

# DEFERENCE TO THE EXECUTIVE IN THE UNITED STATES AFTER SEPTEMBER 11: CONGRESS, THE COURTS, AND THE OFFICE OF LEGAL COUNSEL

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According to the “deference thesis,” legislatures, courts, and other government institutions should defer to the executive’s policy decisions during national security emergencies.<sup>1</sup> In this Essay, I will address two criticisms of the deference thesis. The first argument, which has been developed most powerfully by Professor Stephen Holmes, is that rules dominate standards at moments of crisis.<sup>2</sup> An executive that is unconstrained, that is, not bound by rules, will make worse policy choices than an executive that is bound by rules.<sup>3</sup> This type of argument is usually made in the context of urging legislatures and courts to constrain the executive during emergencies.<sup>4</sup> Some commentators, however, doubt whether it is possible for legislatures and courts to constrain the executive during emergencies.<sup>5</sup> These doubts have led to a second argument that the executive should be bound by institutions within the executive branch such as (in the United States) the Office of Legal Counsel,<sup>6</sup> or

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1. See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 15–16 (2007) [hereinafter POSNER & VERMEULE, *TERROR IN THE BALANCE*].

2. Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301 (2009).

3. *Id.* at 305, 354.

4. This is a more general argument. For present purposes, however, I will consider it only in the context of external constraints.

5. See Holmes, *supra* note 2, at 347–48; see also Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

6. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 32–34, 208 (2007).

through the construction of new institutions that review the executive branch's actions.<sup>7</sup> Both arguments criticize the deference thesis but propose different solutions. The first argument proposes that Congress and the judiciary give the executive less deference; the second proposes that officials within the executive branch give the President less deference. Thus, we can distinguish external constraints on the executive and internal constraints on the President.

Both arguments are flawed. The external constraints argument gets the normal analysis backwards: rules are better for routine, recurring situations. Although some emergencies are, in fact, routine, the type of emergency that calls for deference is not. The internal constraints argument, as normally presented, makes the fatal assumption that the President can be bound by his own agents against his own perceived interest, and relies on other questionable premises about the structure of government in the United States.

#### I. THE DEFERENCE THESIS

The deference thesis states that during emergencies the legislature and judiciary should defer to the executive.<sup>8</sup> It assumes that the executive is controlled by the President, but to the extent that the President could be bound by agents within the executive, the deference thesis also holds that those agents should follow the President's orders, not the other way around. In normal times, the three branches of government share power. For example, if the executive believes that a new, dangerous drug has become available, but possession of the drug is not yet illegal, the executive may not act on its own to detain and prosecute those who deal and use the drug. The legislature must first enact a statute that outlaws the drug. The executive also depends on the legislature for financial appropriations and other forms of support. The executive also faces constraints from the courts. If the executive arrests drug dealers and seeks to imprison them, it must first obtain the approval of courts. The courts ensure that the executive does not go beyond the bounds of the new law, does not violate earlier-enacted laws

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7. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 5–7, 10–12 (2010).

8. See POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 1.

that have not been superseded by the new law, and does not violate the Constitution.

In emergencies, the executive often will contemplate actions that do not have clear legislative authority and might be constitutionally dubious. For example, after September 11, the U.S. government engaged in immigration sweeps, detained people without charges, used coercive interrogation, and engaged in warrantless wiretapping of American citizens.<sup>9</sup> Many, if not all, of these actions would have been considered violations of the law and the U.S. Constitution if they had been undertaken against normal criminal suspects the day before the attacks. After September 11, both the legislature and the courts gave the executive some deference. The legislature gave explicit authorities to the executive that it had initially lacked;<sup>10</sup> the courts did not block actions that they would have blocked during normal times.<sup>11</sup> But neither body was entirely passive. Congress objected to coercive interrogation and did not give the executive all the authorities that it requested.<sup>12</sup> After a slow start, the courts also resisted some of the assertions the executive made. There is some dispute about whether this resistance was meaningful and caused the executive to change policy or merely reacted to the same stimuli that caused the executive to moderate certain policies independently.<sup>13</sup> In any event, no one disputes that the courts gave the executive a nearly free pass over at least the first five to seven years of the conflict with al Qaeda.

