to act more fully as the executive’s “constitutional consciences” and to employ the executive’s distinctive strengths in the service of constitutional rights. The key does not seem to be to make the SG and OLC more genuinely independent of their clients or the Court. There is scant support for constitutional decisionmakers within the executive branch that are neither as politically accountable as other executive-branch actors, nor as familiar, institutionally weak, and subject to public scrutiny as the Article III courts. Rather, the more promising avenues for innovation would focus directly on counteracting the executive branch’s tendency to see judicial constitutionalism as exhaustive, correcting the various ways that existing executive process generates a rights-minimizing bias, and working to bring the institutional and political advantages of the executive branch more fully to bear on the branch’s constitutional decisionmaking. Such innovations would not necessarily require the SG and OLC wholly to abandon their court-centric approach to *justiciable* issues, but would, at a minimum, foster a distinctly executive constitutionalism in areas *beyond* the courts’ reach. A fuller and sturdier executive branch approach to individual rights beyond the justiciable core would at least provide a necessary complement to the historically primary judicial role. On a larger scale, a more developed executive constitutionalism could lead skeptics to take executive constitutionalism more seriously and to be more open to departmentalist proposals to enlarge the executive’s role in constitutional decisionmaking; conversely, to the extent that such development proves elusive, claims for judicial supremacy may look more attractive.

I. OBLIGATIONS AND OPPORTUNITIES FOR EXECUTIVE CONSTITUTIONAL INTERPRETATION

All government officials must abide by the Constitution.¹⁹ Public officials take an oath to uphold the Constitution,²⁰ and the executive, in particular, has the obligation to “take Care that the Laws be faithfully executed”²¹ — laws that include, most prominently, the Constitution. Just as, under *Marbury v. Madison*, the obligation to decide cases consistently with the Constitution gives the Court the power and obligation of judicial review, so, too, the Constitution’s grant of executive power,²² together with the duty faithfully to execute the laws, means that the executive and Congress acting in their own spheres must interpret and apply the Constitution.

The executive branch is constantly engaged in conduct that raises constitutional questions. Such questions can surface in countless varied and diffuse circumstances. The question whether the president should decline to enforce a federal statute that he believes to be unconstitutional has garnered recent attention,²³ but it is by no means the only context in which difficult questions arise about the executive’s obligations under the Constitution. Whenever the president or an executive agency proposes legislation or promulgates (or rescinds) a regulation, program, or policy; makes an appointing, hiring, granting, or contracting decision; conducts a search, arrest, or detention; or grants or denies a prisoner’s or detainee’s request, it may encounter issues of constitutional interpretation and application. Given the

19. See, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199, 200 (1994) (“[T]he President is required to act in accordance with the laws — including the Constitution, which takes precedence over other forms of law.”).

20. Article VI provides that, like judges and legislative officials, “all executive . . . Officers . . . of the United States . . . shall be bound by Oath or Affirmation, to support this Constitution.” U.S. CONST. art. VI, cl. 3. Article II requires that the president take an oath to “faithfully execute the Office of the President of the United States” and “preserve, protect and defend the Constitution of the United States.” U.S. CONST. art II, § 1, cl. 8. Some argue that the oath requires obedience to the Constitution as the Supreme Court interprets it, rather than to an official’s own conscientious constitutional interpretation, but nobody contends that the executive lacks an obligation to abide by the Constitution where the Court has not spoken; as well as to interpret the Court’s precedents. See generally Alexander & Schauer, *Extrajudicial Constitutional Interpretation*, *supra* note 16, at 1361, 1387 (finding the Oath Clause inconsequential in debate over judicial supremacy versus departmentalism); Paulsen, *supra* note 16, at 257-62 (relying on the Oath Clause in defense of departmentalism).

21. U.S. CONST. art. II, § 3.

22. U.S. CONST. art. II, § 1 (Vesting Clause).

23. See generally Symposium, *The Constitution Under Clinton: A Critical Assessment*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 1 (including articles by Dawn E. Johnsen, David Barron, and Peter L. Strauss regarding the president’s nonenforcement power).

contemporary reality of broad delegations of legislative power to the executive, the executive alone determines the contours of much of government's interaction with the public.

The constitutional obligations of government suggest a duty of constitutional self-policing by the political branches. The size of that task depends on where one stands along the spectrum between judicial supremacy and departmentalism. Because departmentalism holds that the political branches have as much authority as the courts to interpret the Constitution, it places in congressional and executive hands complete responsibility to decide constitutional questions for themselves, guided by judicial precedent only for its persuasive value. As the following subsections point out, however, executive constitutional interpretation is ubiquitous even under a strongly judicial-supremacist view because of limits on what the courts can or will decide.

A. *Space for Executive Constitutionalism Under Judicial Supremacy*

Even under a robust judicial supremacism, the executive admittedly has significant space and responsibility to interpret and apply the Constitution. Room for executive branch constitutionalism occurs in part because of the acute practical and legal limitations on the courts' ability and willingness to decide many constitutional issues that confront the executive branch. As James Bradley Thayer famously put it, "much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one."²⁴

First, it hardly needs to be repeated that the Constitution itself leaves large openings for interpretation. Many important constitutional provisions are broadly and generally worded, and cues from history are often ambiguous.²⁵ Supreme Court precedent, however binding we take it to be, frequently fails to provide crisp answers to the next concrete case.²⁶ Where a novel issue arises, there is both an obligation and an opportunity for the executive to arrive at a view of the matter and act accordingly in advance of a court's

24. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 137-38 (1893).

25. *City of Boerne v. Flores*, 521 U.S. 507, 550 (1997) (O'Connor, J., dissenting) (observing that, "[a]s is the case for a number of the terms used in the Bill of Rights, it is not exactly clear what the Framers thought the phrase ['free exercise'] signified.").

26. See *Lawrence v. Texas*, 539 U.S. 558, 568-72 (2003) (finding a constitutional right to engage in homosexual sex based on general privacy precedents, while providing little guidance on potential logical extensions to issues such as homosexual marriage); *United States v. Miller*, 307 U.S. 174 (1939) (finding that the Second Amendment does not guarantee an absolute right to possess firearms, while providing little guidance on whether the Second Amendment's right to bear arms is an individual or collective right).

opportunity to decide it. Even clearly established judicial precedent permits doubt when the Court itself seems uncommitted to it.²⁷

Second, the executive is the most frequent and influential Supreme Court litigant. Even when the Supreme Court is poised to decide an issue, the constitutional views voiced by the executive can shape the Court's view. The potential for dynamic interplay between the executive's and the Court's constitutionalism underscores the importance of the executive's own considered views.

Third, even where private parties can get courts to respond to their constitutional harms, they may face interstitial deprivations. Individuals suffer injury in the time lag between constitutional harm and relevant judicial response. There is inevitable delay between execution of a new practice, policy, program, or other executive action, and the courts' ability to decide its constitutionality (assuming someone brings an appropriate case). An executive that has adequate mechanisms of constitutional self-scrutiny would, however, avoid the unconstitutional conduct or check it more promptly than a court. Similarly, even where courts invalidate challenged government action, limits on their remedial capacities may make them unable fully to cure constitutional harms.²⁸ The only remedies available from courts for race-based conviction in violation of equal protection, for example, are release, expungement of the conviction, and money damages; no post hoc remedy can restore the years of lost freedom to a person wrongfully convicted. Privacy, once violated, cannot be retroactively restored. Similarly, any shame or anxiety visited on a government employee unconstitutionally fired in retaliation for her public expression, and any period of exclusion from the job, even if it can be eased or mitigated, cannot be undone by a court award of reinstatement and back pay or other monetary compensation.²⁹ Thus,

27. See generally *Dickerson v. United States*, 530 U.S. 428 (2000) (sustaining *Miranda v. Arizona* as a constitutionally based decision that could not be legislatively overruled, even though intervening cases had suggested that *Miranda* was not a constitutional holding); *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling recent Court precedent barring public school districts from sending teachers into religious schools after intervening cases had undermined the bases of that precedent); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994) (examining challenges faced by lower courts seeking to ascertain the law in areas in which Supreme Court precedent is uncertain, and evaluating competing approaches); Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667 (1993) (tracing the increasing frequency of Supreme Court cases resolved by 5-4 votes and noting that such precedents are typically viewed as less authoritative).

28. Moreover, the very fact that judicial review occurs only after the executive's expectations have been formed and investments have been made in existing programs or routines may make courts reluctant to disturb them, resulting in implicit deference to the executive.

29. See, e.g., *Bush v. Lucas*, 462 U.S. 367, 372-73 & nn.8-9 (1983) (finding a federal employee's First Amendment retaliation claim cognizable only within the Civil Service

the delay in judicial review and the pervasive inadequacy of remedies — especially, but not exclusively, when harm is “irreparable,”³⁰ — also focuses responsibility on the executive to engage constitutional issues and strive to avoid constitutional violations in the first place.

Fourth, when the courts apply procedural or institutional doctrines that avoid decision on the merits of a constitutional question, their nondecision implies that someone else, i.e., people elsewhere in the government, must make the decisive constitutional calls.³¹ The political question doctrine is a classic example of such judicial avoidance: a decision not to invalidate government action on political question grounds “is of course very different from a decision that specific congressional action does not violate the Constitution,”³² because it leaves open the possibility that the political branches might themselves find a violation. Similarly, other justiciability doctrines, such as standing, ripeness, and mootness,³³ as well as immunity defenses that avoid decisions on the merits,³⁴ mean that many instances of unconstitutional conduct will evade definitive constitutional consideration by the Court, leaving only the political

Reform Act’s remedial scheme, which admittedly did not provide for fully effective remedies).

30. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (sustaining a preliminary injunction because “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”).

31. See generally CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) [hereinafter Sager, *Fair Measure*]; Sager, *Justice in Plain Clothes*, *supra* note 3; David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 128-30 (1993).

32. *United States Dep’t of Commerce v. Montana*, 503 U.S. 442, 458 (1992). *But see* Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 448-59 (2004) (rejecting what he refers to as the “interpretive authority” theory of the political question doctrine).

33. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 55 (1992) (standing); *Poe v. Ullman*, 367 U.S. 497 (1961) (ripeness); *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (mootness).

34. See *United States v. Stanley*, 483 U.S. 669 (1987) (recognizing executive officials’ absolute immunity from constitutional claims arising out of or in the course of activity incident to military service); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (recognizing executive officials’ qualified immunity from constitutional claims); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (recognizing absolute presidential immunity for official actions); *Butz v. Economou*, 438 U.S. 478 (1978) (recognizing absolute judicial immunity for executive officials who perform adjudicatory functions); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (recognizing immunity of prosecutorial officials within the executive branch). *But see* *Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (observing that a court should resolve whether a plaintiff has alleged deprivation of a cognizable constitutional right before proceeding to decide whether the official alleged to have violated the right nonetheless enjoys qualified immunity, thereby allowing for judicial clarification of constitutional standards even in cases where qualified immunity bars a judicial remedy).

branches to avoid or redress them.³⁵ Courts are also unlikely to review challenges to the exercise of exclusively executive powers, like the powers to pardon,³⁶ veto,³⁷ make appointments,³⁸ and receive ambassadors,³⁹ nor are they likely to review most congressional-executive power struggles.⁴⁰ Even under judicial supremacy, constitutional obligations regarding the exercise of those powers are in the executive's hands.

35. Chief Justice John Marshall, whose opinion in *Marbury v. Madison* is still the leading cite for a strong view of judicial supremacy, understood that a role remains for constitutional decisions by the political branches. Walter Dellinger and H. Jefferson Powell recount that Marshall underscored Article III's express limitation of the federal courts' constitutional role to "cases in law and equity," which they argue Marshall understood as "a defined subset of the questions that could arise under the Constitution, the laws and treaties." Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2d 367, 370 (1999). As Marshall explained the limited character of issues fit for court decision:

A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. . . . To come within this description, a question must assume a legal form, for forensic litigation, and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.

Id. (quoting Marshall Speech (Mar. 7, 1800), reprinted in 4 THE PAPERS OF JOHN MARSHALL 95 (Charles T. Cullen ed., 1984)).

36. U.S. CONST. art. II, § 2, cl. 1; see also *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (holding that the power to pardon belongs exclusively to the president).

37. U.S. CONST. art. I, § 7, cl. 2. The Court has reviewed the question of constitutional procedure for effectuating the veto power, but not the merits of any presidential veto decision. See *Wright v. United States*, 302 U.S. 583 (1938); *The Pocket Veto Case*, 279 U.S. 655 (1929).

38. U.S. CONST. art. II, § 2, cl. 2.

39. U.S. CONST. art. II, § 3; see also *United States v. Belmont*, 301 U.S. 324 (1937).

40. See generally Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127 (1999) (describing and defending the "accommodation process," whereby the executive branch and Congress negotiate with one another to resolve separation of powers disputes in ways that accommodate the legitimate needs of both branches and thus ordinarily obviate the need for judicial decision).

B. *Space for Executive Constitutionalism in Light of Courts' Underenforcement*⁴¹

Even where courts do not wholly refrain from judgments on the merits, they often defer in part to the political branches in a range of ways — whether by using rationality review, accepting discretionary executive decisions as subsidiary parts of ultimate constitutional questions, or assuming governmental good faith. By using rational basis review, for instance, which, for reasons of relative institutional competence, judicially underenforces constitutional norms, the courts leave it to the political branches to fill the enforcement gap.⁴²

In cases involving foreign policy,⁴³ national security,⁴⁴ military,⁴⁵ or immigration⁴⁶ judgments, the courts systematically apply doctrines of overt deference that cause them to refrain from full enforcement of constitutional norms, leaving that task to the political branches. The commander-in-chief power, even if narrowly understood, involves executive judgments that could be tainted by unconstitutional

41. It is perhaps confusing to discuss the space judicial underenforcement leaves for executive-branch constitutionalism as if it were distinct from the space available under judicial supremacy or departmentalism. Some of the examples in this subsection arise under judicial supremacy, whereas others clash with judicial doctrine and so arguably belong in the departmentalism subsection. Where the courts themselves describe their decisions as avoiding or stopping short of fully applying substantive constitutional requirements, as they have under the political question doctrine or other grounds for nonjusticiability or deference, the executive has a supplemental role in interpreting and applying the Constitution that is fully consistent with judicial supremacy. But there are also claims of underenforcement that the current Court has rejected or probably would reject, such as the notion that the Constitution supports stronger protection for religious exercise than the Courts recognize, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), or guarantees “a social minimum of goods and services to meet the basic needs of all citizens,” Sotirios A. Barber & James E. Fleming, *The Canon and the Constitution Outside the Courts*, 17 CONST. COMMENT. 267, 272 (2000). To see those as areas of executive constitutional obligation, then, depends on adherence to some version of departmentalism. The poles are clear, but the dividing line between them is not always evident, and because it is not my purpose here to delineate it, I collect these examples into this middle group.

42. *See generally Sager, Fair Measure*, *supra* note 31, at 1215-19.

43. *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

44. *See Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting that the Supreme Court has used a standard of “heightened deference to the judgments of the political branches with respect to matters of national security”); *Haig v. Agee*, 453 U.S. 280 (1981).

45. Regarding the military, the Supreme Court said in *Gilligan v. Morgan* that:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

413 U.S. 1, 10 (1973); *see also Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) (“Not only is the scope of Congress’ constitutional power in this area broad, but the lack of competence on the part of the courts is marked.”).

46. *See Mathews v. Diaz*, 426 U.S. 67 (1976).

considerations that the Court, nonetheless, would decline to review. Similarly, as Alex Aleinikoff and I have argued elsewhere, the plenary power doctrine in immigration law exemplifies the relationship between the underenforcing judiciary and the political branches, which are responsible for picking up where the court leaves off.⁴⁷

The courts' institutional limitations similarly leave space for political-branch constitutionalism in many other areas. When the Court in *United States v. Armstrong*⁴⁸ denied a claim that the federal government engaged in race-based selective prosecution, the Court's decision turned, in large part, on its recognition that the executive has institutional capacities the courts lack, including competence to assess and weigh the various factors relevant to the exercise of prosecutorial discretion, and to preserve the efficiency and confidentiality important to effective law enforcement policy.⁴⁹ Given its footing on judgments about relative institutional competence, the *Armstrong* decision, which denied a claim of racially selective prosecution, can comfortably coexist with an equal protection obligation *within* the executive to analyze its own prosecutorial practices to redress racial disparities. And if the judicial decision in a case like *McCleskey v. Kemp*,⁵⁰ declining to invalidate a penalty of death in the face of evidence of systematic devaluation of the lives of black victims, is understood to express more about the limited capacities of the courts than about the normative commands of the Equal Protection Clause, it may imply continuing constitutional obligations of the political branches to

47. Specifically, we posited that:

[J]udicial deference under the plenary power doctrine is an institutionally rather than substantively based doctrine — meaning, not that sex discrimination is more tolerable in immigration and naturalization than it is domestically, but that [constitutional] sex discrimination norms are judicially underenforced in the former context for reasons relating to the relative institutional competence of the judiciary and the political branches.

Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1, 3.

48. 517 U.S. 456 (1996).

49. The *Armstrong* Court stated that:

Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." . . . It also stems from a concern not unnecessarily to impair the performance of a core executive constitutional function. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."

Id. at 465 (quoting *Wayte v. United States*, 470 U.S. 598, 607-08 (1985)).

50. 481 U.S. 279 (1987).

address the inequalities that the Court did not.⁵¹ In this view, the Court's decision expresses, not the absence of any constitutional problem, but the absence only of a problem susceptible of judicial solution in response to a private party's constitutional claim. Evidence of stark racial disparities at the life-or-death pivot point of our criminal justice system could nonetheless impose constitutional obligations on Congress and the executive to get to the bottom of the problem and mend it. Under this view, the Constitution might require that the political branches take steps, through legislation or otherwise, to narrow the permissible bases for the imposition of the death penalty, to ensure quality of counsel in death penalty cases, or to provide a statutory cause of action where statistically significant racial disparities in the administration of capital punishment are shown.⁵²

A different observer might note that *Lochner v. New York's* deference to the states and Congress on matters of economic regulation rests on the political branches' institutional advantages. The Court's New Deal reversal-of-course on whether there are judicially enforceable substantive due process or commerce clause limits on economic regulation reflected, in part, the Court's understanding that "experience managing a complex commercial economy made the elected branches better able to understand the interests relevant to the scope of constitutional protection for economic liberty."⁵³ That shift to

51. The Court in *McCleskey* justified its decision largely on grounds of institutional deference: "McCleskey challenges decisions at the heart of the State's criminal justice system. . . . Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." *Id.* at 297. *McCleskey* involved decisions by a state rather than federal political branch, and is thus further explained by the Court's expansive view of states' rights, *see, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991) (upholding imposition of capital punishment in an opinion opening with the words: "This is a case about federalism."). But the Court's explicit consideration of the relative institutional capacities of the political branches versus those of the courts is applicable at the federal level as well. Unwillingness to second-guess the discretion exercised by other institutional actors does not, at either the state or federal level, condone discretionary judgments tainted by discriminatory motive or racially selective indifference, nor relieve the executive of responsibility to do what it can to avoid any such taint. Again invoking deference, the *McCleskey* Court also noted that "McCleskey's arguments are best presented to the legislative bodies" which are "better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Id.* at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)). That point equally applies to executive officials, who share the legislatures' flexibility and evaluative capabilities.

52. To the extent that such legislation applied to state prosecutions, current Supreme Court doctrine on the scope of Congress' power under Section Five of the Fourteenth Amendment would require that any federal law be congruent and proportional to a demonstrated pattern of judicially actionable constitutional violations by the states. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *City of Boerne v. Flores*, 521 U.S. 507 (1997). The federalism concerns these cases reflect would not, however, apply to efforts by the federal government to refine its *own* approach to capital punishment.

53. Eisgruber, *supra* note 9, at 358.

a deferential stance did not necessarily resolve as a substantive matter the nature and scope of any constitutional protection of contractual liberty that the Due Process Clause might provide or any limits on federal regulation that the Commerce Clause might imply.⁵⁴ Rather, in light of such deference, it has become the business of the political branches to consider whether government action that curtails economic liberty can be squared with any such liberty that the Constitution may secure.

More broadly, the courts have been reluctant to repair lingering harms arising from historic unconstitutional conduct, most notably various forms of discrimination.⁵⁵ As Larry Sager has argued, judicial underenforcement of constitutional equality norms “fortifies legislative authority” — and, I would argue, executive authority as well — “to repair entrenched injustice against enumerated powers objections to federal legislation and against competing claims of privacy and association that might be offered as objections to both state and federal legislation.”⁵⁶ Whereas judicial enforcement of constitutional equality guarantees “stops short of structural repair,”⁵⁷ the political branches are in a position, through officials’ exercise of discretion, promulgation of executive orders, programming and appropriations, and legislative proposals, to engage in more ambitious remediation — steps which might not merely be constitutionally permissible, but required.⁵⁸

Government treatment of the poor is another area in which courts have played a very limited constitutional enforcement role, but in

54. *See id.*

55. *See Sager, Justice in Plain Clothes, supra* note 3, at 433-35 (referring to the judiciary’s shortfall in repairing “entrenched injustice,” and the political branches’ corresponding constitutional obligation of repair).