The deference thesis, then, can be strong-form or weak-form. This ambiguity has had unfortunate consequences for debates about post-September 11 legal policies. Few people believe that the courts should impose exactly the same restrictions on the

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9. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11 (2004) (describing detention of U.S. citizen without the filing of charges); Rebecca Cathcart, *Immigration Officials Arrest 905 in California Sweep*, N.Y. TIMES, May 24, 2008, at A15; David S. Cloud, *Concerns Led to Revisions, Rumsfeld Says*, N.Y. TIMES, Feb. 22, 2006, at A16 (describing United States use of coercive interrogation techniques); Carol J. Williams, *Wiretapping Lawsuit May Have Its Day in Court*, L.A. TIMES, Feb. 28, 2009, at A9.

10. See, e.g., GOLDSMITH, *supra* note 6, at 208 (noting eventual congressional authorization of military commissions, interrogations, and warrantless electronic surveillance).

11. See, e.g., *Hamdi*, 542 U.S. at 507 (permitting detention of an American citizen without a full criminal trial).

12. See GOLDSMITH, *supra* note 6, at 208–09.

13. See, e.g., Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385, 401–05 (2010).

executive during an emergency as during normal times. Indeed, doctrine itself instructs courts to balance the security value of a course of action and its cost to civil liberties, implying that certain actions might be legally justified to counter high-stakes threats but not to counter low-stakes threats.<sup>14</sup> Nor does anyone believe that the executive should be completely unconstrained.

The debate is best understood in the context of the U.S. government's post-September 11 policies. Defenders of these policies frequently invoked the deference thesis—not so much as a way of justifying any particular policy, but as a way of insisting that the executive should be given the benefit of the doubt, at least in the short term.<sup>15</sup> The deference thesis rests on basic intuitions about institutional competence: that the executive can act more decisively and with greater secrecy than Congress or the courts because it is a hierarchical body and commands forces that are trained and experienced in countering security threats. The other branches lack expertise. Although they may have good ideas from time to time, and are free to volunteer them, the ability of the executive to respond to security threats would be unacceptably hampered if Congress and the courts had the power to block it to any significant degree.

Secrecy is an important part of the argument. Policymaking depends on information, and information during emergencies often must be kept secret. Congress and the courts are by nature and tradition open bodies; if they were to act in secret, their value would be diminished. Meanwhile, the argument continues, the fear of an out-of-control executive who would engage in abuses unless it was constrained by the other branches is exaggerated. The President has strong electoral and other political incentives to act in the public interest (at least, in the United States). Even if the executive can conceal various “inputs” into counterterrorism policy, it cannot conceal the “output”—the existence, or not, of terrorist attacks that kill civilians.

Thus, it was possible for defenders of the Bush Administration's counterterrorism policies to express discomfort with certain policy choices, while arguing nonetheless that Congress and the courts should not try to block executive policymaking

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14. See, e.g., *Hamdi*, 542 U.S. at 531–34.

15. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935 (2009) (book review).

for the duration of the emergency—at least not as a matter of presumption. Critics of the Bush Administration argued that deference was not warranted—or at least not more than a limited amount of deference was warranted, although again these subtleties often were lost in the debate—for a variety of reasons. I now turn to these arguments.

## II. EXTERNAL CONSTRAINTS: THE PROTOCOL ANALOGY

### A. *Medical Protocols*

In an article published a few years ago, Professor Holmes uses the arresting image of the medical protocol as a device for criticizing the deference thesis—or, more broadly, the thesis that the executive should be “unconstrained” during emergencies. Holmes describes his own experience in an emergency room, where his daughter had been brought with a serious injury:

At a crucial moment, two nurses rushed into her hospital room to prepare for a transfusion. One clutched a plastic pouch of blood and the other held aloft my daughter's medical chart. The first recited the words on the bag, “Type A blood,” and the other read aloud from the file, “Alexa Holmes, Type A blood.” They then proceeded, following a prepared and carefully rehearsed script to switch props and roles, the first nurse reading from the dossier, “Alexa Holmes, Type A blood,” and the second reading from the bag, “Type A blood.”<sup>16</sup>

To the layman, the repetitive actions of the nurses seem senseless. Why are they repeating themselves when the patient might die unless she receives the blood transfusion immediately? Surely, the nurses should depart from the script rather than follow it in a time of extreme medical urgency. Yet the protocol makes good sense. Experience has taught medical personnel that basic errors—the transfusion of the wrong blood—occur frequently, and that they can be avoided through the use of simple protocols. Although following the protocol uses valuable time, in practice the increased risk to the patient as a result

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16. Holmes, *supra* note 2, at 301–02.

of the loss of time is less than the risk caused by the errors that protocols are designed to prevent.<sup>17</sup>

The larger and more striking point of the example is that, even during emergencies, when the stakes are high and time is of the essence, agents should follow rules rather than improvise. In this way, agents should be constrained.<sup>18</sup> This argument has potentially radical implications. Recall that the conventional objection to deference is that the risk of executive abuse exceeds the benefits of giving the executive a free hand to counter al Qaeda. Professor Holmes argues—although at times he hedges—that in fact the benefits of giving the President a free hand are zero: A constrained executive, like a constrained medical technician, is more effective than an unconstrained executive. If the benefits of lack of constraint are zero, then the deference thesis is clearly wrong. Constraints both prevent executive abuses such as violations of civil liberties and ensure that counterterrorism policy is most effective.

#### B. Rules and Standards

The arresting medical protocol example helps clarify the tradeoffs involved, but it remains merely an illustration of the familiar rules versus standards tradeoff that has been a staple of the legal literature since time immemorial.<sup>19</sup> A rule is a norm that directs the decisionmaker to ignore some relevant policy considerations when deciding on a course of action; a standard is a norm that directs the decisionmaker to take into account all relevant policy considerations when deciding on a course of action. The familiar example is the speed limit. A sixty-mile-per-hour speed limit tells the driver that she does not face a legal sanction if she drives below sixty miles per hour, and that she does face a legal sanction if she exceeds that speed. A standard—for example, “drive carefully”—tells the driver that she does not face a legal sanction if she drives carefully, but that she does if she drives carelessly. The standard, unlike the rule, directs the driver to take into account all relevant considerations—the weather, traffic congestion, her own skill and ex-

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17. *See id.* at 302.

18. *See id.* at 302–03.

19. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 155–58 (tent. ed. 1958). The speed limit example below is drawn from this text. *Id.*

perience, the responsiveness of her car, and so on—when deciding how to drive.

A skilled and experienced driver who drives at sixty-five miles per hour on a clear day on an empty, straight road poses little threat to anyone, and most people would regard her driving as careful. Thus, under the standard she could not be held liable, although under a rule she would be. Meanwhile, an inexperienced driver who drives sixty miles per hour on a congested, dangerous road, at night, in bad weather, would probably be regarded as careless. He would be held liable under a standard but not under the rule. It is in the nature of standards that we cannot be sure that he would be held liable; it depends on the biases, intuitions, and experiences of the legal decisionmaker.<sup>20</sup> Thus, we say that applying standards involves high decision costs. It is in the nature of rules that we can easily tell whether the driver would be held liable or not, but only because the legal decisionmaker is forced to ignore relevant moral and policy considerations that otherwise complicate evaluation. Rules are under- and over-inclusive; by design, they cause error.