56. *Id.* at 433.

57. *Id.*

58. The disparate-impact standards of both the Voting Rights Act and Title VII of the Civil Rights Act of 1964 are but the best-known responses to what might be viewed as not only permissible but perhaps even constitutionally required action by the political branches in their spheres of authority to ameliorate historic and entrenched race and sex discrimination beyond what the Court’s jurisprudence commands. *Compare* *Washington v. Davis*, 426 U.S. 229, 246 (1976) (stating that the Court will not interpret the Equal Protection Clause to invalidate a race-neutral test on grounds of disproportionate adverse impact against blacks where such a test “rationally may be said to serve a purpose the Government is constitutionally empowered to pursue,” even in the absence of any showing that the government actually had a legitimate purpose), *and* *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979) (rejecting a disparate-impact sex discrimination claim under the Equal Protection Clause), *with* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing a claim of disparate-impact race discrimination under Title VII), *and* *Nashville Gas Co. v. Satty* 434 US 136 (1977) (recognizing claim of disparate-impact sex discrimination under Title VII). *See also* *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that the Family and Medical Leave Act’s sex-neutral family-care guarantee is an appropriate constitutional response to historic, lingering, unconstitutional sex discrimination).

which many scholars argue that the shortfalls are attributable more to the limited reach of the courts than to limitations of the constitutional norms themselves. Those scholars, accordingly, conclude that the Constitution imposes such obligations, but that the political branches are primarily responsible for fulfilling them.⁵⁹ The courts' acceptance of any rational basis for the imposition of fees for access to important public services,⁶⁰ or the failure to grant subsidies to support equal exercise of constitutional rights,⁶¹ should not necessarily get the political branches off the constitutional hook. The Constitution could be read to require the executive and Congress to consider and correct discriminatory impacts on disadvantaged groups, waive fees, or make basic services or other economic necessities available in some circumstances in which the courts, under its current equal protection jurisprudence, would not.⁶²

In other areas, too, courts give the executive a pass that does not necessarily amount to a constitutional stamp of approval for whatever

59. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1336, 1337 (2d ed. 1988) (observing that in certain circumstances, the poor person "must be regarded as the victim of a system of contract and property rights rather than the author of his own plight"; "a government which wholly failed to discharge its duty to protect its citizens would be answerable primarily in the streets and at the polling booth, and only secondarily if at all in the courts. To say this is not to deny that government has affirmative duties to its citizens arising out of the basic necessities of bodily survival, but only to deny that all such duties are perfectly enforceable in the courts of law."); Barber & Fleming, *supra* note 41, at 272 ("[D]espite the slogans about 'negative liberties,' the Constitution might impose affirmative obligations upon the legislative and executive branches of government to provide a social minimum of goods and services to meet the basic needs of all citizens. . . . even if such obligations and rights are not judicially enforceable in the absence of legislative or executive measures."); Charles L. Black Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1113 (1986) ("[A] constitutional justice of livelihood should be recognized, and should be felt by the president and Congress as laying upon them serious constitutional duty."); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 7-8 (1987) (arguing, in support of a constitutional right to minimum subsistence, that, "although the Court could act, it would be far more desirable if it did not have to," because the issues involved are complex and best addressed with participation by "all who take an oath of office to support and defend the Constitution," including legislators and, presumably, executive officials as well); Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Sager, *Justice in Plain Clothes*, *supra* note 3, at 420 (observing that any constitutional right "to adequate food, shelter, health care, and education" would involve "questions that seem far better addressed by the legislative and executive branches of government, questions that seem virtually out of reach of the judiciary absent special circumstances.").

60. See, e.g., *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988) (holding that a state statute permitting certain school districts to charge transportation user fees even to indigent families did not violate equal protection).

61. See, e.g., *Maher v. Roe*, 432 U.S. 464 (1977) (holding that a state participating in the Medicaid program did not violate equal protection by paying medical expenses incident to childbirth but refusing to pay for nontherapeutic abortions for indigent women).

62. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970).

conduct a court leaves undisturbed. When considering constitutional claims in the context of the bureaucratic or technological systems through which the executive acts, the judiciary often refrains from micromanagement. Yet, when courts reviewing government systems or processes presume that government officials undertake good-faith efforts to avoid unnecessary personal harms, or when courts in constitutional cases deferentially review the government's choices of systems and stated interests, their failure to invalidate government programs should not necessarily be understood as full approval of executive conduct on its constitutional merits.⁶³ Just because courts resist constitutionally based micromanagement does not mean the political branches themselves should be inattentive to the impact that myriad operational decisions have on constitutional protections.

Finally, judicial underenforcement is not the only form of slippage between substantive constitutional norms and courts' doctrinal rules: courts also *overenforce* the Constitution, and executive constitutionalism has potential to address that gap between constitutional meaning and judicial edict.⁶⁴ Where the judiciary's

63. For example, the federal government uses many different kinds of powerful databases that implicate individuals' interests in privacy, due process and equal protection, but which courts review leniently. Generally, the courts defer to the superior position of executive officials designing and maintaining databases to evaluate their necessity and attendant risks to individual rights relative to available alternatives, and to consider ways to minimize infringements of individual rights beyond the relatively blunt requirements that a court is equipped to propose or enforce. In *Whalen v. Roe*, 429 U.S. 589, 605 (1977), the Court acknowledged a "threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files," and noted that "in some circumstances" the duty to avoid unwarranted disclosures "arguably has its roots in the Constitution," but concluded that there was no privacy violation because it accepted that the government had a legitimate interest in tracking prescriptions of certain dangerous drugs, and had adequate standards and procedures for protecting the privacy of sensitive medical information. *But see Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (reserving judgment on constitutionality of database because of potential substantive due process issue); *id.* at 9-10 (Souter, J., concurring) (opining that the database remained open to equal protection challenge). The failure of the *Whalen* plaintiffs' privacy claims thus did not relieve government officials of their constitutional obligation to take steps calibrated to avoid unauthorized disclosure. As Justice Brennan explained:

In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure. Given this serious and, so far as the record shows, successful effort to prevent abuse and limit access to the personal information at issue, I cannot say that the statute's provisions for computer storage, on their face, amount to a deprivation of constitutionally protected privacy interests.

Whalen, 429 U.S. at 607 (Brennan, J., concurring). On sex offender registries, see *Smith v. Doe*, 538 U.S. 84 (2003), which upheld Alaska sex offender registry against ex post facto challenge, and *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), which upheld Connecticut's sex offender database against a nondangerous offender's procedural due process challenge. On federal no-fly lists, see *The Scarlet "S"*, LEGAL AFF., Sept./Oct. 2003, at 17.

64. See generally Evan H. Caminker, *Miranda and Some Puzzles of Prophylactic Rules*, 70 U. CIN. L. REV. 1, 2 (2001) (arguing that constitutionally overenforcing, "prophylactic"

distinct institutional limitations cause it to overenforce a constitutional right relative to its true normative scope, there is leeway (under a departmentalist view) for the political branches to engage in narrower, more accurate enforcement, or (under judicial supremacy) for the political branches to conclude that, a fortiori, the courts have not engaged in *underenforcement*, leaving no gap in rights protection that the political branches might fill. Just as extrajudicial constitutionalism is an important supplement to the courts' constitutional underenforcement, so, too, might accurately targeted extrajudicial constitutional approaches relieve the courts of the need to resort to blunt, judicially administrable rules that result in constitutional overenforcement. Concerns about overenforcement have particularly fueled departmentalist claims for executive curtailment of rights that the courts have drawn too expansively.

C. *Space for Executive Constitutionalism Under Departmentalism*

The scope for executive branch constitutional interpretation is substantially broader from the perspective of constitutional departmentalism, which contends that the political branches have authority coequal to that of the courts to interpret the Constitution. The strongest claims of departmentalism are that the executive need not necessarily acquiesce in judicial rulings nor execute legislation where the executive's own constitutional interpretation contradicts the Court's or Congress's view.⁶⁵ Even departmentalists who argue for less, such as the nonbinding character of courts' constitutional dicta, see broad space for executive constitutionalism.⁶⁶ If a constitutional question that the Court has clearly settled to its own satisfaction is not necessarily thereby settled for the legislature or the executive, the political branches plainly have even more constitutional work to do for themselves. While judicial supremacists should care deeply about

rules "respond to the inevitability of imperfect judicial detection of constitutional wrongdoing"); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive and Historical Prolegomenon*, 15 *Cardozo L. Rev.* 375, 390-91 (1993) (contending that judicial overenforcement usurps prerogatives of other branches).

65. See TUSHNET, *TAKING THE CONSTITUTION AWAY*, *supra* note 8; Paulsen, *supra* note 16.

66. See, e.g., Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679, 723-25 (1989) (accepting that Supreme Court opinions are binding on "all within the regulatory reach of federal law," but considering whether court of appeals opinions should be treated differently); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 *IOWA L. REV.* 1267, 1325 (1996) (arguing against judicial supremacy, but disagreeing with Paulsen that departmentalism implies that court judgments are not binding on the executive); Merrill, *supra* note 16 (arguing that executive actors should view judicial opinions as of great importance, but that only the judgment itself imposes any direct obligation of obedience).

the quality of executive branch constitutional decisionmaking, departmentalists must pay especially heightened attention to it.

There is strong kinship between the space left by underenforced constitutional norms and the broader scope that departmentalism finds for executive constitutional interpretation. The executive's political responsiveness and various institutional advantages shape executive constitutionalism in the room judicial supremacy leaves, as discussed above; the same qualities are an important part of the normative grounding for claims in favor of departmentalism. Executive arguments in favor of rolling back some of the court-announced protections for individual rights might be based on the perception that the public prefers more safety and less criminal procedure, or on the executive's own observations, as prosecutor, of practical costs of the Court's constitutional jurisprudence. It is in part because political-branch constitutionalism has the potential to draw on a wide range of powerful institutional attributes that it appeals to departmentalists, who advocate for its broadest scope.

D. *Constitutionalism Beyond Simple Politics*

The fact that there are pervasive gaps in judicial constitutionalism that the political branches might fill does not itself explain how and whether extrajudicial constitutionalism works in practice. The courts, the political branches themselves, and the scholarly literature all offer little concrete guidance. We have seen that scholars paying renewed attention to political-branch constitutionalism envision robust and thoughtful approaches that are institutionally grounded, more democratic, and less formalist than what the courts have developed. Whether the political branches are able to fulfill those aspirations, however, depends not only on the recognition that political-branch constitutionalism is appropriate and necessary, but also on how the political branches in their own spheres actually go about interpreting and applying the Constitution. What devices do they have for identifying unconstitutional conduct? How are issues raised, fleshed out, and resolved within the political branches? What are the characteristics of political-branch constitutional decision makers? Whom do they serve? In short, within the executive branch, what takes the place of the courts' system of doctrines, processes, and rules such as standing, adversarial presentation, precedent, and Article III independence, and how well do existing executive processes harness that branch's distinctive characteristics?

One possible view that would negate the need for such further inquiry is that the space that the courts leave for the political branches demands only the default political-branch response, i.e., whatever decision would result from the regular operation of the branch as it is politically and institutionally composed. A simple version of that

position was voiced by Gerald R. Ford's comment that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history," and that a valid conviction results from "whatever offense or offenses two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office."⁶⁷ In that view, where constitutional questions are properly in the hands of the political branches, those branches' ordinary institutional judgments are all that the Constitution requires, with the result that "[t]hose decisions that are delegated to other branches, like impeachment, are essentially standardless."⁶⁸ Whatever institutional arrangements suffice to do the ordinary work of the executive branch are also, under that view, adequate for any constitutional implementation called for from the executive. Any demand for special institutional arrangements that might facilitate constitutional constraint drops out of the equation.

Discussion of political-branch constitutional interpretation today, however, generally rejects such effacement of identifiably constitutional thinking in the political branches, and instead, assumes a role for some constitutional brand of reasoning from principles toward ideals.⁶⁹ Executive branch constitutional decisions may turn on a mix of practical, prudential, political, policy-based, discretionary

67. 116 CONG. REC. H11913 (daily ed. Apr. 15, 1970) (statement of Rep. Ford in connection with the unsuccessful effort to impeach Supreme Court Justice William O. Douglas). The bare political process also appears to be the mechanism that Herbert Wechsler envisioned as enforcing constitutional federalism. See HERBERT WECHSLER, *The Political Safeguards of Federalism*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 49 (1961); see also JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-259 (1980); THE FEDERALIST NO. 46 (James Madison).

68. Philip Bobbitt, *Mark Tushnet: The Right Questions*, 90 GEO. L.J. 223, 227 (2001). As Walter Dellinger and H. Jefferson Powell characterize that position, "[i]f the judiciary, within whose 'province' lies 'the duty to say what the law is,' cannot answer a question, it is easy to assume the question must simply not involve constitutional law at all." Dellinger & Powell, *supra* note 35, at 368.

69. This is true even if, for some commentators, extrajudicial constitutionalism is not sharply different from political reasoning. In Robin West's view, for example, an aspirational Constitution would be "law" in the hands of the political branches no less than in the courts, and although "the significance of the appellation would be quite different," her political-branch constitutionalism is not raw politics or governmental prerogative, but "a law of moral principle and high ideals." WEST, *supra* note 4, at 313. Tushnet, with his all-things-considered constitutional judgments and self-enforcing, "incentive-compatible" Constitution, see TAKING THE CONSTITUTION AWAY, *supra* note 8, at 95, nonetheless highlights the importance of constitutionally reflective institutional entities like OLC, see Tushnet, *Non-Judicial Review*, *supra* note 10; see also Mark Tushnet, *Constitution-Talk and Justice Talk*, 69 FORDHAM L. REV. 1999, 2005 (2001) (acknowledging a role for constitutionalism as distinct from politics because "the Constitution constitutes the American people" and it "provide[s] opportunities for Americans to engage in discussions about an object held in common").

judgment and principled, justice-oriented, lawlike norms.⁷⁰ That mix may vary depending on the type of question, but in any event, given the distinctly constitutional elements of such decisions, it remains important to identify in concrete terms whether and how the executive self-reflectively works to effectuate the Constitution.

Political-branch constitutionalism manifests itself, not only in opinions on constitutional questions, but also in the kinds of legal products the political branches more typically produce: legislation, regulations, and the diverse array of discrete activities of executive officials doing their jobs. The Fourteenth Amendment's enforcement clause expressly casts the Congress (with presidential cooperation) in a constitutional enforcement role.⁷¹ Regulations and executive orders can express the executive's constitutional vision.⁷² Historical patterns of executive practice, apart from any formal codification or written justification, may also provide a gloss on "abstract analysis."⁷³ At least where interbranch checks and balances are concerned, familiar modes of constitutional analysis can be informed by "deeply embedded traditional ways of conducting government," or "systematic, unbroken, executive practice, long pursued to the knowledge of

70. Interestingly, Dellinger and Powell contend that such a view was held by none other than John Marshall, author of *Marbury v. Madison*. See Dellinger & Powell, *supra* note 35, at 370-72. Even while Marshall in *Marbury* established judicial review, Dellinger and Powell assert that he "also believed in the ability of the political branches conscientiously to interpret and obey the Constitution and other rules of law even, or rather especially, in those cases beyond the power of the judiciary to resolve." *Id.* at 377. As they explain it:

For Marshall, the resolution of some questions involving the interpretation of rules of law and their application to the circumstances of the world demanded the exercise of the type of discretionary judgment that characterizes political action. The process of deciding a question of this sort did not thereby cease to be a matter of applying legal norms (Marshall used the term "principle" in discussing the conclusion the executive reached in the prize cases), but the answer reached included *in principle* the consideration of prudence and policy, of the public interest in the broadest sense. Political, discretionary decision, Marshall's argument assumed, is not by definition the opposite of legal, rule-governed decision. But in our constitutional order, questions of political law that are simultaneously discretionary and rule-governed are committed to Congress or the president. Judicial determination of such questions is neither necessary nor appropriate.

Id. at 373.

71. See, e.g., *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

72. See, e.g., Exec. Order No. 12,612, 3 C.F.R. 252 (1987) (Reagan's federalism executive order) (stating that "[f]ederal action limiting the policymaking discretion of the States should be taken only where [among other things] constitutional authority for the action is clear and certain," and that "[c]onstitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States"), *repealed by* Exec. Order No. 13,132, 3 C.F.R. 206 (1999), *reprinted in* 5 U.S.C. § 601 (2000) (Clinton's federalism executive order).

73. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

Congress and never before questioned.”⁷⁴ Where do the constitutional interpretations that guide those practices come from? And what constitutional vision informs the huge mass of executive conduct that is not itself constitutionally inspired, but that nonetheless has constitutional implications?

The next Part describes the executive branch’s existing mechanisms for and approaches to constitutional interpretation. Later Parts present a critique of the ability of existing mechanisms to fill the gaps that judicial enforcement leaves and carry out the promise of extrajudicial constitutionalism, and, lastly, sketch some implications and directions for change.

II. THE ALLOCATION OF EXECUTIVE-BRANCH CONSTITUTIONAL INTERPRETATION TO THE SOLICITOR GENERAL AND THE OFFICE OF LEGAL COUNSEL

While it seems obvious that the executive branch must respect the Constitution, we lack a clear picture of how and whether that works in practice. In contrast to the basic operations of courts, which are familiar to lawyers and laypersons alike, the practice of constitutional interpretation within the executive branch remains opaque and counterintuitive. Both large and small structural differences between the unelected judiciary and the democratically accountable executive set the stage for any consideration of executive-branch constitutionalism. Article III judges are shielded from political pressure by life tenure, whereas the president and, by extension, his Article II appointees, are at least loosely democratically accountable. The conflict of interest inherent in having federal officials evaluate the constitutionality of other federal officials’ actions is muted when the evaluators are life-tenured judges in a separate branch of government whose only duty is legal decisionmaking. When the evaluators are officials of the same branch, the potential conflicts are more immediate.⁷⁵

74. *Id.* In a similar vein but much earlier, the Court opined that the commander-in-chief’s power to repel sudden attacks “must be governed by *the decisions and acts* of the political department of the Government to which this power was entrusted.” *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (emphasis added).

75. The courts are not, of course, perfectly insulated from politics, nor are the political branches exquisitely responsive to the public will. Even life-tenured judges may be swayed by public opinion, the press, expectations expressed during the judicial nomination process, desire for promotion, the threat of impeachment, and the potential of Congress to react to judicial decisions by, for example, seeking to place limits on federal court jurisdiction. Moreover, the democratic political process is flawed in many ways, including the failure of most eligible persons to vote, the disenfranchisement of others, the influence of political gerrymandering, and the disproportionate influence of corporate money. The constitutional system of representation also, of course, by design blunts the raw effect of majority will. See *THE FEDERALIST NO. 10* (James Madison) (defending representative democracy as a cure

Judges also differ from executive branch constitutional interpreters in that they follow published precedents and interpret the Constitution in concrete cases, which they consider in open proceedings and resolve by publicly available opinions within a hierarchical structure overseen by the Supreme Court. The practice of constitutional interpretation in the executive branch is more diffuse, less transparent, and often considerably less deliberate and selfconscious than it is in the courts. Executive officials, charged with carrying out the work of governing, do not ordinarily view themselves as being directly responsible for effectuating constitutional rights. As James Bradley Thayer observed in his celebrated essay on judicial deference to the political branches, public officials traditionally “have felt little responsibility” for the constitutionality of their conduct; “if we are wrong, they say, the courts will correct it.”⁷⁶ Indeed, there is no guarantee that executive employees, most of whom are not lawyers, necessarily recognize as such most of the constitutional issues that they run across. Ordinary government employees, including most lawyers, generally lack the skill or motivation to spot constitutional issues in their work, and they make most decisions without any written or public record of the reasons for their actions. Many matters of potential constitutional import are inevitably settled only implicitly and by default, and many fall beyond the purview of the courts.⁷⁷

To the extent that it is deliberately and selfconsciously undertaken, constitutional analysis within the executive branch is centralized in the Department of Justice, and, in particular, in the Office of the Solicitor General and the Office of Legal Counsel. Many other executive branch lawyers, such as agency general counsels, routinely engage in thoughtful constitutional analyses, but the SG and OLC are set up to have the last word in virtually all cases. Those offices are both characterized by relative disengagement from their client entities, staffed largely with career lawyers whose principal credentials are their legal skills, and have tended to foster within their own legal cultures a distinction between politics and law. Assigning core legal responsibilities to those two offices focuses constitutional analysis in the hands of lawyers with extensive doctrinal expertise, and separates this function from the day-to-day programmatic business of governing in a way that allows for a more arms-length evaluation of legal

for majority faction). The imperfect independence of courts and the muted responsiveness of the political branches still meaningfully distinguish them. *But see* TUSHNET, *TAKING THE CONSTITUTION AWAY*, *supra* note 8; Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 *IOWA L. REV.* 1287 (2004).

76. Thayer, *supra* note 24, at 155-56.

77. *See supra* Part I.

questions than more programmatically engaged officials would be likely to make.

Through segregating the government's highest legal functions from its policy and political work, and centralizing them in two offices that do not have programmatic executive or legislative responsibilities, the federal government has, in effect, created a kind of mini separation of powers *within* the executive branch. Just as the courts are rendered the "least dangerous branch" by their lack of powers of sword or purse, and are freed of other responsibilities so that they can develop "the ways of the scholar" and take a principled view,⁷⁸ so, too, the Offices of the Solicitor General and Legal Counsel are staffed with legal generalists whose only specialty is the law, who are free of policy or programmatic responsibilities, and who are called upon to take a broader and longer view of the Constitution than other employees in the executive branch.

The following section traces the functions of those two key legal offices, with special attention to the structures, processes, and attitudes that have sometimes enabled them to act as a brake against constitutional violations by the executive branch.⁷⁹ After that largely descriptive discussion, I draw out two distinct strands to the relationship that the SG and OLC have to their executive branch clients: a client-driven strand and a neutral-expositor strand. The client-driven strand substantially fails to engage the challenges of extrajudicial constitutionalism, relying largely on the courts for constitutional constraint. The neutral-expositor approach, in contrast, by emphasizing independence on the part of the leading executive branch lawyers, at first, appears more promising. In later sections, however, I identify ways in which that independence, too, is court centered. I then elaborate the normative implications of that court-centeredness, both for the enforcement of individual rights, and for theories of extrajudicial constitutionalism more generally.

A. *Role and Duties of the Office of the Solicitor General*

The Solicitor General plays a central role in executive constitutionalism, with little or no day-to-day supervision or input from the president or the Attorney General. As background for understanding how, in framing his advocacy, the SG might weigh

78. Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 51 (1961).

79. These descriptions are drawn from the institutional literature, but are also informed by my own experiences in each of these two offices during the Clinton administration. There may be some variation in certain practices across administrations. I am not certain whether, for example, the two-deputy rule adhered to by the Clinton OLC, or the bottom-up briefing sequence in the Clinton SG's office, were consistently employed before or since.

individual rights and other constitutional concerns against executive branch prerogatives, it is useful to review in some detail the types of work the SG's Office does, and how the SG interacts with the rest of government and the courts.

Congress established the job of SG when it created the Department of Justice in 1870.⁸⁰ The SG represents the federal government before the Supreme Court, a task previously done by private counsel.⁸¹ Although Supreme Court litigation is his most visible task, the Solicitor General also has responsibility for supervision of all federal government litigation in lower appellate courts as well.⁸² The SG is appointed by the president with the advice and consent of the Senate, and is subject to removal by the president.⁸³ The SG is the only federal official who is required to be "learned in the law";⁸⁴ when the SG job was established, the prior statutory requirement that the Attorney General have that qualification was dropped.⁸⁵ That change captures a distinction still operative today between the legal role of the SG and the political, policymaking, and managerial role of the Attorney General.⁸⁶

1. *Duties*

The SG's office conducts all Supreme Court litigation on the federal government's behalf. The SG's Supreme Court work breaks down into several categories: The merits work includes deciding which

80. Act of June 22, 1870, ch. 150 §§ 1-2, 16 Stat. 162 (codified as amended at 28 U.S.C. §§ 501, 505 (2000)); Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 181 (1938).

81. Charles Fahy, *The Office of the Solicitor General*, 28 A.B.A. J. 20 (1942).

82. 28 C.F.R. § 0.20 (2004).

83. 28 U.S.C. § 505 provides: "The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties."

84. See 28 U.S.C. § 505.

85. Kristin A. Norman-Major, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081, 1082 (1994).

86. The Department of Justice is a huge organization that in 2004 had an annual budget well over twenty-three million dollars and employed over 111,000 people. See Department of Justice FY2004 Budget Summary, at <http://www.usdoj.gov/jmd/2004summary/index.html> (last updated Feb. 20, 2004). It includes not only twenty-six subject-matter components devoted to the legal work of the government, but also includes United States Attorneys' offices in every state, and the Federal Bureau of Investigation, Drug Enforcement Agency, Bureau of Prisons, United States Marshals Service, Bureau of Alcohol, Tobacco and Firearms, and other subsidiary entities, several of which have their own nationwide systems of offices. Department of Justice Organization Chart, at <http://www.usdoj.gov/jmd/2004summary/html/pg1.htm> (Jan. 7, 2003).

cases are worthy of a government petition for certiorari,⁸⁷ preparing the petitions, and, once the Court grants the petitions, briefing and arguing the cases on the merits. In addition, the SG's office prepares hundreds of briefs in opposition to petitions for certiorari filed against the government. The SG also selects those Supreme Court cases in which federal amicus participation is warranted, frames the government's positions, prepares the amicus briefs, and often participates as amicus in oral arguments in the Court. Finally, he responds to what are referred to within the Office as "invitations," or CVSGs (Calls for the Views of the Solicitor General), whereby the Court, usually at the petition stage, asks the SG for his views on whether it should grant a writ of certiorari.⁸⁸ The SG typically appears in approximately two-thirds of the cases the Supreme Court decides on the merits.⁸⁹

The SG oversees lower-court cases as well. He has responsibility for authorizing all appeals or suggestions for rehearing en banc to intermediate appellate courts that any part of the federal government might want to take from an adverse decision. One recent SG reported that he acted on an average of approximately three such requests per day, year-round.⁹⁰ The SG also decides whether the government

87. See generally 28 U.S.C. § 518 (2004); 28 C.F.R. 0.20 (Organization of the Department of Justice; Office of the Solicitor General). Independent agencies have their own authority to litigate, and thus may take appeals without the SG's permission, but nonetheless must seek the SG's approval for any petition for certiorari to the Supreme Court. See *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (dismissing certiorari for want of jurisdiction on the ground that after-the-fact authorization by Solicitor General of a certiorari petition filed by an independent agency cannot render the petition valid); *United States v. Providence Journal Co.*, 485 U.S. 693 (1988) (holding that a special prosecutor lacked authority to represent the United States before the Supreme Court without the permission of the Solicitor General).

88. I consistently use the pronoun "he" in referring to the SG and the AAG for OLC. Neither position has yet been held by a woman, although women have headed each office briefly in a short-term, "acting" capacity.

89. Functions of the Office of the Solicitor General, at <http://www.usdoj.gov/osg/aboutosg/function.html> (last visited Jan. 11, 2005).

90. Drew S. Days, III, compiled some statistics in preparation for a speech he gave while serving as SG and discovered that during the twenty-one months he had been on the job from his swearing in on May 28, 1993, up to March 2, 1995, he had "acted on 1756 recommendations related to the Government's appearance in appellate courts or roughly three each day, including weekends and holidays." Drew S. Days, III, *No Striped Pants and Morning Coat: The Solicitor General in the State and Lower Federal Courts*, 11 GA. ST. U. L. REV. 645, 648 (1995). Certain agencies with independent litigating authority need not obtain the SG's approval before appealing. See, e.g., James R. Harvey, III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1573 n.20 (1996) (discussing government entities with litigation control). The SG's role in authorizing appeals is somewhat asymmetrical. Because government lawyers need not get SG approval to *defend* a lower-court *victory* against an appeal taken by an opposing party, it is only when a federal entity wants to *seek* review of a decision adverse to it that the SG performs this screening function. In rare cases in which the Attorney General or SG believes it is important to follow a developing legal issue particularly closely to ensure that the

should intervene in an existing litigation in which a federal statute has been challenged.⁹¹ In any pending case in which the United States is not already a party, the federal courts are obligated to inform the Attorney General whenever a question is raised as to the constitutionality of any federal statute. The United States then has a statutory right, exercisable by the SG, to intervene as a party to participate in the resolution of the question.⁹²

2. *Role Separation*

The SG and his office operate with something of the isolation, formality, and regularity of judicial chambers, keeping a distance from the president and Attorney General, agency clients and counsel, and even other lawyers within the Justice Department. In its insulation, and in its emphasis on legal analysis as distinct from policy or politics, the SG's Office somewhat mimics within the executive branch certain attributes of the Article III courts.

As a formal matter, the SG is "subject to the general supervision and direction" of the Attorney General.⁹³ In practice, however, the SG formulates legal positions on his own, without input from the Attorney General or the president, and with rare exceptions, his superiors do not second-guess the SG's decisions.⁹⁴ The Attorney General

government is taking a uniform position in all fora, the SG will review draft briefs for the government as appellee as well as screening the appeals of adverse decisions.

91. 28 U.S.C. § 2403(a) (2000) (obligation of the Department of Justice to decide whether to intervene to defend the constitutionality of an act of Congress).

92. 28 U.S.C. § 2403(a).

93. 28 C.F.R. § 0.135. Another provision states:

When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

28 U.S.C. 518(b).

94. As a high Justice Department official, the SG is ordinarily included in regular meetings with the Attorney General and other top department officials. Those meetings provide some opportunity for the SG to brief the AG and other department officials about upcoming Supreme Court cases or important appeals. On rare occasions the Attorney General has stepped in to alter a position that the SG has proposed to take in Court — or even one that he has already taken. See David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 Geo. L.J. 2079, 2085 n.38 (1994). Such rare intervention may highlight how autonomous the SG ordinarily is, but it may also signal to the SG that his autonomy is not unlimited and cannot stray beyond the bounds of acceptability to his political superiors. See Neal Devins, *Politics and Principle: An Alternative Take on Seth P. Waxman's Defending Congress*, 81 N.C. L. REV. 2061, 2066-67 (2003) (suggesting that Solicitor General Seth Waxman's decision unsuccessfully to defend the Communications Decency Act, despite that Act's apparent unconstitutionality, may have been affected by a former SG's experience in *United States v. Knox*, 510 U.S. 939 (1993), a case involving a constitutionally questionable child pornography conviction, in which the

customarily argues a Supreme Court case during his or her tenure, but that tradition is designed not to exert supervisory authority over the SG, but to give the Attorney General the opportunity of a Supreme Court appearance.

The SG is assisted by a small legal and administrative staff operating within a relatively flat office hierarchy. Only two of the office's lawyers — the SG and one of his four Deputies — are political appointees; all of the others, including the three other Deputies and all of the Assistants to the SG, who research and draft the office's briefs, are "career" employees with civil-service protection.⁹⁵ The office's functional separation from policymaking is further shown by the pattern of hiring lawyers for their general skill at legal analysis and appellate advocacy, rather than for any particular area of substantive expertise. Consistent with that pattern, SGs routinely hire lawyers from the Justice Department's appellate divisions, but rarely hire from client agencies.

The work flow in the SG's Office typically follows a bottom-up path that reflects an assumption that skilled, dispassionate legal analysis by career lawyers will unearth constitutional issues relevant to the litigating position proposed by an agency or a component of the Justice Department. The SG and his Deputies assign each matter to an Assistant who completes the research and drafting. Sometimes the assigning Deputy will discuss the merits of a new assignment briefly with the Assistant, but more often the Deputy has no advance conversation with the Assistant. The Assistant typically learns of the assignment once it is deposited in his or her in-box by an office courier, and the Assistant independently develops a draft.⁹⁶ Thus, the

Attorney General abandoned the SG's position in a brief that she — and nobody from the SG's office — signed and submitted to the Supreme Court).

95. The principal, or "political," deputy slot originated in the aftermath of the controversy over the Justice Department's position in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). See Remarks of Donald Ayer, in Transcript: Rex E. Lee Conference on the Office of the Solicitor General of the United States (Sept. 12-13, 2002), 2003 B.Y.U. L. REV. 1, 88-89. The largely career staff provides continuity across administrations and political parties. Although a new administration's arrival sometimes factors into lawyers' voluntary departures, ordinarily no sudden group shift occurs, and, in recent years at least, many assistants and most career deputies have remained to serve more than one SG, without regard to political party.

96. Depending on the posture of the case, the file typically includes either a recommendation memo or a recommended preliminary draft brief from the appropriate Justice Department division and/or the agency that handled the issue in the lower court, as well as memos from any other potentially affected federal entities. The assistant reviews the file, conducts the relevant research, and passes a completed draft brief (or, where no brief is called for, a completed recommendation) to the responsible deputy, who reviews it, works with the assistant to revise it, and then submits it for the SG's review and approval. See Thomas Merrill, *High-Level, "Tenured" Lawyers*, LAW & CONTEMP. PROBS., Spring 1998, at 83, 98 (describing how this process works in the special case in which an Assistant to the SG recommends a confession of error to the Solicitor General and his deputy).

SG's Office's work is not a collaborative political-legal enterprise, promoting "all-things-considered" judgments,⁹⁷ but is quite formally doctrinal. Only occasionally do executive agency officials — i.e. those who are responsible for executive branch policy decisions — even meet with the Solicitor General or his staff. Those patterns reflect the office's focus on legal, rather than policy-oriented or political, analysis.

3. *Client-Checking*

The SG is not merely a mouthpiece for his federal clients. Although he seeks to advocate (or authorize other government lawyers to advocate) the positions and interests of the client entities, lawyers in the SG's Office critically evaluate the input they get from the government's policymaking agencies. Departments and agencies seek the SG's approval for hundreds of petitions each year, but he typically authorizes less than ten to twenty percent of them.⁹⁸ He also turns down a sizeable fraction of requests for authorization to appeal, and the overwhelming majority of requests for authorization to seek rehearing en banc.

The SG often declines to make particular arguments in briefing and may even confess error, abandoning the government's victory in a lower court.⁹⁹ If the SG's own analysis disagrees with the judgment of the lower court that sustained the government's position, he can choose not to defend the favorable decision against the opposing party's appeal or effort to obtain Supreme Court review. Giving up a victory already in hand is virtually unheard of in the private bar, but it is an established practice by the SG, occurring on average two to three times per year.¹⁰⁰

Each of these ways through which the SG checks client initiatives — rejecting requests to appeal or petition, declining to make certain proposed arguments in briefs to the courts, and even confessing error — might be thought to illustrate the law's capacity to constrain politics within the executive branch. OLC, the other centralized source of executive constitutional interpretation, can also play a checking role.

97. TUSHNET, TAKING THE CONSTITUTION AWAY, *supra* note 8.

98. Interview with former Solicitor General Seth Waxman, *Talk of the Nation* (NPR radio broadcast); Ronald S. Chamberlin, *Mixing Politics and Justice: The Office of the Solicitor General*, 4 J.L. & POL. 379, 393 (1987).

99. See Rosenzweig, *supra* note 94, at 2080-81.

100. Judy Sarasohn, *SG's Switch Breathes Life Into Bias Suit*, LEGAL TIMES, Mar. 29, 1993, at 22 (noting that Acting Solicitor General William Bryson had estimated that "[o]f the roughly 1,000 requests a year for cert that require a government response, the Solicitor General confesses error in, at most, two or three").

B. *Role and Duties of the Office of Legal Counsel*

The Office of Legal Counsel, the executive branch's other constitutional expositor, shares with the SG's Office common institutional roots, a similar internal structure, and a culture of legal skill and doctrinal analysis. Before OLC was established as a separate office, its functions were performed by the SG, and then, starting in the late 1920s, by a specialized Assistant SG.¹⁰¹ In 1933, that assistantship became subject to presidential appointment and Senate confirmation.¹⁰² In 1950, Congress abolished that special Assistant SG position and established a separate Office of Legal Counsel (so named in 1953), headed by its own Assistant Attorney General.¹⁰³

1. *Duties*

Just as the SG is the federal government's chief litigator, the head of the Office of Legal Counsel is the executive branch's chief legal advisor. The Attorney General has formally delegated the legal-advice-giving part of his statutory responsibility to OLC.¹⁰⁴ OLC has no enforcement or litigation responsibilities, and is devoted exclusively to giving legal advice. OLC's role within the executive branch has evolved over the years, with tasks calling for legal and, especially, constitutional judgment migrating to OLC, while more politicized tasks, like OLC's short involvement in vetting potential judicial nominees, being reassigned elsewhere.¹⁰⁵

OLC's core work is to provide written and oral legal opinions to others within the executive branch, including the president, the

101. See Pub. L. No. 73-78, 48 Stat. 283 § 16 (1933); Letter from Erwin Griswold to Theodore B. Olson 1-2 (Mar. 23, 1983) [hereinafter Griswold letter] (copy on file with author).

102. Griswold letter, *supra* note 101, at 3.

103. Reorganization Plan No. 2 of 1950, 64 Stat. 1261 § 4 (1950).

104. The Attorney General must "give his advice and opinion on questions of law when required by the President," and, upon appropriate request, give his "opinion . . . on questions of law arising in the administration of [a] department." 28 U.S.C. §§ 511, 512 (2004). OLC now carries out those functions. 28 C.F.R. § 0.25(b) (2005); see also Att'y Gen. Order No. 23,507 (Dec. 30, 1933); 1934 ATT'Y GEN. ANN. REP. 122.

105. One former OLC head from the 1960s commented that the evolution of OLC's duties was fueled by the need for an office "somewhat detached from the turmoil of the White House, the special focus of the executive departments and the limelight of the Attorney General." Frank M. Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A. J. 33, 37 (1971). Although it seems anathema to OLC lawyers of today, at one point OLC was responsible for screening judicial nominees — a task that is now quite political, and is done by the White House and the Justice Department's Office for Policy Development. OLC lawyers also were initially sent to investigate the Iran-Contra affair. See Michael Stokes Paulsen, *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and Its Limits*, LAW & CONTEMP. PROBS., Winter 1998, at 83, 87.

Attorney General, and heads of other departments. In practice, the White House and the Attorney General are by far the most frequent requesters, often asking complex, momentous questions, frequently on short notice. OLC clients may seek opinions on matters such as the sustainability of a claim of executive privilege, or the lawfulness in a particular circumstance of a quarantine, detention, or use of military force. OLC has been consulted when troops have been sent abroad and when international criminals were arrested overseas.¹⁰⁶ Much of OLC's work is more quotidian, including topics such as the constitutionality under the Appointments Clause of various boards and commissions, or the scope of an agency's statutory authority to alter a regulation or settle a case in a particular way. Its opinions "involve domestic problems, international issues, pet plans of bureaucrats, the application of the Constitution and the laws to administrative policies and procedures, the powers and jurisdictions of departments and agencies, the advisability of contemplated actions, [and various mundane and] momentous matters."¹⁰⁷

OLC traditionally requires that requests for advice come from the head or general counsel of the requesting agency, that advice-seekers submit their own view of the question to OLC, and that independent agencies (not already presumptively bound) agree in advance to abide by the advice — even oral advice — that OLC delivers.¹⁰⁸ The agreement to be bound forestalls opportunistic advice-shopping by entities willing to abide only by advice they like, and it preserves the resources and authority of OLC against being treated merely as an extra source of legal research on issues that other lawyers or officials will ultimately resolve for themselves.¹⁰⁹

In addition to its opinion function, OLC performs a constitutional review function dubbed the Bill Comments Practice, whereby OLC lawyers review bills introduced in Congress for constitutional problem

106. See, e.g., *Deployment of United States Armed Forces into Haiti*, 18 Op. Off. Legal Counsel 173 (1994); *Authority to Use United States Military Forces in Somalia*, 16 Op. Off. Legal Counsel 8 (1992).

107. LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* 34 (1967).

108. See Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1320 (2000) ("[W]e have been able to go for over two hundred years without conclusively determining whether the law demands adherence to Attorney General Opinions because agencies have in practice treated these opinions as binding."); Wozencraft, *supra* note 105, at 34; Theodore B. Olson, *Remarks to the Federal Legal Council* 2 (Oct. 29, 1981) [hereinafter Olson remarks] (copy on file with author).

109. Apart from the bill comments practice, discussed below, OLC does not give opinions to members of Congress, nor does it give opinions to private individuals or nongovernmental entities. OLC also does not formally opine on matters pending in litigation.

areas.¹¹⁰ If the assigned OLC Attorney Advisor identifies provisions of proposed legislation that either present constitutional concerns facially or that create risks of unconstitutional application, that lawyer will draft a Bill Comment identifying the constitutional problem. Those comments are then reviewed and approved by an OLC deputy and sent to the Office of Management and Budget, which compiles the administration's overall views on the proposed legislation, and forwards the constitutional objections to Congress together with policy concerns or suggestions originating elsewhere in government. If Congress does not change a bill to eliminate a constitutional defect, it runs the risk of a presidential veto.