These considerations lead to a basic prescription.<sup>21</sup> Rules should be used to govern recurrent behavior, and standards to govern unusual behavior. Experience teaches us that if drivers obey certain rules (such as speed limits), the risk of accidents is greatly reduced, although judicious choice of (sometimes complex) rules ensures that error costs are low. When legislatures enact new rules, they can invest a great deal of time and effort determining the optimal rules, because the cost of the rules are then spread out over many instances of the behavior that the legislatures seek to regulate. Yet rules frustrate us because there always seems to be some new, unanticipated case where the application of rules leads to an injustice. The speed limit rule should not apply to the parent who rushes a badly injured child to the hospital. And there are many cases where rules can too easily be gamed. Tax rules, no matter how intricate, can be exploited: Lawyers set up tax shelters that evade the purpose of the rules. Congress reacted to this problem initially by creating ever more complex rules, but eventually trumped them

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20. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 588 (1993).

21. *Id.* at 621–23.

with a standard that prohibited bad faith evasion of the tax laws.<sup>22</sup>

The legal landscape is a complex mix of rules and standards, which often overlap. Drivers must obey both traffic rules like the speed limit and traffic standards like laws against reckless driving and tort norms against negligent driving. Indeed, one can think of traffic norms as complex rules with standards—where there are apparently bright-line rules (drive under sixty miles per hour) that are subject to muddy standards (unless there is an emergency).

Medical protocols are just one more example of a choice along the rules-standards continuum. The nurses Professor Holmes describes follow a protocol that ensures that they do not use the wrong blood in a transfusion. Likewise, doctors are instructed to clear the windpipe before staunching the wound.<sup>23</sup> These protocols, like the speed limit, reflect generalizations from past medical experience. Delaying the blood transfusion is less risky than permitting only one nurse to check the blood type. Letting the blood flow from the wound is less risky than leaving the windpipe blocked. In the absence of protocols, medical practitioners may misjudge the situation, or panic, or allow themselves to be distracted by irrelevant factors (the goriness of the wound calls out for attention while the blocked windpipe is hidden). It is important to see that these rules, like the speed limit, are mere generalizations, and in individual cases the generalizations might be wrong. The patient dies because of the delay before the transfusion, yet we instruct medical practitioners to follow the rules because otherwise they are likely to make worse or more frequent errors.

That uncompromising rules produce high error costs supports adopting sensible exceptions to rules. Indeed, medical practitioners may violate protocols. The reasons are obvious. Consider Professor Holmes's insistence that the rule "always wash your hands" is unalterable and written in stone.<sup>24</sup> This clearly cannot be the case. Suppose that, in the midst of an emergency involving a patient with a serious trauma, the staff

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22. See Steven A. Dean & Lawrence M. Solan, *Tax Shelters and the Code: Navigating Between Text and Intent*, 26 VA. TAX REV. 879 (2007); see also Ellen Aprill, *Tax Shelters, Tax Law, and Morality: Codifying Judicial Decisions*, 54 SMU L. REV. 9 (2001).

23. Holmes, *supra* note 2, at 305.

24. See *id.* at 309.



is informed that the tap water is tainted, it is discovered that a patient has a rare allergy to the only soap available in the emergency room; or, for that matter, the emergency room runs out of soap. Common sense (which is just the application of the standard, “help the patient at minimal risk to him and oneself”) will tell the doctors and nurses to deviate from the protocols when they clearly interfere with medical necessity. If they did not, they would be sued, and rightly so. The protocols, like many rules, turn out to be presumptions, which may be overcome by the press of events. That is why medical professionals are so highly trained; if one could really treat patients by following algorithms, one would not need doctors who have vast training and experience that supplies them with judgment and the ability to improvise.<sup>25</sup>

In sum, medical protocols, like rules, provide a valuable service by simplifying the decision-making process at times of high stress, but, like rules, they unavoidably produce wrong results if they are not applied sensitively. Usually, when the stakes are high, rules and protocols create presumptions, but the decisionmaker is free to violate the presumption if circumstances suggest that that the presumption is based on factual assumptions that turn out not to be true in the particular setting in which the decisionmaker finds himself.

### C. *Rules and Standards During Emergencies*

I now turn to the bulk of Professor Holmes’s argument. Professor Holmes is right to identify confusion about the nature of emergency, and it is useful to distinguish a rule-development stage—which often but not always takes place before the emergency—and a rule-application stage—which takes place during the emergency. Holmes argues that during the emergency, rule application should be controlled by protocol, so the executive does not need (much) discretion; while pre-emergency, rule development does not need to be rushed and secret, so the executive can collaborate with Congress. The first problem with

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25. This problem is famous from labor relations. Workers who seek to pressure employers without going on strike (which in certain cases may be illegal) have frequently adopted the strategy of “work-to-rule,” where they follow the rules or protocols of their job in a literal-minded way rather than use them as presumptions. The result is that they become extremely unproductive while maintaining deniability, though no one is fooled. *See generally* Karl O. Moene, *Unions’ Threats and Wage Determinations*, 98 *ECON. J.* 471 (1988).

this argument is that during the emergency one can follow protocols rather than exercise discretion only if the emergency is the same as earlier emergencies. This was not the case for September 11, though it may be the case for other security threats. The second problem is that the rule-development stage cannot always take place during normal times. For example, September 11 required not only an immediate response to the newly discovered threat but also the development of new rules under the shadow of that threat. Those rules needed to be developed quickly and (for the most part) secretly, and these exigencies limited the ability of Congress to contribute. A final point is that Holmes ignores an important dimension of the problem: the difference between agents, who in theory can merely follow rules and protocols, and principals, who cannot. The Bush Administration did in fact recognize the value of protocols and used them frequently; it just did not apply them to itself.

### 1. *Two Concepts of Emergency*

Professor Holmes makes a valuable point, often neglected in the literature, that there are two distinct phases for addressing emergencies<sup>26</sup>—what I will call the stage of rule development and the stage of rule application. As we will see, the two stages can run together, but conceptually they are distinct. The rule-application stage comes when the patient is on the gurney. The doctors follow the protocols in the course of helping the patient. The rule development stage occurs earlier. Someone must decide what the protocols should be. Someone had to invent the rule that two nurses must check the blood type and that doctors should unblock the windpipe before staunching wounds—just as the legislature must determine the speed limit before drivers comply with it and police enforce it.

We might use the word “emergency” to refer to the time of rule application. As Professor Holmes points out, however, for the medical professionals, what seems like an emergency to a layperson is not an emergency at all.<sup>27</sup> They just apply the protocols that have been drilled into them, no different from assembly-line workers. Under this definition of “emergency,” it is hard to support the deference thesis and those who argue that the executive

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26. Holmes, *supra* note 2, at 309–10.

27. *See id.* at 309.

must be unconstrained during emergencies. If doctors are constrained during emergencies, why not executives?

If we refer instead to the time of rule-development, reliance on the idea of emergency seems even less appropriate. The doctors who develop emergency room protocols do not do so under time pressure but at their leisure. They also can do so in a large body, so as to take advantage of the perspectives of many different people, and in public, so that all stakeholders have a say. The executive can as well, the argument goes. When the executive determines the rules that will govern the response during a terrorist attack, it does so in advance, and it can, indeed should, do so in consultation with Congress and subject to judicial constraint.

Thus, executive deference is unnecessary. During rule development, there is no emergency, and so the executive, Congress, and the courts can collaborate in developing appropriate rules that will govern during emergencies. They can do so openly, deliberately, and slowly, with full respect for constitutional norms. During rule application, there is an emergency, but the executive can merely follow the rules or protocols that were developed during the rule-development stage. Thus, in the rule-application phase, executive discretion is unnecessary. It follows that deference to the executive is also unnecessary. During rule development, Congress has no reason to defer to the executive. During rule application, courts also have no reason to defer to the executive, but should instead insist that the executive comply with the rules.