In a parallel function, OLC's Orders Practice similarly reviews all proposed executive orders and proclamations before they are presented to the president for review and approval. OLC reviews proposed orders of the Attorney General and regulations that require the Attorney General's approval as well.¹¹¹

In its most fully judgelike function, OLC also resolves interagency legal disputes.¹¹² When disagreements on points of law affecting more than one agency arise, such as a disagreement between the Department of Defense and the Environmental Protection Agency on the validity or scope of an environmental statute, or a disagreement between the Equal Employment Opportunity Commission as the enforcer of nondiscrimination laws and some other agency in its role as employer regarding potential First Amendment implications of a discrimination or harassment rule, OLC will, upon request from the agencies involved, resolve the dispute. Its resolutions are then binding on the agencies involved.

Most OLC advice is never made public. When OLC writes an opinion, it sends it in confidence to the requestor, and includes it in OLC's own internal and confidential database. After a period of time, OLC lawyers review completed opinions, decide which might be worthy of publication, and seek permission from the requestors for release.¹¹³ Selected opinions are then made available on electronic

110. Tushnet, *Non-Judicial Review*, *supra* note 10, at 470; Wozencraft *supra* note 105, at 35-36. In my experience, OLC sought to review every bill introduced that, in the view of the Department of Justice's Office of Legislative Affairs, had a significant chance of progressing through the legislative process to enactment.

111. These duties are the Attorney General's by Executive Order. Exec. Order No. 11,030, 3 C.F.R. §§ 610, 611 (1959-1963), *reprinted in* 44 U.S.C. § 1505 (1994). OLC currently carries them out under delegation from the Attorney General pursuant to 28 C.F.R. § 0.25(b)-(d).

112. Exec. Order No. 12,146, 3 C.F.R. §§ 409, 411 (1979).

113. When a client resists publication, OLC may have to engage in negotiations to encourage release, but it cannot force the issue, and would lose the trust of its client base if it did.

legal research databases (LEXIS, WESTLAW), and on a searchable OLC database. For the most part, however, OLC opinions are not readily available to the public,¹¹⁴ or even to others within the executive branch, and there is a substantial delay before any opinions go online.¹¹⁵ A large mass of bill comments remains unpublished, as does the substantial body of oral and emailed advice.¹¹⁶

2. *Role Separation*

The Office of Legal Counsel is of similar size and structure to the SG's Office, with a politically appointed and Senate-approved Assistant Attorney General at the head, four deputies, and approximately twenty career Attorney Advisors. The Attorney Advisors, like the SG's Assistants, are civil servants rather than political appointees. Unlike the White House Counsel, who is part of the president's immediate staff in the White House and who acts as a kind of "in-house counsel" to the president,¹¹⁷ OLC is part of the Justice Department and, like the SG, works at arms-length from its clients in relative isolation from the political fray. As noted above, OLC lawyers, like those in the SG's office, specialize in legal analysis, not political advice or policymaking.

OLC, however, is in a more institutionally fragile position within the executive branch than the SG. The SG has a monopoly over the types of work his office does. The SG's approval is legally required on many litigation matters, including all of the federal government's Supreme Court litigation and all federal appeals. In contrast, although virtually any legal issue is appropriate for OLC consideration, the office "has no precise mandate. Its influence is measured by its ability

114. See Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 515, 523 (1993). *But see* THE CONSTITUTION AND THE ATTORNEYS GENERAL (H. Jefferson Powell, ed., 1999) (reprinting significant AG and OLC opinions).

115. See Koh, *supra* note 114, at 517; Office of Legal Counsel, Memoranda and Opinions, at <http://www.usdoj.gov/olc/opinions.htm> (last visited Jan. 12, 2005) (posting only one opinion less than one year old).

116. Although OLC aspires to maintain a comprehensive, searchable database within the office, neither written memorializations of oral advice nor copies of emailed advice are systematically added to the database.

117. See generally Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, LAW & CONTEMP. PROBS., Autumn 1993, at 63 (1993). Rabkin explains that the position of White House Counsel is an innovation of recent decades, and that, unlike the AG, SG, or OLC, it lacks specific statutory grounding or duties. The White House Counsel is appointed at the sole discretion of the president and serves as "literally an 'in-house counsel' in the same White House office complex" as the president. *Id.* at 64.

to persuade rather than by direct authority.”¹¹⁸ Nobody is required to seek a legal opinion from OLC. Each potential client agency, department, or office has its own lawyers and they are free to resolve issues, including constitutional issues, on their own.

The optional nature of OLC's advice means that it is sought, or not, for a range of reasons. Government officials seeking to comply with the law and avoid litigation may turn to OLC, especially in difficult, undeveloped, or controversial areas of the law. (It would be surprising, for example, if OLC were not consulted on a decision to commit troops abroad.) OLC's relatively disengaged vantage point, expertise on constitutional issues, and reputation for sound, high-quality advice trigger many requests. Those qualities are, however, only part of the picture as to why OLC's advice is sought (or not). OLC attracts work because it can resolve legal squabbles within an agency or department, or provide “cover” for entities unsure about a proposed course of conduct. But because resorting to OLC is purely optional, any agency wary of advance constitutional scrutiny of its conduct, or simply unaware of or inattentive to constitutional implications, may fail to seek advice from OLC. The risk is that the separation of OLC from the day-to-day business of governing, while allowing for a more detached perspective, may also, too often, leave it side-railed.

At the same time, OLC review is routine, rather than dependent on the client's behest, in the case of constitutional comments on bills, executive orders, and those regulations calling for Attorney General review. In those areas, the office exerts exclusive authority over constitutional interpretation more akin to the SG's Office's exclusive control over constitutional questions arising in the government's appellate and Supreme Court litigation. Notably, the vast majority of individual-rights issues that OLC deals with arise within the routine rather than the client-initiated practice areas, suggesting that executive-branch clients either do not perceive individual-rights problems, or do not bring them to OLC for resolution.

3. *Client-Checking*

In one very important way, the OLC has an advantage over the SG with regard to checking constitutional violations. Whereas the SG is a litigator who necessarily examines potential constitutional problems only after challenged government action is already a *fait accompli*, the Assistant Attorney General for OLC can weigh in *before* federal

118. Wozencraft, *supra* note 105, at 37. *But see supra* notes 111-112 and accompanying text (identifying OLC's legal obligations to review executive orders and resolve interagency disputes).

initiatives are undertaken to nip constitutional problems in the bud.¹¹⁹ Assume, for example, that the SG and OLC preliminarily held the same view about an issue, such as the constitutionality of federal funding for religious as well as nonreligious instruction.¹²⁰ The fact that the SG would face the issue only after the government had given such aid would create incentives for the SG to interpret the Constitution to permit it, in order to facilitate his defense of the conduct in court — incentives that OLC would not face when considering the issue in advance of any commitment to such aid. OLC thus, at least in theory, has opportunities, which the SG lacks, to prevent unconstitutional action from occurring in the first place.¹²¹

Moreover, its *ex ante* review makes OLC interpretations that impose constitutional constraints less subject to judicial second-guessing than those of the SG. If OLC were to advise against proposed conduct based on constitutional concerns and the executive were to follow the advice, no justiciable controversy would arise. OLC's opinion would effectively be final.¹²² OLC also addresses many nonjusticiable issues, where the absence of any prospect of judicial review makes its views even more definitive. In contrast, if the SG were to take a moderate rather than extreme view of government power in defense of conduct challenged in litigation, there is no guarantee that the Court, in its own decision, would show the same restraint.¹²³ A joke about his own promotion from OLC to SG that Walter Dellinger made captures this OLC-SG difference: After Dellinger had served for three years as AAG for OLC, Clinton appointed him Acting Solicitor General. Dellinger then argued his first case in the Court, and once the Chief Justice intoned, "[T]he case is submitted," Dellinger thought to himself, "What do you

119. See Koh, *supra* note 114, at 515, 523 (1993).

120. See generally *Locke v. Davey*, 540 U.S. 712 (2004) (resolving a close constitutional question regarding whether a state violated the Free Exercise Clause by excluding from a state scholarship program a student pursuing a degree in devotional theology).

121. When a group of OLC Deputy Assistant Attorneys General interviewed me for an open Deputy slot in 1998, I asked about their approach to deciding the issues that came before them. An experienced Deputy replied that the office was such an exciting place to work because the lawyers were required only to give their own, best view of the law. Unlike the SG's lawyers, the Deputy insisted, OLC lawyers were not called upon to justify or defend governmental action already taken, but could, if they believed the law imposed a constraint, cite it to forestall unlawful conduct before it took place.

122. When the executive follows OLC advice to *halt* potentially rights-infringing conduct, OLC's constitutional interpretation has thereby forestalled the very violations that might otherwise have spawned private court challenges.

123. For example, although the Court ultimately accepted the position of the Solicitor General in *United States v. Dickerson*, 530 U.S. 428 (2000), that the *Miranda* decision was constitutionally based and that an attempted statutory override of *Miranda* was therefore invalid, that result was not a foregone conclusion, and the case thus raised the possibility of the Court offering the government constitutional latitude that it had disavowed.

mean ‘the case is submitted’? I’ve made up my mind. What more is there to do?’¹²⁴

There are some minor differences from the SG’s Office in the setup of OLC, and it is not entirely clear how they bear on the office’s capacity to give arms-length advice that effectively checks misguided client initiatives. Those differences may make OLC more vulnerable to political pressure and, therefore, less likely to question executive proposals or, alternatively, they may fortify the authority of the office in the eyes of client entities to enable it to raise hard questions more effectively.

One such difference is that all of the OLC deputies are politically appointed, whereas in the SG’s Office, three out of the four deputies are career employees. A more politically led office seems less likely to make impartial, arms-length constitutional decisions, but the political pedigree of OLC’s leadership may give it credibility with the political leadership of client entities by helping them to trust that OLC will not use constitutional objections as a back-door way to stop or limit policies with which it simply disagrees. Only when clients are willing to abide by its advice can OLC play a client-checking role. Another difference between the two offices is that, whereas only one deputy reviews each matter in the SG’s office, OLC customarily follows a “two-deputy rule,” permitting advice on behalf of the office only after review and approval by two deputies. Without the immediate threat of an adverse court judgment against an agency that fails to follow its advice, OLC’s clout depends more on support from other sources. Presenting a “united front,” rather than lone authors more readily questioned as idiosyncratic, may enhance OLC’s authority with its clients.¹²⁵

As noted above, however, while OLC in many instances has greater potential than the SG as a check on executive-branch behavior, in other significant respects it stands on more precarious footing. Because it lacks mandatory jurisdiction, OLC decides only those issues that the president, the Attorney General, or the heads of agencies — i.e. the potential objects of constitutional (or statutory) constraint — decide to bring to it. That is hardly a system that seems likely to assure active intraexecutive constitutional scrutiny.

124. Conversation with Walter Dellinger (confirmed by email to the author Jan. 10, 2005).

125. OLC has balanced the higher turnover required of its deputies by employing three or four very experienced career lawyers with great familiarity with certain core practice areas, such as separation of powers, executive privilege, appointments, executive orders, and foreign affairs. In the absence of career deputies, it is these senior OLC lawyers, some of whom are in the elite Senior Executive Service, who provide continuity as well as leadership across transitions from one administration to another. *See* 5 C.F.R. § 214.402 (b)(2) (1998) (describing the Senior Executive Service).

Indeed, the more critically OLC examines executive conduct, the more cautious its clients are likely to be in some cases about seeking its advice.

C. *Conflicting Expectations for Lawyers Delineating the Executive's Constitutional Duties*

Executive branch constitutional decisionmaking faces different challenges than judicial review. On the flip side of the courts' familiar countermajoritarian difficulty lies the political branches' *majoritarian* difficulty: How can a politically responsive branch of government protect individual rights against contrary interests of the majority, the politicians, and the institutionalized government? Can the executive avoid a jurisprudence of mere political expedience, engaging in something other than opportunistic, situational constitutionalism through which lawyers advance whatever arguments support the president's immediate agenda? Self-serving analyses short on principle and constraint, like the OLC torture memos, seem undeserving of either of the appellations "constitutional" or "law."¹²⁶ Can we expect better from the executive branch?

The answer depends at least in significant part on how the Solicitor General and the Office of Legal Counsel conceive of and carry out their relationships with their executive clients. Two models of these lawyer-client relationships raise distinct possibilities regarding the effectiveness of executive-branch constitutionalism: a client-driven approach contrasts with a neutral-expositor model. Both, in the end, present significant drawbacks in terms of reliable adherence to constitutional constraint, and extrajudicial constitutionalism more generally.

1. *Client-Driven Advice and Advocacy: Facilitating Executive Interests*

The first model is perhaps most dramatically illustrated by a question posed by Chief Justice Rehnquist during a 1995 oral argument. The case, *Board of County Commissioners v. Umbehr*,¹²⁷

126. The OLC torture memos were roundly criticized in the press and academia, e.g. Anthony Lewis, *Making Torture Legal*, N.Y. REVIEW OF BOOKS, July 15, 2004; David Luban, *The Lawyer as Absolver: Ethical Reflections on the Torture Lawyers* (2005) [copy on file with author], and ultimately repudiated by the president himself, see Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (December 30, 2004). For defenses of client-driven or "situational" executive lawyering, and of the torture memos in particular, see Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 447 (1993); McGinnis, *supra* note 64, at 402-07; Posner & Vermuele, *supra* note 15.

127. 518 U.S. 668 (1996).

presented a relatively straightforward application of First Amendment principles to the context of government contracting. The United States appeared as *amicus curiae* and argued that the First Amendment prohibited cancellation of a public contract with a trash hauler for making political comments on his own time with which government officials disagreed. The Court ultimately decided by a clear majority that such a cancellation was indeed unconstitutional. The government's position nonetheless attracted special notice: during oral argument, Chief Justice Rehnquist leaned forward, glared at the Assistant to the Solicitor General before him, and boomed, "Well, that's an extraordinary argument for the *government* to be making."¹²⁸ The Chief Justice (who had himself earlier served as the AAG in the Office of Legal Counsel) apparently thought that the SG had stepped out of his proper role by advocating constitutional constraints on governmental action. Even though the governmental entity in that case was local rather than federal, the approach the SG proposed would equally apply to any level of government, state or federal, so the SG was, at least indirectly, inviting the Court to identify constitutional limits applicable to his own client.

The view implicit in the Chief Justice's criticism from the bench in *Umbehr* is that the executive branch, at least when acting in an advocacy role, should not pull its punches by declining to make available, nonfrivolous arguments to support broad governmental prerogatives. Instead, the Chief Justice implied, the SG should consistently argue against constitutional constraints on government where reasonable arguments are available. In that view, elaborated in the institutional literature on the SG's Office, the Solicitor General's role is to advocate for government prerogative; advocacy of constitutional constraint should be left to the individuals challenging the law, with courts playing the role of arbiter.¹²⁹

128. Oral argument, *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996), available at 1995 WL 710471, at 55 (Nov. 28, 1995) (emphasis added). The Chief Justice made that remark with some apparent irritation, continuing, "Certainly the Federal Government is going to be getting the same deference as a county commission, and it seems to me extraordinary for the Federal Government to come in and say, we don't think we get much deference under the Constitution." *Id.*

129. See John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 807 (1992) (arguing that the Solicitor General, as a presidential subordinate, should not seek to interpret the law impartially, but should act as a "paladin who attempts to impress the President's undiluted constitutional vision upon the Court"); Geoffrey Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294 (1987) (arguing that for government lawyers to seek to interpret the law in a way that serves the "public interest" as opposed to client interest would usurp the roles of the Congress, the president, or both, and would ultimately be "incoherent"); Strauss, *supra* note 31, at 133 (describing "a persistent executive branch practice — judging its own actions neither as a court would, nor according to its own autonomous interpretations, but rather by their defensibility under current doctrine"); Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001) (discussing

a. *In favor of the client-driven approach.* There are simple, traditional, and appealing arguments in favor of the client-driven model: The SG is the government's Supreme Court advocate, and should present only the government's interests, not those of third parties. The Solicitor General's job is not to act like a court, but to advocate in court for the government as an institutional client. After all, government, like a private entity, needs a voice in court. The premise of the adversary system is that each side musters its strongest arguments and presents them to courts, which then neutrally evaluate the arguments and reach decisions that reflect the best view of the law. If one side fails to present its strongest arguments, the court gets a distorted picture, potentially skewing the outcome.¹³⁰ The Chief Justice, no doubt, thought that it was the role of Mr. Umbehr and his counsel, not the Solicitor General of the United States, to highlight the constitutional constraints against speech-based retaliation in government contracting.

The lawyers' role might at first blush seem quite different in the context of the advance scrutiny that OLC gives. The client-driven approach as applied in litigation rests on a premise that government action, presumptively taken in the public interest, should not be abandoned for any but the clearest constitutional defects without an authoritative judicial determination of unconstitutionality.¹³¹ Where there is room for reasonable argument, let the judges do the judging. When matters come to OLC in its advisory role, however, there is no judge poised to decide them, and OLC is asked to interpret the Constitution, not in order to defend any government *fait accompli*, but to make clear in advance the relevant constitutional constraints that government actors face. That posture might be thought to require a more impartial stance from OLC than his litigating role calls for from the SG.¹³²

the SG's obligation to defend an arguably unconstitutional statute when there is any "professionally responsible" argument to be made in its support).

130. The Court's demand for adversary presentation is such that, in circumstances in which the SG declines to defend a position earlier staked out by a lower level government attorney, the Court appoints counsel to argue that position, thereby relieving the government of that obligation. *See, e.g.,* *United States v. Dickerson*, 530 U.S. 428, 442 n.7 (2000) (noting appointment of Paul G. Cassell as *amicus curiae* at the invitation of the Court in support of the judgment below); *Ornelas v. United States*, 517 U.S. 690, 695 n.4 (1996) (noting appointment of Peter D. Isakoff, as invited *amicus curiae* in support of the judgment below).

131. *See* Rosenzweig, *supra* note 94, at 2106.

132. A former ABA standard on the difference between a lawyer acting in a role of advocate versus the role of advisor clearly distinguishes lawyer-as-advocate from lawyer-as-advisor along these very lines:

Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. . . . While serving as advocate, a lawyer

Indeed, one might think that the validity of the client-driven model in the context of litigation depends on fully critical, advance constitutional scrutiny of executive action. The legislation and regulations that the SG defends in court presumably have been vetted for constitutionality by OLC, and OLC gives executive entities advance guidance, on request, to officials unsure about the constitutional constraints they face. It is in part because courts assume the government engages in meaningful constitutional self-scrutiny that they give special weight to the government's constitutional views.¹³³

There is, however, a client-driven model for OLC, too. Nelson Lund, for example, argues that lawyers in OLC generally should *not* take a "judge-like" stance with respect to legal issues brought before them. Instead they should follow the same approach as a private lawyer counseling a private client: interpret the law in light of the client's interests, making the most persuasive available arguments to support what the client proposes to do.¹³⁴ OLC gives advice in response to specific requests by authorized persons with plans that raise constitutional questions, and the client-driven view is that "there is no obvious reason for [the president] to have less freedom than private clients to require from his lawyers the kind of legal advice he thinks will be most useful to him."¹³⁵ Eric Posner and Adrian Vermuele's defense of the OLC torture memo as "standard lawyerly

should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law."

MODEL CODE OF PROF'L RESPONSIBILITY EC 7-3 (1981). The current Model Rules are not so explicit, but they do not contradict the distinction drawn in the Model Code. *See also* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference of the ABA/AALS*, 44 A.B.A. J. 1159, 1161 (1958) (classic statement of lawyers' ethical obligations within the adversary system, distinguishing between the role of a lawyer as an advocate in open court and the role of a lawyer as a counselor).

133. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (commenting on the enhanced constitutional legitimacy of well-established practices "engaged in by Presidents who have also sworn to uphold the Constitution").

134. Lund, *supra* note 126, at 449 (arguing that, "although "[i]t is true that the President has legal obligations that are different from those of any private citizen . . . they are *his* obligations, not those of his lawyers or other subordinates"); *see also* McGinnis, *supra* note 126, at 402-03.

135. Lund, *supra* note 126, at 449; *see also* Miller, *supra* note 129; Wozencraft, *supra* note 105, at 36. Wozencraft also draws the explicit analogy between OLC and lawyers counseling private clients:

In many ways OLC's work within government is remarkably similar to counseling business clients. The laws are different, but the basic considerations and demands are the same. Lawyers in government have to be concerned with precedential effect and with what the Congress or foreign nations or the press will say. But so do business lawyers and their clients. The difference is, at most, one of degree.

Wozencraft, *supra*.

fare, routine stuff” illustrates this view. Professors Posner and Vermeule are in accord with Lund that the OLC has been — and should be — “highly pro-executive,” and they assert that “former officials who claim that the OLC’s function is solely to supply ‘disinterested’ advice, or that it serves as a ‘conscience’ for the government, are providing a sentimental, distorted and self-serving picture of a complex reality.”¹³⁶ Assuming the federal government had good practical reasons to want to subject Iraqi prisoners to extreme pain falling just short of that associated with “organ failure, impairment of bodily function, or even death,”¹³⁷ these commentators suggest, OLC under the appropriate, client-driven model should avoid giving “moral or political advice” and merely provide a plausible constitutional justification for the requested prerogative, “trusting that their political superiors would make the right call.”¹³⁸

b. Against the client-driven model. The client-driven model of constitutional rights protection falls short. The most obvious defect is that, typically, “normal politics” prevails over “constitutional politics.”¹³⁹ Significant segments of voters do from time-to-time make constitutional-rights demands, and those demands may be reflected in presidential agendas and become part of the executive’s positive program. Vivid examples include the enactment and preservation of laws guarding against race discrimination in voting; against race, sex, or religious discrimination in employment; against discrimination in other areas of public life;¹⁴⁰ protection for the exercise of abortion rights¹⁴¹ and for religious free exercise;¹⁴² and the right to bear arms.¹⁴³ The public’s attention for, and will to protect, individual constitutional rights is limited, however, so public pressure only operates on that

136. Posner & Vermeule, *supra* note 15.

137. *See supra* note 1.

138. Posner & Vermeule, *supra* note 15.

139. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1049 (1984).

140. The Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000), contains prohibitions against racial discrimination in voting that substantially overlap with the Fifteenth Amendment ban against such discrimination. As applied to government, the prohibition on race, sex, and religious discrimination expressed in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000), substantially overlaps with the Equal Protection Clause.

141. *See, e.g.*, Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (2000).

142. *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

143. *See* Calvin Massey, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*, 73 *FORDHAM L. REV.* 573, 575 n.23 (2004).

small set of issues that have become central enough and sufficiently established to be in the public mind. Where even those rights are threatened in contexts difficult for the public to perceive (e.g. reproductive rights or religious free exercise on the part of persons in prison or detention), they are unlikely to be the subject of either public pressure or corresponding presidential mandate. Similarly, the public is unlikely to be engaged effectively when questions of the particular contours of rights arise at levels of specificity too detailed for general political mobilization (e.g. waiting periods for abortions, roving wiretaps on cell phones, cash versus in-kind assistance to religious organizations or activities). But such relatively arcane questions matter a great deal in terms of the quality of rights we enjoy, and they are the daily fare of the executive branch.¹⁴⁴

Operating under the client-driven model, the SG and OLC fail to supply fully effective internal constitutional brakes on executive conduct. There are substantial reasons to question whether the routine constitutional instincts of executive-branch clients will give due weight to constitutional obligations. As noted above, whereas the judiciary is dedicated exclusively to resolving legal questions, including questions of constitutional interpretation, the executive branch has many programmatic responsibilities. That mixture of roles, as both interpreter and executor of laws, creates tremendous incentives for the executive to view the Constitution in self-serving ways.¹⁴⁵ Under the client-driven model, then, the countermajoritarian provisions of the Constitution seem inadequately shielded from popular will, likely to be “enforced” extrajudicially only when it is politically popular to do so — that is, where constitutional constraints are least necessary.¹⁴⁶

144. Moreover, the line between legal and “political or moral” advice is seldom bright: Where the internal morality of law itself is concerned, such as the duty to eschew ad hoc, secret, and inconsistent legal standards, see LON L. FULLER, *THE MORALITY OF LAW* (1964), or where the relevant political questions include whether a particular legal analysis would likely boomerang against other United States legal positions or interests, see Clark & Mertus, *supra* note 15, political and moral questions are also distinctly legal ones.

145. As Paul Brest explains:

Considering issues from the moral point of view requires habits and attitudes that come from regular practice and that are not readily acquired on the spur of the moment. It is simply not plausible to expect citizens or officials to act out of self interest day to day, and adopt a very different perspective whenever the word “constitutional” is invoked.

Paul Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 188 (1985-86).

146. Sanford Levinson writes:

We should not tolerate a process whereby a member of the President’s inner circle . . . is asked only to prepare a memorandum offering arguments . . . designed to justify a position already adopted by the President on raw political grounds. Presumably the lawyer would view her only constraint as refraining from offering “frivolous” (as distinguished from merely bad or otherwise unpersuasive) arguments. This is, of course, the common conception of the lawyer’s role, at least in the private market. More, however, should be expected from the public attorney (and from governmental process).

2. *Neutral Expositors of the Constitution: Constitutional Consciences for the Executive Branch?*

Those who find the client-driven model wanting typically advocate a more dispassionate role for the SG and OLC. Neither office is formally independent of the executive in the sense in which the courts are, or even as an independent agency, independent counsel, or State Attorney General might be.¹⁴⁷ Their independence, such as it is, results largely from institutional design, custom, and tradition, as discussed above. Nonetheless, the SG and OLC do stand apart from executive politics and policy, and carry a level of authority within the executive that potentially enables them to insist on executive branch respect for constitutional rights even when courts might not.

a. The apparent independence of the Solicitor General. Many SGs describe their role as serving not only an institutional client, but also the United States, the people, and the interests of justice. As former Solicitor General Frederick W. Lehmann famously wrote, in words engraved on the facade of the main Justice Department building in Washington, “[T]he United States wins its point whenever justice is done its citizens in the courts.”¹⁴⁸ Former Solicitor General Francis Biddle declared that “[t]he Solicitor General has no master to serve except his country.”¹⁴⁹

Biddle described the SG as an independent justice-seeker and expressly rejected the client-driven model. The SG:

[D]etermines what cases to appeal, and the client has no say in the matter, he does what his lawyer tells him, the lawyer stands in his client's shoes, for the client is but an abstraction. He is responsible neither to the man who appointed him nor to his immediate superior in the hierarchy of administration. The total responsibility is his, and his guide is only the

Levinson, *supra* note 10, at 380. For views of the proper role of private lawyers that emphasize their duty to exercise independent judgment, see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995).

147. In fact, Congress very likely could not constitutionally make the SG independent in that sense. See *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926); *Proposals Regarding an Independent Attorney General*, 1 Op. Off. Legal Counsel 75 (1977) (expressing “serious doubt” about the constitutionality of any legislation restricting the president's power to remove the Attorney General, e.g., by providing for appointment for a term and removal only for malfeasance); Janene M. Marasciullo, Student Essay, *Removability and the Rule of Law: The Independence of the Solicitor General*, 57 GEO. WASH. L. REV. 750 (1989) (arguing that Congress could not constitutionally restrict the president's ability to remove the SG).

148. See *Role of the Solicitor General*, 1 Op. Off. Legal Counsel 228, 231 (1977).

149. FRANCIS BIDDLE, IN BRIEF AUTHORITY 98 (1962).

ethic of his own profession framed in the ambience of his experience and judgment.¹⁵⁰

The official executive branch view of the SG similarly highlights his independence.¹⁵¹ An OLC opinion on the role of the SG notes that, despite his formal subordination, the SG “has enjoyed a marked degree of independence.”¹⁵² The SG:

[I]s not bound by the views of his “clients.” He may confess error when he believes they are in error. He may rewrite their briefs. He may refuse to approve their requests to petition the Court for writs of *certiorari*. He may oppose (in whole or in part) the arguments that they may present to the Court in those instances where they have independent litigating authority [and have obtained permission from him to appear separately].¹⁵³

The key reason for supporting this independence, according to the OLC opinion, is that it “is necessary to prevent narrow or improper considerations (political or otherwise) from intruding upon the presentation of the Government’s case in the Nation’s highest Court. . . . The Nation values the Solicitor General’s independence for the same reason that it values an independent judiciary.”¹⁵⁴ The opinion notes that, in contrast to the SG, the Attorney General is consistently exposed to the president’s and the cabinet’s political and policy views, making it difficult for him to separate those considerations from legal ones.¹⁵⁵ As a result, the Attorney General implements the president’s constitutional duty to “take care that the laws are faithfully executed” by delegating to the SG the framing of legal positions and, “in the ordinary course,” permitting the SG’s views to be dispositive.¹⁵⁶

150. *Id.* at 97. The OLC opinion on the role of the SG quotes this passage, but also correctly notes that “Francis Biddle may have overstated the case to some degree. Under the relevant statutes . . . the Attorney General retains the right to assume the Solicitor General’s function himself, if he conceives it to be in the public interest to do so.” Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 230 (1977).

151. *See id.* at 228.

152. *Id.* at 229.

153. *Id.* at 230.

154. *Id.* at 231. The other three reasons the opinion cites in support of the tradition of independence, in fact, support centralization, but not independence. The SG performs a clearinghouse function of coordinating legal positions within the executive branch, protects the Supreme Court from overwhelming burdens of work by screening the government’s cases, and selects the best vehicles for orderly law development. *See id.* at 231-32. Each of these functions could be fulfilled without the SG maintaining his quasi-judicial independence from the Attorney General and the president.

155. Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 232 (1977).

156. *Id.* at 234. The SG should be shielded from political and policy pressures, and his views should be dispositive “in the normal course.” *Id.* at 232. But the opinion suggests that the Attorney General should step in and take the heat in “those small number of cases with

In describing the ideal working relationship between the SG and the Attorney General, the OLC opinion stated that “the Solicitor General should be given the opportunity to consider the questions involved and to formulate his own initial views with respect to them without interference from the Attorney General or any other officer in the Administration.”¹⁵⁷ The Attorney General should not attempt to shape an SG decision merely because the Attorney General disagrees with the SG’s proposed approach, but only in the “quite rare” case in which the SG has seriously erred, or in a case in which the SG himself identifies a nonlegal, policy issue embedded in the case that calls for a policy judgment — i.e. a decision beyond his expertise and more appropriate for the Attorney General or other policymaking official.¹⁵⁸

Lincoln Caplan’s book, *The Tenth Justice*, popularized the notion of the independent SG.¹⁵⁹ The book is an extended critique of the approach of President Reagan’s second SG, Charles Fried, whom Caplan argues tarnished the SG’s independence by acting as an aggressive proxy in the courts for Reagan’s right-wing political agenda. The backdrop for Caplan’s critique is an image of the SG as a highly principled and independent legal official, insulated from political and institutional pressures from without and within the administration, seeking only to advance the best view of the law. Caplan describes the ethos of the SG’s office before Fried’s arrival as one of scholarly impartiality,¹⁶⁰ in which the SG “stood for the nation’s commitment to the rule of law.”¹⁶¹ The justices, in Caplan’s account, traditionally relied on the SG to “look beyond the government’s narrow interests” and “help guide them to the right result in the case at hand.”¹⁶² Caplan’s view is frequently invoked in confirmation hearings.¹⁶³

highly controversial policy ramifications,” in order to shield the SG from the political and policy-driven pressures that such controversial positions would engender. *Id.* at 233. In other words, the SG should have leeway to frame positions according to his own best legal judgment, and his independence should be protected by the mantle of the Attorney General’s authority in those cases in which the SG positions could trigger substantial adverse public opinion or client pressure.

157. *Id.* at 233.

158. *Id.* at 234-35; *cf.* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

159. CAPLAN, *supra* note 11.

160. *See id.* at 50.

161. *Id.* at 277. *But see* FRIED, *supra* note 11.

162. CAPLAN, *supra* note 11, at 3.

163. *See, e.g.*, 147 CONG. REC. S5586 (daily ed. May 24, 2001) (statement of Sen. Leahy) (commenting on the nomination of Theodore Olson to be Solicitor General, and citing and entering into the record an article by Caplan referring to the role of the SG as the Tenth Justice).

Scholars, too, stress the SG's independence. In a 1987 congressional oversight hearing during Solicitor General Fried's tenure, Burt Neuborne testified that "the office [of the Solicitor General] has generally functioned as a source of excellent, non-ideological advice on the state of the law."¹⁶⁴ Neuborne thought that:

[T]he Solicitor General's role as a reliable, non-ideological and, essentially, non-political source of technically excellent advice to the Supreme Court and the President about what the law is (as opposed to what it ought to be), is much more important than the Solicitor General's potential role as a President's mouthpiece engaged in a campaign to push the law in an ideologically-tinged direction.¹⁶⁵

Sanford Levinson expresses confidence that we can "expect a greater independence of judgment from the Solicitor General than we do from other presidential appointees."¹⁶⁶ David Rosenzweig similarly claims that "[t]raditionally, the Solicitor General has enjoyed considerable independence from the political forces of the executive branch and the office has developed a reputation for excellent, largely nonpartisan advocacy before the Court."¹⁶⁷

In sum, the SG is often characterized not as a client-driven lawyer, but rather as a highly independent, principled official. Indeed, if independence is measured in terms of the freedom to make important decisions without presidential consultation or approval, the SG is arguably functionally more independent than the Attorney General. Traditionally, the SG makes judgments about which cases to pursue and the positions to take in appellate and Supreme Court litigation without much, if any, substantive supervision by the Attorney General or the president, even when agency heads or other high-ranking officials might disagree with him.¹⁶⁸

b. The apparent independence of the Office of Legal Counsel. The AAG for the Office of Legal Counsel is also frequently acclaimed as a neutral, dispassionate advisor, interpreting the law more as a judge would than as a lawyer for a private client. The quasi-judicial conception of the Attorney General's opinion function, and, by extension, the function of OLC, has its classic statement in the words of President Pierce's Attorney General, Caleb Cushing. Cushing wrote that the Attorney General, in giving opinions and advice, "is not a counsel giving advice to the Government as his client, but a public

164. Burt Neuborne, *Testimony Before the Subcommittee on Oversight of the House Judiciary Committee* (Mar. 19, 1987), 21 LOY. L.A. L. REV. 1099, 1102 (1988).

165. *Id.* at 1101.

166. Levinson, *supra* note 10, at 381.

167. Rosenzweig, *supra* note 94, at 2081.

168. See Devins, *supra* note 94.

officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation.”¹⁶⁹

According to former Attorney General Griffin Bell, the Attorney General has a “duty to define the legal limits of executive action in a *neutral manner*.”¹⁷⁰ Theodore Olson, when he was AAG for OLC, explained that “it is not our function to prepare an advocate’s brief or simply to find support for what we or our clients might like the law to be”; rather, OLC seeks to make “the clearest statement of what we believe the law provides and how the courts would resolve the matter. . . . The Attorney General is interested in having us provide *as objective a view as possible*. . . .”¹⁷¹ Levinson similarly contends that when executive action is or seeks to be outside of the purview of judicial review, “[t]he President must have . . . *the ‘best,’ and not merely a ‘possible,’ argument* behind his assertion of constitutional power.”¹⁷²

Randolph Moss, head of OLC under President Clinton, finds statutory, prudential, and constitutional bases for a “neutral expositor,” or independent, quasi-judicial model of OLC.¹⁷³ In establishing an office of “Attorney General” with authority to render “opinions,” Congress alluded to the English Attorney General, a position characterized by a tradition of objective legal advice; moreover, legislative history “seem[ed] to presuppose that the advice provided [by the Attorney General would] be objective and not colored by the exigencies of a particular circumstance or policy goal.”¹⁷⁴ As a prudential matter:

Objectivity and balance in providing legal advice are the currency of the Attorney General and the Office of Legal Counsel. . . . [T]he legal opinions of the Attorney General and the Office of Legal Counsel will likely be valued only to the extent they are viewed by others in the executive branch, the courts, the Congress, and the public as fair, neutral,

169. Offices and Duties of the Attorney General, 6 Op. Att’y Gen. 326, 334 (1888). Cushing noted that the Attorney General’s opinions:

[O]fficially define the law, in a multitude of cases, where his decision is in practice final and conclusive, — not only as respects the action of public officers in administrative matters, who are thus relieved from the responsibility which would otherwise attach to their acts, — but also in questions of private right, inasmuch as parties, having concerns with the Government, possess in general no means of bringing a controverted matter before the courts of law, and can obtain a purely legal decision of the controversy, as distinguished from an administrative one, only by reference to the Attorney General.

Id.

170. GRIFFIN B. BELL & RONALD J. OSTROW, TAKING CARE OF THE LAW 185 (1982) (emphasis added).

171. Olson remarks, *supra* note 108, at 5-6 (emphasis added).

172. Levinson, *supra* note 10, at 381 (emphasis added).

173. See Moss, *supra* note 108, at 1303.

174. *Id.* at 1310.

and well-reasoned.¹⁷⁵

Moss rejects the view that OLC should give a legal green light to any conduct supported by a legally colorable, nonfrivolous argument.¹⁷⁶ The Constitution's Take Care Clause and presidential oath requirement reinforce what Moss sees as more generally "implicit in the Constitution and the very structure of [our] government": In a government established and bound by the Constitution, "[t]o act beyond the best view of the law is to act beyond those instruments that grant the official the status and authority that he or she seeks to employ."¹⁷⁷ Moss concludes that "[i]n the end, because the law is by its very nature supreme, the best view of the law must trump other interests."¹⁷⁸

III. THE UNFULFILLED PROMISE OF EXECUTIVE CONSTITUTIONALISM

The rosy accounts above portray two executive offices exercising substantial independence to render constitutional judgments that depart from the political will of the executive. Those accounts may appeal to champions of extrajudicial constitutionalism.¹⁷⁹ On closer examination, however, what is commonly called independence is revealed to be highly derivative of judicial doctrine. The SG and OLC gain their ability to say "no" to their own client typically by reference to the Court's precedents. To the extent that they shape or alter client proposals, these lawyers' "independent" positions are, in fact, married to the Supreme Court's doctrine and the Court's role as expositor of law. Those offices, thus, are likely to fail to supplement existing doctrine where the Court's underenforcement leaves gaps. Their court-centrism also means that they are not likely to tap into what the theoretical literature on extrajudicial constitutionalism celebrates as the executive's potentially distinctive institutional or populist sources of constitutional inspiration, and therefore do not offer additional or different ways of effectuating constitutional rights beyond what the Court's constitutional doctrine supplies.¹⁸⁰

175. *Id.* at 1311.

176. *Id.* at 1311-312.

177. *Id.* at 1315-316.

178. *Id.* at 1330.

179. *See supra* notes 3-11 and accompanying text.

180. This critique by no means denies the importance of top-down presidential (and congressional) constitutionalism and the capacity of a president to act in ways that are, in the spirit of the theoretical literature, informed by popular will and the institutional resources of the executive. Some presidents have had strong jurisprudential visions that pervasively informed executive conduct under their watch. President Franklin Roosevelt was elected on a platform opposing free market-oriented substantive due process and legal formalism in

A. *The SG's Strategic Client-Checking and Court-Reliant Independence*

A closer look at the writing of observers who highlight the SG's independence reveals that what they champion as independence from the government's institutional or political agenda is really either adherence to Supreme Court precedent, or is not independence from those client interests at all. What passes as SG independence usually amounts to the SG telling his client that the law, *as the Supreme Court has developed it*, would not permit the course of action the client prefers. In that sense, the SG does have significant authority to act as a constitutional brake within the executive branch. But that brake is largely either strategic or court-based.

1. *Client-Checking as Litigation Strategy*

As noted above, much of the SG's reputation for independence comes from his apparent ability to separate himself from client interests and act as a check on government by, for example, refusing certain client requests, confessing error, or declining to make the most aggressive arguments. In most such instances, however, he is not necessarily acting independently, but is simply advancing government interests in the Supreme Court in a more long-term or cross-cutting way. In fulfilling that strategic role, the SG considers the impact of any given litigation position both across the government as a whole and over time. Rather than manifesting independent constitutional judgment when he curtails an agency's more ambitious position, the SG is often merely acting strategically in order to increase his

favor of a realist jurisprudence more compatible with the emerging social welfare state. President Reagan ran in opposition to the Warren Court's rights revolution and in favor of constitutional originalism. President Clinton embraced a living Constitution that protects abortion rights, religious free exercise and a broad vision of equality. Each president brought those jurisprudential pre-commitments with him into the White House. A president with a declared constitutional vision can conceivably be constrained by it, even when such constraint is, in the moment, politically or institutionally inconvenient. The vast bulk of top-down presidential constitutionalism, however, has historically either sought to expand federal power (e.g., the New Deal jurisprudence), to restrict individual-rights constraints on government at any level (e.g., the Reagan/Bush post-Warren Court criminal justice counterrevolution and the Clinton commitment to affirmative action), or has been aimed largely at states and localities (e.g., Clinton's reproductive choice platform). There are important counterexamples, such as Reagan's property rights jurisprudence, the Bush/Ashcroft position on the Second Amendment, Clinton's position on the rights of HIV-positive service members, and various recent presidents' commitment to an expansive view of religious free exercise. The point, however, is that in most ordinary cases constitutional protection of individuals at the hands of the executive depends on a more bottom-up approach to constitutionalism, and the existing capacity of executive lawyers to protect individual rights depends largely on a court-centric approach.

credibility, reduce risks of damaging losses, and thereby better serve the government's interests over the long term.