## 2. *Rule Application*

Let us consider the stages in reverse order. We already have addressed some of the problems with Professor Holmes's argument from protocols. Rules are seldom as bright-line as they first appear. They often turn out to be presumptions which are themselves subject to standards (drive under the speed limit unless there is an emergency). It is true that security threats, like medical emergencies, often fall into patterns and can be addressed in partially rule-governed fashion. Thus, when a gunman takes a hostage, the police follow certain rules: first clearing the area, then making contact with the gunman, and so on. Some officers will be given very simple rule-governed tasks ("don't let anyone cross this line"). But the rules quickly give out. Every hostage-taker is different, and the most highly

trained police officers will be given a great deal of discretion to deal with him and to make the crucial decision to use force. But even these types of threats are simple compared with the scenario that opened up on September 11. The government knew virtually nothing about the nature of the threat. It did not know how many more members of al Qaeda were in the United States, what their plans were, what resources were at their disposal, what their motives were, or how much support they had among American Muslims.<sup>28</sup> Protocols were worthless because nothing like the attack had ever happened before. (The closest analogy seemed to be the absurdly irrelevant example of Pearl Harbor.) The government could not follow rules; it had to improvise subject to a vague standard—protect the public while maintaining civil liberties to the extent possible. Improvise it did—instituting detentions, sweeps, profiling, surveillance, and many other policies on an unprecedented (in peacetime, if that was what it was) scale.<sup>29</sup>

For the rule-application stage, the deference thesis counsels Congress and the judiciary to (presumptively) defer. Congress simply cannot set about holding hearings, debating policy, and voting on laws in the midst of emergency. Either the problem will not be addressed, or Congress will end up voting on a bill that it has not written, debated, or even read.<sup>30</sup> For courts, too, the alternatives are unrealistic. If courts enforce rules developed for normal times, then they will interfere with the proper response to the terrorist threat, just as they would if they required the U.S. military to comply with the Fourth Amendment on the battlefield. Alternatively, the courts could insist on applying a standard and halt executive actions that, in the courts' view, violated the standard described above—protect the nation while maintaining civil liberties to the extent possible. But here the courts are at a significant disadvantage. They do not have in-

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28. President George W. Bush, Address to the Nation (Sept. 11, 2001) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>).

29. But if al Qaeda launched another attack on U.S. soil tomorrow, the argument for deference would be weaker, because more is known about al Qaeda today than ten years ago.

30. As occurred with the TARP law. See Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1625 (2009).

formation about the nature of the threat.<sup>31</sup> Courts can demand this information from the government, but the government will not give it to them because the government fears leaks (to say nothing of recalcitrance caused by rivalries among intelligence agencies). Moreover, judges are inexperienced in national security unlike the specialists in the executive branch.

None of this is to deny Professor Holmes's basic point that protocols can be valuable. Indeed, the Bush administration was as protocol-happy as any other institution. Consider the protocols for interrogation which were disclosed in a leaked OLC memo:

In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. . . . During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated.<sup>32</sup>

So not even the Bush administration disagreed with Professor Holmes's argument that lower-level officials faced with recurrent situations should be subject to protocols where they are appropriate. In this sense, Professor Holmes's argument misses the mark entirely. The problem was not so much that protocols were not used; the problem, if it was a problem, was that they were developed, modified, and revised solely by the executive branch. This leads to the question of rule development.

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31. See Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1405–08 (2009).

32. Memorandum from Jay S. Bybee, Assistant Att'y Gen., OLC, to John Rizzo, Acting Gen. Counsel, CIA, Re: Interrogation of al Qaeda Operative, 3–4 (Aug. 1, 2002) [hereinafter *Interrogation Memorandum*], available at <http://s3.amazonaws.com/nytdocs/docs/151/151.pdf>.