The SG also refuses requests when he finds an inconsistency in the proposed position, viewed on behalf of the government as a whole rather than simply from the client entity's particular vantage point. The need to reconcile the legal positions of the numerous and varied parts of the executive branch and to evaluate each agency's expressed interest through a government-wide lens may lead the SG to reject the more narrowly opportunistic constitutional analysis of a particular client entity. The SG may look independent in those instances, but SG coordination of the government's diverse interests simply serves the executive's institutional interests from a broader perspective, and does not necessarily reflect an SG's independent view of constitutional constraints, such as the rights of members of the public or powers of Congress or the states.

The SG also moderates client positions in light of the government's long-term interests as a "repeat player" before the Supreme Court.¹⁸¹ The SG's effectiveness in the Court depends on his gaining and maintaining the Court's trust over time. The SG cannot afford to press every case to the hilt the way a lawyer for a private client might, because his effectiveness in future government cases would suffer.¹⁸² Indeed, that was precisely Lincoln Caplan's criticism of Solicitor General Fried. In order to serve the long-term interests of the government as a repeat player in the Court, the SG will sometimes need to disappoint his client in the short term. But, again, acting as a brake on client interests for intertemporal strategic purposes is not the same thing as independence.

2. Court-Centered Client-Checking

The SG is, however, more than a skilled strategic advocate; he also plays a role in assuring the executive's respect for the law. His is a decisive voice of executive constitutionalism. Yet, the SG's approach is fundamentally court-centered, and therefore, does little to fulfill the

181. See, e.g., Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1105, 1108 (1988) (pointing out that the various approaches he ascribes to the SG might be explained in terms of the prudence of "the only lawyer who frequently appears before the Court"; seen in those terms, each apparently distinct approach "is subsumed in the lawyer's creed: win as many cases as you can").

182. Solicitors General accordingly seek to advise the Court "in the way which will be best for the Court, and for the handling of its precedents, instead of seeking the sweeping decision most favorable to the government's short-term interests." Archibald Cox, *The Government in the Supreme Court*, 44 CHI. BAR ASS'N REC. 221, 223 (1963); see also Drew S. Days, III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma*, 22 NOVA L. REV. 679, 686-87 (1998); Erwin N. Griswold, *The Office of the Solicitor General — Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 535 (1969).

promise of a distinctively executive constitutional vision that supplements or conceivably supplants the Court's.

a. *Doctrinalism*. The definitive OLC opinion on the role of the SG maintains that the SG's independence stems, in part, from the fact that the SG is "an officer of the Court" with "a special duty to protect the Court in the discharge of its constitutional function."¹⁸³ The picture is one of fidelity to the law *as the Supreme Court has developed it*. This is hardly surprising given that the SG's role is to litigate, his principal audience is the Court itself, and that he formulates positions with a view towards obtaining the Court's imprimatur. One of the SG's key roles is to "provide the Court with an accurate and expert statement of the legal principles that bear upon the questions to be decided."¹⁸⁴ In that account, "the law" is the law as delineated by the Supreme Court. As such, the SG's "independence" is unlikely to provide any systematic corrective to the Court's jurisprudence, nor, generally, to yield a version of constitutionalism free from the institutional limitations that constrain the Court but need not similarly constrain the executive.

Given that implicit equation of independence with adherence to precedent, it is not surprising that commentary underscoring the importance of the SG's independence crested in reaction to efforts by President Reagan's Solicitor General Charles Fried to push constitutional jurisprudence in a more conservative direction by seeking to limit and overturn various precedents of the Warren and Burger Courts. Caplan's critique of Fried as failing to perform his function as the "Tenth Justice" rests on an assumption that the best, most accurate view of the Constitution was the then-existing Supreme Court doctrine, and that therefore Fried's attempt to challenge the status quo was deeply problematic. Neuborne's vision of an independent SG is similarly one who gives advice "about the state of the law," i.e. advice "about what *the law is (as opposed to what it ought to be)*."¹⁸⁵ These views are plainly opposed to distinctly executive constitutionalism.

Even the standard the SG uses to decide whether to confess error — a practice so often cited to distinguish the SG's independence from a private lawyer's service to client self-interest — is really only a concrete example of court-centered doctrinalism. In practice, the SG confesses error when the victory in the lower court appears unsustainable in light of the Supreme Court's own precedents. The SG confesses error when he believes he lacks reasonable arguments in support of the government's position — that is, when he is almost

183. Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 231 (1977).

184. *Id.*

185. Neuborne, *supra* note 164, at 1101 (emphasis added).

certain to lose upon Supreme Court review. The SG's apparent independence is in this way, too, derivative of the Court's doctrine and driven by judicial precedent.

b. Supreme court expertise. An important practical explanation of the SG's aura of independence within the executive branch is his unique relationship to the Court. The SG's duties focus overwhelmingly on the Supreme Court, and he is constantly aware that his decisions will be subject to the Supreme Court's judgments. It is the exclusivity, intensity, and scope of the SG's work with the Supreme Court and its precedents that give him an unparalleled opportunity to develop expertise in the substance of the Court's doctrine, and to become intimately familiar with the Court's practices and procedures. Other high-ranking officials can read and reason from Supreme Court opinions, but they typically defer to the SG. They recognize the SG's special stature and relationship to the Court and his intimate and broad-ranging familiarity with Supreme Court doctrine, in contrast to their own expertise, which often is more subject-matter-specific and mixes law, policy, and politics. The SG's ability to predict the Supreme Court's reception of a proposed government position tends, therefore, to be widely respected and relied upon within government. It uniquely arms him to dissuade other officials from insisting that he present positions that he thinks are not worth pursuing. But that authority stems almost entirely from the SG's familiarity with the Court and its doctrine, and is therefore derivative of judicial constitutionalism.

The centralization of the SG function reinforces a court-centered executive approach to the content of constitutional law. Focusing litigation authority in a single official who is "learned in the law" makes sense if one subscribes to a doctrinal conception of constitutional law. It makes less sense from a perspective that sees constitutional law, at least in the hands of a political branch, as a more empirically grounded enterprise fueled by considerations of the institutional capacities of relevant executive offices and employees. One might expect the postrealist awareness of the relevance of empirical settings and institutional relationships — blurring the line between law and politics — to have eroded the authority of and deference paid to the SG by other officials, who usually have greater political acumen and policy expertise than he does. Alternatively, one might expect to see political or policy expertise become an ever-larger part of the SG's qualifications. After all, if the SG knows a great deal about the Court and its decisions, but little or nothing about what makes good policy or how a particular executive agency or system operates, why should an agency secretary allow the SG to decide how hard, how far, and with what arguments to push the Court to permit that agency to follow its preferred path?

The Court's own doctrinalism and commitment to judicial supremacy, however, shape the nature of advocacy before the Court: In speaking to the Court, the government continues to find it useful to rely on the kinds of doctrinal analyses that the Court might plausibly adopt. The SG's special expertise in the Court's doctrine thus continues to bolster his ability to act with apparent independence within the executive branch. Drawing on an authority that is derivative of the Court's, the SG can in some cases act as a brake on his clients' unconstitutional conduct. It is a brake, however, largely on the Court's terms.

c. Prioritizing judicial resolution. The SG also acts in a court-centric way by prioritizing judicial resolution of claims against the government, pressing arguments and defenses that might not represent the best constitutional view, and letting the Court decide whether to accept borderline contentions and deliver the government a perhaps undeserved benefit. Several commentators who champion the SG's putative independence highlight the SG's role, not in making his own quasi-judicial determinations, but in facilitating judicial resolutions. On that view, were he to do otherwise, the SG would usurp the Court's decisional function. The demanding standard for confessions of error, for example, calls on the SG to defend against a constitutional challenge where there is a reasonable ground for doing so, even if, in his own best view, the federal action was unconstitutional. Thus, rather than expressing his own independent judgment and declining to pursue a case in favor of more promptly remedying the violation, the SG under this approach makes it a priority to funnel disputes to the Court for decision, and to avoid making decisions that would pretermitt Court consideration. As Drew Days puts it, "[t]he Solicitor General's job is to . . . try to guide issues over which the lower courts have differed *to the Supreme Court for definitive resolution.*"¹⁸⁶ Michael McConnell, too, stresses the SG's role as a facilitator of Supreme Court decision making, not as an independent source of authoritative interpretation. In McConnell's view, even if his own independent judgment would lead the SG to find a practice unconstitutional, he should:

[P]reserve[] the adversary posture necessary for proper resolution of a case by the judiciary. . . . If the Solicitor General declines to defend the government interest — if he confesses error or concedes the case — the case will be lost by default, unless private parties to the case have standing to defend the government's interests or the Court intervenes. In effect, the Solicitor General becomes the final arbiter of what the Constitution means.¹⁸⁷

186. Days, *supra* note 90, at 650 (emphasis added).

187. McConnell, *supra* note 181, at 1117.

As discussed in Part I, above, however, in order fully and accurately to identify and remedy constitutional wrongs, it is entirely appropriate for the SG in some circumstances to be the final arbiter, foregoing points that the Court might have granted him had he pressed them. Yet the SG's practice remains court-centric in this way, prioritizing judicial resolution of constitutional questions and tending to accept the Court as both the supreme and exhaustive interpreter of constitutional rights.

B. *OLC's Court-Derived and Court-Mimicking Independence*

The apparent independence of the AAG for the Office of Legal Counsel is, like the SG's, also largely derivative of the Supreme Court's independence. In advising the government on how to comply with the Constitution, OLC relies heavily on judicial doctrine, and OLC's persuasiveness rests largely on that judicial authority. OLC, like the SG, inevitably faces clients urging constitutional interpretations most hospitable to government. To the extent that OLC successfully uses doctrinally based arguments to resist those pressures, it exercises a court-derivative form of independence akin to that of the SG.¹⁸⁸

OLC also brings some of the passive virtues of the judiciary into the executive branch, but in an incomplete way. The weaknesses of OLC as a shadow court, together with the distinct potential of the executive to protect constitutional rights in a more active, empirically grounded, and institutionally diverse set of ways, suggest that quasi-judicial neutrality is not the only, and perhaps not the best, model for OLC.

1. *Doctrinalism and Prioritizing Judicial Resolution*

To the extent that there is relevant judicial doctrine on an issue that OLC confronts, that office generally treats it as authoritative and, where the doctrine is inconclusive, OLC seeks to implement its best prediction of the Court's approach. That court-centered method is laid out in a relatively recent OLC opinion by former OLC Assistant Attorney General Walter Dellinger:

188. Interestingly, the very provision of the Model Code that makes a general distinction between the lawyer's role as a court advocate and as an assertedly more dispassionate legal adviser depends heavily on court doctrine for the latter's neutrality: "In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to *what the ultimate decisions of the courts would likely be as to the applicable law.*" MODEL CODE OF PROF'L RESPONSIBILITY EC 7-3 (1981) (emphasis added). A court-centric approach in decisional areas where the courts defer to the executive, however, simply drops the constitutional ball where the executive is supposed to run with it.

We believe that the constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power. While the Supreme Court's decisions interpreting the Constitution cannot simply be *equated* with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution. "It is emphatically the province and duty of the judicial department to say what the law is."¹⁸⁹

Thus, even though the executive also has a "special role" in the interpretation of the Constitution (and OLC in particular is assigned that role as to action not yet taken), the OLC opinion adheres to a judicial-supremacist reading of *Marbury*.

According to OLC, a substantively court-centered approach to executive constitutionalism applies, not only where there is settled Court precedent on point, but even where the Court's existing doctrine is not determinative of the constitutional question. Dellinger thus advised President Clinton to execute a federal statute that required the armed forces to fire all HIV-positive personnel even though the relevant Court doctrine was unsettled and the president believed the statute was unconstitutional, because it was predictable that the Court would sustain the law.¹⁹⁰ The opinion concludes that, "if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute";¹⁹¹ he has the authority not to execute it only if in "exercising his independent judgment, [he] determines both that the provision would violate the Constitution and that it is probable that the Court would agree with him."¹⁹²

Relatedly, OLC is also court-centered in that it seeks as a procedural matter to maximize opportunities for judicial review. The Dellinger opinion on the scope of the nonenforcement power illustrates that procedural court-centrism as well. It rejects nonenforcement of the HIV-exclusion law, in part, because to decline to enforce it would mean that no service member would suffer the

189. The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 127 (1996) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), reprinted in *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 617, 620 (H. Jefferson Powell, ed. 1999); see also Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199, 200 ("The Supreme Court plays a special role in resolving disputes about the constitutionality of enactments.").

190. 18 Op. Off. Legal Counsel 124 (1996) (advising the president of his authority to enforce but not defend, in response to a question that arose regarding Section 567 of the National Defense Authorization Act for FY 1996, Pub. L. No. 104-106, 110 Stat. 186 (1986)); see Johnsen, *supra* note 13.

191. *Id.* at 200.

192. *Id.*; see also Johnsen, *supra* note 13 (articulating an approach to nonexecution that generally accords with the Dellinger OLC opinion, and advancing a contextualized approach to the exercise of the nonenforcement power).

injury that would give him standing to challenge the statute in court. On this view, avoiding such injury takes a back seat to enabling judicial review, so that the Court might decide the constitutional dispute between the Congress that enacted the law and the president who believes that it is unconstitutional.¹⁹³ Prioritizing judicial resolution over the executive's own determination of unconstitutionality necessarily fails to capture putative benefits of any distinctively executive approach to constitutional interpretation, and gives short shrift to constitutional rights, at least as the executive understands them.¹⁹⁴

2. *Incomplete Court Mimicry*

Because much of the demand for OLC advice concerns issues that are nonjusticiable, unlikely to spark court review, or subject to some degree of judicial underenforcement of substantive constitutional norms, OLC often has little or no relevant court doctrine on which to rely, and thus no way to pass the buck back to the courts. In those situations, OLC's independence, such as it is, relies not on court precedents, but on structurally mimicking judicial process by remaining somewhat institutionally insulated from clients, passively waiting for matters to come to it, specializing in law and not policy, and generating and relying on a body of written legal precedents. But its mimicry is incomplete. OLC stands in an ambiguous role between judge of and counsel to the executive, and the awkward coexistence of the client-driven and neutral-expositor models leads to confusion and inconsistency on the part of OLC lawyers about what role they properly play.

193. For critiques of that approach, see David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61, 65-66 (“[T]he ‘need’ for judicial assistance [in determining the constitutionality of a statute] should be understood less as an a priori constraint on the President’s nonenforcement power than a judgment to be made by the political branches.”); Peter L. Strauss, *The President and Choices Not to Enforce*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 107, 119 (questioning whether “acting to secure review is, in itself, a factor that bears on the President’s responsibility under his oath”).

194. OLC also draws its authority from the Supreme Court more indirectly, such as by frequently hiring Supreme Court clerks as attorney advisors. (Of the approximately ten attorney advisors who were hired in the 1998-2000 period, half had just finished a Supreme Court clerkship, two more came from fellowships in the SG’s office, and two went directly from their stints as OLC attorney advisors to clerk at the Supreme Court.) Those young lawyers come to the office steeped in the Court’s jurisprudence and attuned to the Court’s own confidence in the supremacy of its constitutional interpretations. Although these lawyers are often significantly junior to, and less experienced than, the agency and White House counsels to whom OLC advice is directed, their clerkship experience is one factor that may bolster OLC’s credibility to say “no” to constitutionally questionable client proposals.

a. Structured myopia. When OLC lawyers employ a quasi-judicial process to buttress their independent stance, they are hobbled by the absence of a mechanism for development and expression of insight or expertise on most individual-rights questions. Courts receive briefing from both sides. The SG's office usually also has the benefit of some sort of adversary presentation of the issues because it acts after cases have been briefed and decided in lower courts, and receives a memo from the division or agency seeking to appeal, which presents counterarguments to the arguments upon which the lower court relied. OLC, in contrast, receives the requestor's view of the question, but ordinarily hears no adverse view. Opposing views are usually unavailable to OLC because the programmatic interests of the requesting entities support only one side. Virtually all requests for OLC advice are privileged and confidential, so there is no opportunity for members of the public, academics, advocacy groups, or others to supply the otherwise-missing information or analyses. If, for example, the FBI were to seek an OLC opinion on the constitutionality of electronic searches of email, there is no entity within the executive that would ordinarily articulate a proprivacy perspective — and certainly not anyone with factual and legal sophistication equal to the FBI's countervailing experience with law-enforcement needs.¹⁹⁵ Individuals outside the government who would be affected by the proposed searches would have no knowledge of or occasion to speak to the nascent plan.¹⁹⁶ Thus, even where OLC seeks to be quasi-judicial, the information presented to it is likely to be systematically skewed, leading to underenforcement of constraints on executive power.

b. Court-like passivity. OLC's ability to protect constitutional rights also suffers from its passivity, because it waits for matters to come to it on an optional basis. One of the defining features of judicial power in the United States is its passivity, with the judiciary deciding controversies only if and when they are brought to it. The courts are like fixed cannons — only able to shoot at what happens to come within their sights. Executive power, in contrast, is typically characterized by the taking of initiative, including active agenda-setting, investigating and monitoring for problems, and pursuing chosen priorities. Although there is nothing inherent in the task of legal interpretation that would require judicial-style reticence on the

195. *But see infra* Part V.A.2.

196. Government initiatives that are formalized into regulations do, of course, trigger public input through the notice and comment period required under the Administrative Procedure Act. Beyond the rulemaking context, however, it was my experience that only on very rare occasions did outside people or groups write to or request to meet with OLC to express a view. The public generally had no way of knowing what issues were under consideration at any given time.

part of the executive entities principally charged with that task, OLC mimics the courts' passivity. It addresses only those issues brought to it and, as noted above, there is no general requirement that novel legal issues be submitted to OLC if agencies or officials are content with their own decisions. When considered in conjunction with the SG's similarly passive role, it is particularly striking that the only offices within the executive branch specifically tasked with constitutional interpretation traditionally have not enjoyed one of that branch's distinct advantages, namely, the power to take initiative to address problems affirmatively.

That passivity adds to the likelihood that executive branch constitutional interpretation systematically underappreciates threats that the government's own conduct poses to constitutional rights and liberties. Courts can count on aggrieved individuals to become plaintiffs and bring constitutional questions to them. But within the executive branch, there is generally no mechanism for the executive to unearth and deliberate over potential individual-rights problems. When agency leadership chooses not to initiate consideration of potential constitutional obstacles to or requirements of their own proposed programs or activities, OLC, too, remains silent. Thus, although OLC is thought to act as a constitutional conscience for the executive branch, it is a conscience that is more readily avoided than engaged.

c. Paucity of published precedents. OLC's ability to play a court-like checking role is also handicapped by its sharply limited body of written precedents. Its opinions and reasoning are often not memorialized, or, even if written, are not readily available to the public, to others within the executive branch, or even to others in the Department of Justice. OLC has a substantial internal database,¹⁹⁷ but only a very limited body of published opinions available to entities outside that office, even to the rest of the Justice Department or the executive agencies, let alone the general public. The executive branch thus lacks a fleshed-out system of interbranch precedents on constitutional rights to supplement judicial doctrine, and to guide and inform other executive officials and the public.¹⁹⁸ When precedents are

197. OLC's *internal* database is an extremely valuable, yet limited, tool. Oral advice is not systematically recorded, not all written advice is electronically recorded, and the paper filing system is unwieldy. The electronic database records only objections that were ultimately raised to the client, and thus lacks explanations of why no constitutional objection was asserted where OLC considered a potential objection but ultimately determined that it was not a problem. It is thus ordinarily unclear in retrospect whether an issue was simply never raised, or was carefully considered and found to pose no obstacle.

198. Most of the published OLC opinions address questions of separation of powers or sources of executive power, with only the rare opinion addressing protections for individual rights. See generally THE CONSTITUTION AND THE ATTORNEYS GENERAL (H. Jefferson

secret, the law's commitment to consistency can get no traction, and officials will have trouble abiding by OLC's views since they cannot know most of them.¹⁹⁹ Perhaps most importantly, as illustrated by the second Bush administration's prompt disavowal of the OLC torture memo only after that memo was leaked to the public, opinions that are not disclosed cannot benefit from public scrutiny and critique.²⁰⁰ The very limited publicity of OLC opinions keeps its work of marginal practical importance in guiding executive conduct.

IV. IMPLICATIONS FOR EXECUTIVE CONSTITUTIONALISM

The SG's and OLC's roles within government and their relationships to their government clients are important terrain on which our various aspirations for executive branch constitutionalism play out. I have argued that, where the executive branch's respect for constitutional constraints does not spring directly from court order or presidential campaign promise, it relies heavily on backstopping from Supreme Court precedents. The SG is court-centered, institutionally isolated from politics and the practicalities of governing, and deals with past action, not advance prophylactics. Also, OLC's court-centric doctrinalism and institutional separation, its court-like passivity rather than executive-style initiative-taking, and its practice of taking questions only from agency principals prevents it from being a source of prospective, affirmative, factually grounded, distinctively executive constitutional effectuation.

Executive processes that echo the courts' reliance on judicial doctrine, passivity, and relative isolation from the institutional functions of the executive are helpful to bring the courts' teachings and institutional approach to bear within the executive. In other respects, they fall short.

Powell ed., 1999) (compiling and reprinting selected, important OLC published opinions, and including an appendix listing all others).

199. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029 (1990). The realities of OLC's small size and lack of mandatory jurisdiction make its clients' norm-internalization particularly important. No amount of decisions that OLC could feasibly make could begin to fulfill directly the executive branch's actual need for constitutional guidance, making it all the more important that OLC foster constitutional self-monitoring within the executive by openly giving reasons for those decisions it does make.

200. See Memorandum from the Office of Legal Counsel to James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), at <http://www.usdoj.gov/olc/dagmemo.pdf> (withdrawing and replacing OLC's August 2002 torture memo); Ruth Wedgwood & R. James Woolsey, *Law and Torture*, *WALL ST. J.*, June 28, 2004, at A10 (noting that "the Justice Department took the unprecedented step of rescinding the August 2002 foundational OLC opinion "Standards of Conduct for Interrogation"); see generally, Koh, *supra* note 114.

First, the court-centered approach virtually eliminates any executive recognition of constitutional duties that might pick up where the courts leave off. Lawyers in the SG's Office and OLC are unlikely to insist that government conduct be curtailed in the name of the Constitution unless they can ground their position on judicial doctrine.²⁰¹ Those offices' reliance on the Court's doctrine as describing the high water mark of the executive's constitutional duties means that their work is destined to recapitulate the shortfalls of the courts, unnecessarily truncating executive constitutionalism. The gaps in judicial doctrine that call for constitutional interpretation within the executive branch are not bridged, but replicated, by the executive's own court-centered analysis.

The court-centered analysis tends to treat court nonenforcement as a free pass. The SG's and OLC's treatment of judicially unresolved constitutional questions is skewed in favor of government power and against constitutional constraint because, where the court has not or likely will not prohibit executive conduct, the court-centered interpreter concludes that there is no relevant constitutional obstacle to it. Outside of judicially announced limits, the SG and OLC lack reliable methods for delineating executive self-limitation.

Instead, the SG ordinarily presses plausible cases or arguments in support of governmental prerogative, without regard to whether the Constitution might be better understood to require more restraint. To the extent that OLC acts before, and often without, court guidance, yet seeks to mimic a dispassionate, court-like process, its court mimicry is similarly skewed because OLC does not ordinarily even hear the case for constraint; there simply is no systematic provision within the government for advocacy of constitutional constraints. Except in scattered islands where the executive has affirmative responsibility for constitutional enforcement, such as on certain civil rights questions,²⁰² executive analysis is likely to be systematically biased against constitutional rights or other constraints.

Second, the centralization of executive branch constitutional deliberation in the elite OLC and SG's Office suggests to other government officials that constitutional concerns are taken care of elsewhere, effectively lulling them into thinking they need not examine their own spheres through a constitutional lens. That phenomenon echoes James Bradley Thayer's classic point about the impact of judicial review on political life: Thayer observed that, when constitutional "correction of legislative mistakes comes from the

201. OLC frequently works with executive clients to minimize constitutional problems by helping to find alternative means to meet client objectives, but I refer here to situations in which constitutional difficulties cannot be sidestepped so neatly.

202. See *infra* Part V.A.2.

outside” in the form of judicial review, it “dwarf[s] the political capacity of the people,” and “deaden[s] its sense of moral responsibility.”²⁰³ A similar tendency occurs within the executive branch as a result of the centralization of primary responsibility for constitutional analysis in the hands of the “experts” — the SG and OLC — leaving agency lawyers less inclined to shoulder responsibility for grappling with difficult constitutional questions and exercising constitutional self-restraint even when no court at the behest of any private party would likely succeed in imposing it.

That is especially problematic under the client-driven approach, insofar as OLC and the SG take their cues from clients who themselves lack habits of constitutional vigilance.²⁰⁴ Agency personnel, who often are the only ones with the practical experience “on the ground” to perceive constitutional problems and appreciate ways they could be ameliorated, do not ordinarily view doing so as part of their jobs. At the same time, the separation of OLC and the SG from the day-to-day operations of government, their custom of receiving input and inquiries only from the principals at the client entities, and those principals’ latitude not to seek OLC advice at all, mean that those offices are in no position to assure that constitutional rights are fully effectuated.

Third, the institutional separation of the SG and OLC from policy and politics, cast as being protective of countermajoritarian rights within a majoritarian branch, is in tension with aspirations for a distinctive executive constitutionalism. Demands for a more informed and grounded analysis, free from the institutional constraints that govern the courts, remain unmet because OLC and the SG are almost

203. JAMES BRADLEY THAYER, JOHN MARSHALL 106-07 (1920); *see also, e.g.*, TUSHNET, *TAKING THE CONSTITUTION AWAY*, *supra* note 8, at 55-66 (defining “judicial overhang” as the effect of the very presence of judicial review in encouraging others, including the political branches, not to take responsibility themselves for constitutional compliance); Robert Nagel, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 380, 382 (1988) (“[W]e are becoming accustomed to the idea that the direction, the emphasis, even the mood of Supreme Court opinions is a kind of official orthodoxy binding on everyone else in the society.”).

204. *Cf. Brest, supra* note 145; *see also* Paul Brest, *Congress as Constitutional Decision Maker and its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 98-99 (1986) (observing that “[i]f Congress ever had a tradition of systematically considering the constitutionality of its own legislation, the tradition has disintegrated. For every legislator who openly asserts that constitutional questions belong exclusively to the judiciary, there are dozens who act that way.”); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 588-89 (1983) (describing Congress as “not ideologically committed or institutionally suited to search for the meaning of constitutional values,” but instead as viewing its “primary function in terms of registering the actual, occurrent preferences of the people — what they want and what they believe should be done,” and so readily “passing the hard questions to the courts”) (quoting Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-10 (1979)).

as aloof as the courts from both the problems and practical capacities of the executive branch. If the courts are institutionally ill-equipped to impose constraints on prosecutorial discretion, for example, or to second-guess assertions of national security interests, so, too are the SG and OLC. The lawyers in OLC and the SG's Office are, like judges, neither schooled nor steeped in the norms and practicalities of getting the work of government done. They operate in a kind of naive isolation from the institutional capabilities of their client agencies, largely missing the added insight that the executive's concrete experience, distinct institutional expertise, and vantage point could afford.

The SG and OLC thus lack thick experience with the kinds of matters that are at the heart of the executive branch's potentially distinct contributions to constitutional analysis. Much of constitutional law pits public needs for efficiency, security, administrability, and the like, asserted by the government, against individual claims of right. The precise lines drawn depend in part on contextual assessments of the importance of government interests, and the feasibility of serving them well in alternative ways. The SG and OLC hear from their client agencies about the practical needs, capabilities, and constraints of governing, yet they generally lack the kinds of experience and expertise that would permit them to evaluate or question client contentions much more deeply than could a court. When government officials in the military, law enforcement, immigration, or homeland security, for example, contend that the nation's safety depends on practices that burden the freedom, privacy, or equality of certain groups, the SG and OLC lack recourse to any commensurate expertise to validate or reject such claims.²⁰⁵ Those lawyers are similarly hamstrung with respect to a broad range of other claims relating to the executive's institutional capacity: if a client agency asserts that it simply lacks the capability to accommodate HIV-positive or openly gay service members on warships, to set up procedures or criteria to eliminate apparent racial bias in prosecutorial decisions, or to expedite the clearance and release of persons mistakenly detained in investigation of terrorism, the executive's own top constitutional lawyers ordinarily would not be in a position to evaluate those contentions critically. The mini separation of powers within the

205. In this respect, the "mini separation of powers" within the executive may have contributed to the abuses of prisoners at Abu Ghraib by partitioning responsibility, insofar as the legal advice may have led programmatic officials to believe they were legally authorized to use extreme humiliation and fear to extract information, and the lawyers may have believed that it was up to the political and operational officials, not the lawyers, to "make the right call." See generally SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004) (tracing connections between the authorities outlined in the August 1, 2002, OLC memo and the subsequent abuses of prisoners in Iraq); Posner & Vermeule, *supra* note 15.

executive, which places the SG and OLC apart from the day-to-day work of governing, also leaves them shorn of much of the distinctive, institutionally and factually grounded insight that the executive might sometimes employ in support of constitutional rights, rather than only against them.

Finally, constitutionalism by the political branches is frequently hailed as more populist or democratic than the judicial brand.²⁰⁶ Insofar as the executive branch is concerned, however, hopes for a democratic, populist constitutionalism have largely foundered on the institutional separation of the SG and OLC from policy and politics. Neither the insight of the public, nor the initiative-taking character of the executive branch, nor the democratic political legitimacy available to the representative branches, applies much, if at all, to the work of the SG and OLC. Constitutional interpretation in the hands of the executive's constitutional lawyers relies overwhelmingly on the traditional constitutional sources used by courts, such as text, history, and judicial precedent. In the hands of the SG and OLC, standing aloof from politics, the potentially distinctive democratic voice of the executive branch is muted, and both the populist vitality and legitimacy attributed to extrajudicial constitutionalism are largely unfulfilled.

V. ENABLING EXECUTIVE CONSTITUTIONALISM

The courts indisputably do not and cannot fully assure our enjoyment of our constitutional rights, and it is equally clear that the federal executive has an independent constitutional duty to fulfill the Constitution's promise. Executive constitutionalism seems ripe with promise. Yet, it is striking how limited and court-centered the executive's normative and institutional approaches to constitutional questions remain.

One conceivable way to avoid the pitfalls of court-centric executive lawyering on one hand and constitutional decisions warped by political expedience on the other would be to make the Solicitor General and Office of Legal Counsel — or perhaps the entire Department of Justice — as structurally independent as an independent counsel or independent agency.²⁰⁷ Making the SG and OLC independent in order to insulate them from politics presumably would alleviate the “majoritarian difficulty” resulting from their service to elected clients. Promoting fuller independence in that sense does not, however,

206. See *supra* notes 3-11 and accompanying text.

207. See *Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93rd Cong. (1974) (hearings conducted in the wake of the Watergate scandal regarding whether the Justice Department could be made independent of presidential control).

appear to be clearly normatively attractive, constitutionally permissible, nor particularly feasible. In all the criticism of our current constitutionalism, there is little call for an SG or OLC that would act, in effect, as a fully insulated and jurisprudentially autonomous constitutional court within the executive branch, operating with even less transparency and accountability than the Supreme Court. Moreover, as a practical matter it would be complex and problematic to increase the independence of the SG and OLC. The federal government faces Article II obstacles to formally insulating executive lawyers from politics and institutional pressures, and the president and his administration likely would be less amenable to guidance from such unaccountable lawyers.²⁰⁸

The challenge, rather, is to draw forth from the executive a constitutional consciousness and practice that helps the government actively to seek to fulfill the commitments of the Constitution and its Bill of Rights, interpreted by the executive as guiding principles for government. Adjustments to executive branch constitutional process and culture should be favored if they encourage the executive to use its experience and capacities to fulfill its distinctive role in effectuating constitutional guarantees. There is transformative potential in measures that break ingrained executive branch habits of looking to the Constitution only as it is mediated through the courts, and of reflexively seeking, where there is no clear doctrinal answer, to minimize constitutional constraint. It is difficult fully to imagine what kinds of changes would best prompt executive lawyers and officials to pick up constitutional analysis where the courts leave off, and to rely on the Constitution as an affirmative, guiding mandate for government action; what follows are not worked-out proposals, but are meant to be merely suggestive.

A. Correcting the Bias Against Constitutional Constraint

As we have seen, the SG's and OLC's default interpretive approach to individual rights and other forms of constitutional constraints on government is to follow what clear judicial precedents there are and, where precedents are not squarely to the contrary, to favor interpretations that minimize constitutional rights or other constitutional obligations on federal actors. Those court-centered and narrowly self-serving executive traditions produce a systematic skew against individual rights.

208. Those obstacles are not mirrored in the constitutions of states like New Jersey and Tennessee, whose independent attorneys general are protected from removal by the chief executive. *See* N.J. CONST. art. V, § VI.3; TENN. CONST. art. VI, § 5.

1. *Encourage Express Presidential Articulation of Commitment to Constitutional Rights*

To the extent that a president articulates his own rights-protective constitutional vision with any specificity, he ameliorates the tension his constitutional lawyers otherwise face between advancing individual rights and serving their boss's presumed interest in maximum governing flexibility. Case or controversy requirements and restrictions against courts issuing advisory opinions do not, of course, apply to the executive's internal constitutional decisionmaking, and presidents can better serve individual rights to the extent that they expressly stake out their constitutional commitments in general and in advance of any concrete controversy.²⁰⁹ When the president takes a stand for advancing abortion rights, property rights, disability rights, "charitable choice," a right to bear arms, or full remediation of race and sex discrimination, he signals to his lawyers that they should, in those areas, set aside their default bias in favor of preserving executive prerogative, even if it requires extra executive effort or restraint to do so.

If presented in a concrete setting with a choice between interpreting and applying the Constitution in fully rights-protective ways or sparing themselves the effort where Supreme Court precedent can be read not to require it, government officials typically default to the latter course without considering whether they might thereby be giving short shrift to a constitutional duty. A president's stated commitment to protection of particular rights, however, flips the default position with respect to those rights, acting as a spur to executive-branch lawyers and other personnel to work to give effect to constitutional rights even where, for a range of institutional reasons, the courts would not. A president is thus uniquely situated to facilitate full executive-branch constitutional compliance by precommitting himself to a rights-protective constitutional vision, and thereby making clear that respect for constitutional rights is part of the executive's interest, not counter to it.

209. Any presidential expression of support for individual rights can have a constraining effect, but commitment before the fact plays an especially important role in practice. The president will often be unaware of particular instances of executive conduct with constitutional implications. When a matter is sufficiently important that it does come to his attention, by the same token the accompanying pressures to interpret the Constitution in narrowly self-serving ways may also be acute. Constitutional rights are more likely to be respected by a government with rights-protective marching orders from the president. Institutional separation is but one strategy for blunting the potential opportunism of politics and institutional pressures; precommitment is another — and, in the context of executive-branch constitutionalism, one that has the benefit of building on rather than seeking insulation from any popular mandate the president may have to more fully effectuate constitutional rights.

The reality, however, is that direct presidential constitutionalism is generally stated at a high level of generality as “campaign rhetoric” and is relatively rare, while concrete and particular constitutional-rights questions arise every day within the executive branch. Moreover, a president’s expression of commitment to certain rights that he and his party view as a priority could be thought to carry the negative implication that other rights need not be so vigilantly protected.²¹⁰ For a more broad-based and consistent approach, we must also look down into the executive bureaucracy for ways to enhance executive-branch attention to constitutional rights.

2. *Provide Institutional Support for Affirmative Rights-Consciousness Within the Executive Branch*

Supplying the “missing-plaintiff perspective” within the executive branch can counteract the executive tendency to reflexively overprotect its own prerogatives. Several existing arrangements within the executive branch suggest ways of supplying the missing-plaintiff perspectives.

Islands of affirmative commitment to individual rights have arisen where the federal government has constitutional enforcement responsibilities vis-à-vis state or local governments.²¹¹ When the federal government sues states or localities for employment discrimination, unconstitutional conditions of confinement, or racial profiling by police, for example, it develops affirmative expertise in constitutional rights protection. To the extent that the federal government itself has functions parallel to those it monitors in the states, the standards the federal government advocates for the states presumptively also apply to it. Thus, the federal government’s monitoring of the states’ respect for individual rights can have a spillover effect that constrains the federal government as well.

210. It may be that a legitimate characteristic of executive branch constitutionalism is prioritization of certain rights that shifts with the popular mood of the nation, so it is not entirely clear whether a certain amount of singling out is illegitimate.

211. *See, e.g.*, 42 U.S.C. § 1973a (2000) (authorizing the U.S. Attorney General to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments); 42 U.S.C. § 1997c (2000) (authorizing the Attorney General to enforce constitutional and statutory rights of persons residing in state institutions); 42 U.S.C. § 2000d (2000) (“Title VI”) (authorizing federal government entities that disburse federal funds to ensure nondiscrimination on grounds of race, color, or national origin under any program or activity that receives federal financial assistance); 42 U.S.C. § 2000e (“Title VII”) (providing for enforcement by the federal government against federal and state employers of, inter alia, prohibition of disparate treatment that is coextensive with requirements of the Equal Protection Clause); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 352 (1978) (plurality opinion of Brennan, J., concurring in the judgment in part and dissenting in part) (expressing the view that “Title VI’s definition of racial discrimination is absolutely coextensive with the Constitution’s”).

For example, the Elementary and Secondary Education Act of 1965 authorizes the United States Attorney General to bring suit to enforce the Equal Protection Clause against violations by local school boards or public colleges.²¹² The executive relied on that law to challenge the Virginia Military Institute's policy of excluding women.²¹³ The constitutionality of single-sex education more generally was close to the surface in that litigation, but the Court's passing, cryptic reference to the issue left it unresolved.²¹⁴ When the White House and the Department of Justice later sought to develop a position on the constitutionality of amending its Title IX regulations to more generally encourage single-sex schools,²¹⁵ the Civil Rights Division as well as the Department of Education had relevant expertise to bring to the table. The Civil Rights Division's role litigating the VMI case, together with its long experience litigating equality issues in a range of other contexts, could inform the executive's deliberations in ways that other executive entities could not. The Civil Rights Division, as an internal government entity with rich experience in litigating equal protection in education from a plaintiff's perspective, had the capacity to engage with the Department of Education and other policy makers that were eager to provide more latitude for education experimentation. The Civil Rights Division could play a role in the executive's constitutional deliberations that government policy makers lacking the Division's expertise in equality law, and perhaps eager to make a splash with a new, inexpensive education-reform idea, would not likely have fulfilled in its absence.

Congress has assigned the executive such an enforcement role in only a very few areas, however, and the trend has been toward greater federalism-based deference to state and local governments. In most areas, there simply is no institutionalized voice for constitutional constraint and individual rights within the executive branch. Attorney General Janet Reno apparently recognized and sought to address that shortcoming at least partially when she convened a Privacy Council within the Justice Department. The Privacy Council was, in effect, an advocacy group within the executive to discuss and help to minimize incursions that executive activities might make on the personal privacy of members of the public. The group included ex officio members

212. See 42 U.S.C. § 2000c-6 (2000).

213. *United States v. Virginia*, 518 U.S. 515 (1996).

214. *Id.* at 534 n.7.

215. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 69 Fed. Reg. 11,276-11,283 (proposed Mar. 9, 2004) (to be codified at 34 C.F.R. pt. 106.34(b)(1)(I)).

from a wide range of components and bureaus within the Justice Department whose work might have privacy implications.²¹⁶

There is inadequate public information available to assess the Privacy Council's effectiveness. Its nonlitigating character suggests that it could potentially better avoid court-centrism and so, perhaps, be proactive about executive capacity to perceive and prevent constitutional problems. On the other hand, as an ad hoc group without programmatic privacy-enforcement responsibilities or experience, it lacked the sophistication, motivation, and institutional heft of an enforcement entity. Despite such shortcomings, however, the Privacy Council could serve as an exemplar for a more broad-ranging, rights-protective function within the executive. Islands of affirmative rights-consciousness within the executive branch, like the Civil Rights Division and the Privacy Council, show that there is indeed a place for such consciousness, but that, in practice, it is fulfilled only sporadically and with varying degrees of effectiveness.

B. Exploiting Executive Branch Institutional Advantages

The second type of institutional innovation suggested by the above critique would seek to develop ways to take advantage of and build on the executive's distinctive institutional features in the service of more balanced and effective elaboration of the executive's constitutional obligations. The current reliance on the SG and OLC do little to tap into the executive's institutional advantages, but instead, often recapitulate the shortcomings of courts. The challenge for the executive is to bring its institutional advantages to bear on its own constitutional thinking.

1. *Develop Vocabulary of Institutional Advantage*

Because the relative institutional capacities of each branch play a significant role in the distinct contributions each can make to constitutional effectuation, it is important to develop within the executive a more nuanced understanding of the branches' relative institutional capacities. The challenge is to break the executive habit of simply looking to the courts and largely ignoring rights the court does not enforce, rather than appreciating and speaking from within its own institutional context about effectuating constitutional rights.

216. Telephone Interview with John Bentivolgio, Former Chair of the Privacy Council (Feb. 12, 2004) (confirming that the Council was established by an Attorney General memorandum and describing its general role and composition).