### 3. Rule Development

Recall that Professor Holmes says that the argument that the executive can act more swiftly than Congress and the courts does not apply to the rule-development stage because the crisis is past even if the threat remains.<sup>33</sup> But if we think back to September 11, the crisis did not end on that day, even if the immediate threat of violence did. It was reasonable to believe that other plots had been put into action and that violence could erupt at any moment. As the weeks and months passed, these concerns faded. But it also became clear that al Qaeda had sympathizers in the United States, and that these people might strike at any time, possibly on their own initiative, or volunteer for training that would later make them considerably more dangerous. The anthrax scare brought home the possibility that al Qaeda could use even more deadly weapons than hijacked airplanes. Every day brought another revelation of a hole in border security. Thus, it was a matter of urgency to develop new rules that would address the threat.

The government maintained the confidentiality of a constant supply of intelligence, for fear of exposing sources and methods.<sup>34</sup> Meanwhile, the government was already taking secret actions (many of which were later exposed), including tapping cell phone calls, tracking monetary transfers, and infiltrating terrorist organizations.<sup>35</sup> Optimal policy going forward necessarily depended on secrecy. Policy X, which might seem plausible given publicly available information, might turn out to be unnecessary, redundant, or even counterproductive in light of secret information about the activities of al Qaeda or secret Policy Y. Thus, although Congress could no doubt give useful advice, it seems hard to believe that it could have contributed much to the development of counterterrorism tactics, any more than it can contribute to military tactics (where to invade, where to bomb) during a regular war.

A set of constitutional protocols normally applies to the making of policy and its embodiment in government action. The ex-

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33. See Holmes, *supra* note 2, at 310.

34. See GOLDSMITH, *supra* note 6, at 81 (noting that officials were limited in their ability to reveal legal positions to avoid disclosing counterterrorism measures).

35. See Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 904 (2008) (discussing wiretapping and money-transfer tracking programs).

ecutive must act with Congress, and it must respect the courts; it cannot act by itself. But these rules apply to normal times, and the medical protocol analogy is of little use here. Medical protocols do not need to be secret because patients have no incentive to game them—unlike terrorists who benefit greatly from knowing the methods that the United States uses to spy on them, capture them, and interrogate them. Furthermore, medical protocols are not based on secret information; they are based on widely available medical research. Thus, when medical researchers develop medical protocols at the rule development stage, they can do so publicly without undermining the purpose of developing the protocols in the first place.

By contrast, rules governing counterterrorism operations must be developed mostly in secret, and mostly on the basis of secret information. Hence the importance of keeping rule development as much as possible within the only branch that possesses the power to act against security threats. Those rules, of course, would constrain only lower-level executive agents, not the executive itself. There is an obvious reason for this; if the rules are wrong, they need to be corrected. It would similarly make little sense for doctors to develop emergency room protocols that could never be changed in the future as new technologies and new health problems rendered the old protocols worthless.

Professor Holmes argues that the executive becomes subject to groupthink and other decision-making pathologies when it makes policy itself rather than with Congress and other agents.<sup>36</sup> But the same point can be made about executive decisionmaking during regular wars, when the risk of groupthink (if it is a risk) is tolerated because of the need for secrecy.

If Congress and the judiciary cannot constrain the executive during emergencies because of the problem of secrecy, then perhaps this problem can be overcome by putting the source of constraint in the executive branch itself, where norms of secrecy prevail. That brings us to the Office of Legal Counsel.

### III. INTERNAL CONSTRAINTS: THE OFFICE OF LEGAL COUNSEL

In the early years of the Bush Administration, the Office of Legal Counsel (OLC), an office within the Department of Jus-

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36. Holmes, *supra* note 2, at 344–47.

tice, issued a series of memoranda arguing that certain counterterrorism practices—including surveillance of U.S. citizens and coercive interrogation—did not violate the law.<sup>37</sup> These memos were later leaked to the public, causing an outcry.<sup>38</sup> In 2011, the head of the OLC told President Obama that continued U.S. military presence in Libya would violate the War Powers Act. The President disregarded this advice, relying in part on contrary advice offered by other officials in the government.