Larry Sager,²¹⁷ Christopher Eisgruber,²¹⁸ David Barron²¹⁹ and others have already highlighted the general importance of institutional capacity. Executive-branch constitutionalism should build on those insights by identifying what exactly the executive's abilities are and how they might bear on constitutional decisions in various contexts. In defending Congress's power to enforce constitutional rights under Section 5 of the Fourteenth Amendment, observers have pointed to its factfinding abilities, its capacity to tax and spend, and its ability to fashion broad, affirmative, prospective mandates in contrast to the narrower, retrospective, and largely negative remedial powers of the courts. The executive's and Congress's capacities differ from the courts' in some common ways. Both political branches have agenda-setting and factfinding powers. The executive, however, has an arguably unique ability to estimate national security and public-safety risks, and to make certain decisions in a discretionary manner (rather than by announcing general rules) and thereby to match responses more closely to relevant circumstances. The executive also has the capacity to be flexible and innovate, to marshal affirmative resources, and to prioritize, lead, and set an example for other political officials, both in the other branches and in the states.

Officials thinking about the Constitution from the vantage point of the executive branch should reflect on when and why their branch might have different insights on constitutional rights from those of the courts. They should also focus on why and how the executive's powers and duties regarding constitutional rights are distinctive. More explicit understandings of the institutional underpinnings of deference, and of the executive's institutional strengths, could help to map out more clearly the constitutional ground the Court often cedes to the executive.²²⁰ If, as several scholars contend, there is more to be said in favor of extrajudicial constitutionalism than is typically thought, an intensified focus on relative institutional capabilities is an important aspect not only of claiming the political branches' role, but fulfilling it.

2. *Increase Transparency*

The notion that executive constitutionalism distinguishes itself from the judicial kind as more "populist" or "democratic" is hard to swallow when the people have no idea what its substance is, and thus

217. See Sager, *Fair Measure*, *supra* note 31; Sager, *Justice in Plain Clothes*, *supra* note 3.

218. See Eisgruber, *supra* note 9, at 355.

219. See Barron, *supra* note 193.

220. See Tushnet, *Non-Judicial Review*, *supra* note 10, at 456 (noting that "the necessary comparative judgment about the relative ability of courts and nonjudicial actors to perform constitutional review is harder than our familiar understandings would have it").

cannot hold elected officials accountable. People will make demands relating to executive constitutional compliance only when they understand what the issues are and what positions the government is taking. To that end, executive constitutional views should be made more widely available to the public. The more the public understands what is at stake in executive constitutionalism, the more pressure it can bring to bear on the executive to do it fully and well.

The SG's Office now has a publicly accessible, searchable database with all its briefs, and all arguments to and decisions of the Supreme Court are made public and routinely covered by the national news media. When it comes to public scrutiny, the larger problem lies with OLC, whose opinions typically relate to actions under consideration but not yet taken, and are therefore covered by deliberative-process privilege. Compare the secrecy of the OLC torture memo before it was leaked with the public scrutiny of the SG's positions in the recent detainee cases.²²¹ Harold Koh identifies as one of OLC's major problems this "opacity" of its work, "namely, the danger that it will support political action with a legal opinion that cannot be publicly examined or tested."²²² Koh's proposed corrective — broad publication of OLC opinions — proves elusive in practice. OLC seeks to publish some opinions after the immediate issues are no longer hot. But Koh relates chilling examples of OLC's opacity in his litigation over the fate of Haitian refugees interdicted ten miles off the United States coast and repatriated to Haiti without due process. One "public" OLC opinion explaining that the president had extended the United States' territorial waters from three to twelve miles offshore was printed only in "an obscure law review called the *Territorial Sea Journal*" that Koh, by sheer happenstance, saw mentioned in a draft of a symposium paper.²²³ Koh then filed suit arguing that the refugees were entitled to due process, relying on publicly available OLC opinions on the due process rights of refugees, only later to discover when confronted with a motion for hefty Rule 11 sanctions that OLC had secretly overruled its earlier opinions in an unpublished opinion letter during the course of another refugee litigation. In the ensuing decade, publication of OLC constitutional advice remains spotty.

Much broader and more consistent publication would serve the public's interest in knowing and monitoring the government's constitutional views. Surely, when OLC overrules prior public

221. Nat Hentoff, *DOJ and Padilla: A 'Hail Mary' Pass to the Supreme Court*, WASH. TIMES, June 1, 2004, at A19; Joan Biskupic, *Conyers Asks Whether Torture Denial Was a Lie*, USA TODAY, May 20, 2004, at 11A; Stephen Henderson, *In Two Cases, White House Tells High Court: Trust Us*, PHILA. INQUIRER, May 2, 2004, at A03; Linda Greenhouse, *Court Hears Case On U.S. Detainees*, N.Y. TIMES, April 29, 2004, at A1.

222. See Koh, *supra* note 114, at 513, 515.

223. *Id.* at 517.

opinions, it must publish its changed constitutional position.²²⁴ It also should do so when it takes a new position, departing from settled understandings of the law. But even if the OLC opinion finding no due process rights against summary repatriation had been the executive's first word on the subject, publication seems imperative. OLC's Bill Comments, which are not prepared as confidential advice but are written for Congress, should also be collected and promptly made electronically available to the public.

Proposals to increase publication in order to enhance both sources of guidance for public officials and scrutiny by the public, however, raise complex questions. Client entities within the executive might be less likely to seek OLC advice on sensitive questions if they knew it would become public. Publication of opinions makes them more effective as precedent, yet the prospect of more and stronger precedent highlights the specter of one administration writing its version of the constitutional canon in order to impose it on the next. Enabling public scrutiny in order to promote greater democratic responsiveness of executive constitutionalism rests on the premise that executive constitutional jurisprudence *should* "follow the election returns." Publication policy is closely tied to questions about the role of stare decisis from one administration to the next. Should the executive, as an elected branch, be willing to reverse itself more readily than a court? Should one administration feel free to bring its own constitutional vision to bear and, where necessary, reverse OLC or SG positions that do not accord with its own vision? If not, how should we understand and implement the extrajudicial constitutional theorists' aspirations for a more democratic, responsive constitutionalism in the hands of the political branches?

3. *Foster Rank-and-File Constitutionalism*

Practical experience with administering government, and data and expertise gained therefrom, are core strengths of the executive branch that could be brought to bear on the executive's interpretation of its constitutional obligations. Fostering broad-based, decentralized consciousness of potential executive branch constitutional obligations and responses could help to displace more grudging attitudes about constitutional rights. It could also counterbalance the relative isolation and lack of factual and institutional grounding experienced by lawyers in OLC and the SG's Office.

In order better to ground the executive's constitutional analysis, executive-branch personnel at all levels should be encouraged to report on conduct that they believe might be constitutionally

224. *Id.* at 523.

problematic, as well as putative constitutional constraints they think are hindering the government's operation, and to suggest ways to ameliorate the problems. Given the limitations that deliberative privilege imposes on the prompt publication of some OLC opinions, rank-and-file constitutionalism may also provide something of a proxy within the executive branch for popular reactions unavailable from without. Concerns voiced by persons throughout the entire corps of executive-branch employees would, no doubt, better replicate those of the broader citizenry than concerns identified by the top executive-branch lawyers alone, acting without such input.

If a frontline government employee administering a law enforcement data bank of personal, private information perceived overinclusiveness that could readily be pared away, for example, the executive should have access to that information when it decides how to understand the contours of and protect constitutional privacy interests. Officers engaged in various forms of searches and arrests who are familiar with the degrees of intrusion their work imposes, and whether there are ways, consistent with their missions, to refine procedures to minimize insults to personal liberty or privacy should have input into the executive's own decisionmaking on Fourth Amendment law. And career military personnel should be heard within the executive regarding the necessity of putatively health-based exclusion from service, or the likely consequences of softening a clear-cut ban against the abuse of prisoners, because of the likelihood that their practical experience affects evaluation of the asserted risks.²²⁵ If federal housing administrators learn of devastating effects of eligibility limitations on families' safety and ability to function in society,²²⁶ or other officials learn of risks to persons in immigration or penal custody,²²⁷ or health and safety inspectors learn of patterns of inadequate safety precautions,²²⁸ for example, such information could bear on the executive's reflection on the extent of any potential affirmative constitutional obligations toward poor or at-risk populations.

One way to encourage rank-and-file constitutionalism would be to make employee vigilance about constitutional concerns a factor on performance evaluations. Employees could also be encouraged to

225. See Johnsen, *supra* note 13, at 56-57 (noting the relevance of the executive's institutional expertise, including input from the Joint Chiefs of Staff, to President's Clinton's determination that exclusion of HIV-positive service members was arbitrary and therefore unconstitutional).

226. See generally *Lindsey v. Normet*, 405 U.S. 56 (1972).

227. See generally *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (rejecting claim of judicially enforceable right to be proactively protected from harm).

228. See generally *Collins v. Texas*, 484 U.S. 56 (1972).

report on potential constitutional trouble spots through a relatively simple program that could be established to gather and deliberate on such reports. Consider as a potential model the mechanisms President Clinton adopted to enable declassification of documents in an executive branch information management system that had built-in institutional biases toward secrecy. In Executive Order 12958, the president provided that anyone dealing with classified documents in the course of their work or any member of the public who questioned an existing classification should challenge it, thereby triggering a declassification review. The Executive Order required agencies to develop procedures to respond to such challenges, created a right of appeal to an interagency panel, and provided antiretaliation protections to employees making challenges to classifications.²²⁹

Similar mechanisms could be developed to counter the executive's built-in bias against recognition of and response to constitutional rights problems. A presidential invitation for any person to raise a potential constitutional rights problem, combined with the creation of mechanisms for evaluating, deliberating over, and responding to such information, would help the executive shift from a passive to an active approach. It would also help the executive to ground that approach in the experience of frontline employees and managers who are often in a position to observe constitutional problem areas, as well as to help identify ways to resolve them.

The prospect of fostering rank-and-file constitutional consciousness is, however, not without potential drawbacks. Creating institutional space to enable the expression of frontline employees' factually grounded observations about fundamental fairness of government treatment of the people, and about potential improvements thereto, would not alone assure that executive constitutionalism would be more factually and institutionally rooted. Most frontline employees are not trained in constitutional analysis, nor would it be efficient to extend such training to them. One major challenge, then, is to build connections between grounded executive experience and trained constitutional analysis such as is currently conducted in OLC and the SG's Office. More generally, creating space for rank-and-file constitutionalism could foster a bureaucratic culture of potentially misplaced righteous constitutional indignation, ripe not only with benefits of critical scrutiny, but also with conflicts and concerns about efficiency and loyalty to the mission that some whistleblowing currently invokes.

229. Executive Order 12,958, Sec. 1.9; 3 C.F.R. 333 (1995), *reprinted as amended in 50 U.S.C. § 435 (1996)*.

4. *Identify Executive Constitutional Clearinghouses*

The executive need not merely stir up constitutional babel from the bureaucratic bottom by encouraging rank-and-file constitutionalism, but might ensure that officials with authority, judgment, and stature will sort through the noise and respond effectively to real constitutional problems that the rank-and-file identify. As discussed above, neither the SG nor OLC as they are currently constituted wholly fulfill the obligations or potential of executive-branch constitutionalism. Perhaps with input from an expanded array of sources sharing insight into perceived constitutional harms, risks, and safeguards, those existing offices — with assistance from other new or existing entities such as the Offices of the Inspectors General and the Office for Policy Development — might be able to play a more grounded, generative role in the service of individual rights.

What is lacking in the current, reactive approaches of the SG and OLC is a mechanism for receiving and deliberating over the kind of rank-and-file information about constitutional problem areas discussed in the last subsection. Inspectors General (IG's) provide a partially useful model insofar as they receive, evaluate and respond to information from all sources. They have a relatively narrow compliance mandate, however, focusing on incidents of fraud, waste and abuse that violate existing law. Unlike the Inspectors General, a constitutional clearinghouse should focus on prospective responses to potential and actual threats to constitutional rights — and not just, as the IG's do, on clear, past violations. A constitutional clearinghouse mechanism providing fuller information about problem areas could better inform efforts by top executive lawyers and other officials affirmatively to articulate executive constitutional responsibilities and use distinctive executive capacities to fulfill them.

There is a range of possible concrete ways to establish such a mechanism. The point is to link the executive's constitutional deliberators in OLC (and, to a lesser extent, the SG's Office) with the executive's rich operational resources and empirical experience that currently are dispersed throughout the government. Lawyers need not produce an opinion in response to every complaint or concern surfaced in such a clearinghouse, but could formulate special priority areas. Routinely supplying the executive's constitutional decisionmakers with broader and deeper information would equip them affirmatively to effectuate an executive constitutional vision — one that is more generalized than, for example, the incidental advocacy on equality concerns that the Civil Rights Division provides. Clearly assigning a constitutional clearinghouse responsibility within government could cut through some of the existing confusion about whether government lawyers may appropriately advance

constitutional rights, and dispel the notion that they should confine themselves to defending government prerogatives and actions.

A central issue in the institutional-design challenge implicitly posed by the theoretical literature on extrajudicial constitutionalism is the tension between values of factual groundedness and democratic responsiveness on one hand, and arms-length perspective on the other. If the executive is to make use of its empirical expertise and the grounded perspectives of its broad employee base, it will need some mechanism to sift the rank-and-file's input for incorporation (or not) into authoritative, executive constitutional views. Getting people whose institutional outlook is traditionally aloof and legalistic to be responsive to more grounded and democratic executive perspectives poses its own problems. What assurance is there that the former will listen to the latter, rather than merely recapitulate the relative isolation and doctrinal focus identified in the foregoing critique of OLC and the SG? On the other hand, would opening OLC and the SG to vastly more input from the broad base of the bureaucratic pyramid put at risk the relative objectivity that a more arms-length relationship has fostered? Would responsiveness turn into capture? The allure of political branch constitutionalism derives at least in part from the conviction that we might be able to elaborate a constitutionalism that is both more principled *and* more democratic than what we have now, but the route to achieving it has yet to be fully mapped.

5. *Engage in Active, Not Just Reactive, Constitutionalism*

One particular institutional strength of the executive, in contrast to the courts, is the ability to reach out and tackle a problem, rather than wait for it to come knocking. The rank-and-file constitutional insight just discussed can come from the bottom, but it also can be sought out from above. One example is the OLC-led project under Assistant Attorney General Walter Dellinger of developing a constitutional response to the Supreme Court's *Adarand Constructors, Inc. v. Peña* decision restricting affirmative action in construction contracting.²³⁰ In significant part, of course, that project was court-centered because it responded directly to a Supreme Court decision and sought to meet its standards. But it was also a distinctively executive constitutional response in that it reached out to the various executive entities involved in substantial government contracting, sought their detailed

230. See Legal Guidance on the Implications of the Supreme Court's Decision in *Adarand Constructors, Inc. v. Peña*, *supra* note 14 (including appendix to OLC opinion supplying "a series of questions that should be considered [by agencies] analyzing the validity under *Adarand* of federal affirmative action programs that employ race or ethnicity as a criterion").

input, and ultimately offered them prospective guidance well beyond anything the courts have announced on how to determine whether to eliminate certain programs and how to make adjustments to others to avoid constitutional problems.

A more generally and routinely active approach to uncovering constitutional problems and determining constitutionally required responses is readily imaginable. Contrast OLC's insulation and passivity with the activity of the Offices of Inspectors General ("IG") present in all government agencies. The special role that Congress scripted for the Justice Department's IG under the USA PATRIOT Act vividly illustrates the point. In response to concerns that the executive would abuse its new PATRIOT Act powers, Congress included in the Act a provision charging the IG of the Department of Justice to investigate and report on claims of civil rights or civil liberties violations by Department of Justice employees.²³¹ The IG has filed semiannual reports identifying over two thousand civil rights or civil liberties complaints, including several dozen the Inspector General deemed credible after investigation. Most significantly, in June 2003, the IG filed a special 198-page report and testified to the Senate Judiciary Committee strongly condemning the Department's treatment of aliens detained on immigration charges in connection with the September 11 attacks. The IG found "significant problems in the way the detainees were handled."²³² The problem areas included practices regarding classification of arrestees and detainees, information sharing among agencies, processing and clearing detainees, and treatment of detainees during their confinement. As an office to which anyone — not just heads of agencies or the president — can complain, and one with power and duty actively to investigate, the IG learned of vastly more potentially unconstitutional conduct under the PATRIOT Act than did OLC.²³³ The abuses the IG found in that one area under exceptional statutory mandate simultaneously

231. Section 1001 directs the Inspector General to designate one official to receive complaints and review information "alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice," to publicize that official's role and contact information, and to report to the House Judiciary Committee every six months. USA PATRIOT Act, Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391 (2001).

232. Press Release, Office of the Inspector General, The September 11th Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (June 2, 2003), at <http://www.usdoj.gov/oig/special/0306/press.htm>.

233. See *Limitations on the Detention Authority of The Immigration and Naturalization Service*, Op. Off. Legal Counsel (Feb. 20, 2003), at <http://www.usdoj.gov/oic/INSDetention.htm> (opining that it would be permissible for the Attorney General to detain a removable alien beyond the 90-day period provided in the Immigration and Naturalization Act if the delay in removal is, for example, "attributable to investigating whether and to what extent an alien has terrorist connections").

underscores the lack of more general, active constitutional self-monitoring and reflection on any routine basis within the executive branch, and suggests a model for reform.

To the extent that law enforcement activities post-September 11, 2001, raised significant constitutional rights questions, even the exceptional PATRIOT Act mandate to the IG failed to create the occasion for such novel constitutional questions to be deliberated internally. The Office of the IG is active in addressing violations of established law — i.e., in implementing the Court's constitutional standards. It is empowered only to investigate and report on "allegations of waste, fraud and abuse . . . and to promote economy and efficiency" in agency operations.²³⁴ Its focus is on facts, and its main task is to determine whether the facts it uncovers show clear violations of existing law. The IG refers potentially criminal violations of civil rights and liberties to criminal prosecutors in the Civil Rights Division, but only willful violations of constitutional rights are subject to criminal prosecution.²³⁵

In an extraordinary step, the IG used his special PATRIOT Act mandate not only to accept complaints and investigate them, but also to offer twenty-one recommendations for reforming executive practices to minimize incursions on civil rights and civil liberties, most of which the Justice Department and the Department of Homeland Security ("DHS") have agreed to in theory. The IG then filed a follow-up report criticizing the Justice Department and DHS for their failure adequately to address the problems. That attention to individual rights was particularly important because, for a variety of reasons, detained aliens rarely bring private suits to challenge the circumstances of their detention.²³⁶ Even with the IG's prospective, systematic attention — which was itself extraordinary — the executive has not announced refinements or elaborations of its relevant constitutional views on individual rights that respond to the range of problems the IG identified.

It is OLC, not the IG, that plays the deliberative, potentially generative role in executive branch constitutional interpretation. There is an institutional disconnect, however, between the active and factually grounded work of the IG in reviewing problem areas and the law-shaping function of OLC. The IGs do not, and are not expected to, interpret the Constitution for the executive branch, for example, by

234. 5 U.S.C. app. § 3 (2000).

235. *See, e.g.*, 18 U.S.C. § 242 (2000); *Williams v. United States*, 341 U.S. 97, 101 (1951); *Screws v. United States*, 325 U.S. 91, 102 (1945); *United States v. Classic*, 313 U.S. 299 (1941).

236. *But see* *Turkmen v. Ashcroft*, No. 02-CV-2307, 2004 U.S. Dist. LEXIS 14537 (E.D.N.Y., July 29, 2004) (challenging aspects of post-9/11 detention of immigrants in New Jersey).

shaping additional, distinctly executive standards for individual rights compliance relating to detentions of aliens or others at risk.

As a result of the lack of connection between OLC or the SG's office and an affirmative, grounded investigative entity focused on constitutional rights protection, the executive does not live up to its constitutional promise. There is a real need to enable those entities responsible for executive branch constitutional interpretation to play a more active and critical role. The executive should be institutionally capable of undertaking the kind of rich, pragmatically engaged advising that might go beyond disapproving conduct that violates clearly established court-announced constitutional rules to, for example, interpret the Constitution in light of the executive's unique experience. The executive should also have routine mechanisms to suggest changes to programs, processes, or institutional culture that are needed to effectuate more fully the promises of the Constitution and its Bill of Rights.

CONCLUSION

The current, court-centric approach of executive branch constitutionalism casts the courts' constitutional doctrines as virtually exhaustive of the Constitution's normative scope. That approach fails to provide guidance as to how to fill the substantial space for constitutional effectuation that the courts explicitly or implicitly leave for the executive. In the space beyond judicial enforcement, the executive should ask not "what would the Court do?" but "what *should we* do?" The best answers will be framed in terms of the Constitution *as it works in executive hands*. In other words, the executive should analyze constitutional issues not through a purely doctrinal lens, but in view of all relevant constitutional sources, the executive's institutional strengths and abilities, its analysis of the immediate factual issues and their broader context, and the public interest as the people express and the elected president understands it, accounting for the competing demands of *both* governance needs and individual rights. Doing so will not provide clear answers to many questions, and we might not favor all the results produced. But if we could avoid the risks of recapitulating the courts' own limitations, the biases of answers that are driven by narrowly partisan or institutionally parochial impulses, and loss of the opportunities presented by the executive's special strengths, executive constitutionalism will have advanced toward fulfilling its promise.