These two events neatly encapsulate the dilemma for the OLC, and indeed all the President's legal advisers. If the OLC tries to block the President from acting in the way he sees fit, it takes the risk that he will disregard its advice and marginalize the institution. If the OLC gives the President the advice that he wants to hear, it takes the risk that it will mislead him and fail to prepare him for adverse reactions from the courts, Congress, and the public.

Many scholars, most notably Professor Jack Goldsmith, argue that the OLC can constrain the executive.<sup>39</sup> The underlying idea here is that even if Congress and the courts cannot constrain the executive, perhaps offices within the executive can. The opposite view, advanced by Professor Bruce Ackerman, is that the OLC is a rubber stamp.<sup>40</sup> I advocate a third view: The OLC does not con-

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37. *E.g.*, Memorandum from Jay S. Bybee, Assistant Att'y Gen., OLC, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340–2340A (Aug. 1, 2002); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., OLC, to David S. Kris, Associate Deputy Att'y Gen., Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the "Purpose" Standard for Searches 1, 3 (Sept. 25, 2001).

38. GOLDSMITH, *supra* note 6, at 157–59 (discussing leak of memoranda related to interrogations); *id.* at 177–81 (discussing leaks regarding surveillance program).

39. *See* GOLDSMITH, *supra* note 6, at 33. In a review of Ackerman, *supra* note 7, Professor Trevor Morrison defends OLC against Ackerman's assertion that it can only be a rubber stamp, but it is not clear whether Professor Morrison takes Professor Goldsmith's view (that the OLC can serve as an external check on the executive) or a view closer to the one advanced in this paper (that the OLC serves as an enabler). *See* Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) [hereinafter Morrison, *Constitutional Alarmism*] (reviewing ACKERMAN, *supra* note 7); Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 64–65 (2011) [hereinafter Morrison, *Libya*] (again disputing Professor Ackerman's assertion that the OLC's analysis is unreliable but without taking a stance on the impact of that analysis on the scope of executive power).

40. *See* ACKERMAN, *supra* note 7 at 104. For similar skepticism, see Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2335–38 (2006).



strain the executive but enables him to accomplish goals that he would not otherwise be able to accomplish. It is more accurate to say that the OLC enables rather than constrains.

A. *Background on the OLC*

The OLC is a small office in the Justice Department headed by an assistant U.S. Attorney General.<sup>41</sup> The OLC chief is nominated by the President and confirmed by the Senate, and is formally a subordinate of the Attorney General. The OLC is essentially an adviser to an adviser. The Attorney General's primary obligation is to give advice to the President; he typically relies on the OLC to produce that advice. But he retains the authority to disagree and disregard it if he so chooses. In practice, the OLC often gives advice directly to the President because the Attorney General has delegated to it much of his advice-giving role.<sup>42</sup>

Most matters that come before the OLC are routine. The OLC provides legal analysis of bills, executive orders, and signing statements. The OLC also plays an important role in resolving disputes among executive agencies over legal authority. In most of these cases, the President does not have any particular agenda, so the OLC can give honest advice without fear of retribution.<sup>43</sup> But in a number of significant cases, the White House asks the OLC to evaluate a proposed action or policy that the President clearly seeks to pursue. For example, the President might seek to launch a military intervention, and ask the OLC for legal authorization. In such cases, the White House might put pressure on the OLC to rubber stamp the action.

B. *The OLC as a Constraint on the Executive*

A number of scholars have argued that the OLC can serve as an important constraint on executive power.<sup>44</sup> I argue that the OLC cannot act as such a constraint. Indeed, its only function is the opposite—as an “enabler” or extender of executive power.

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41. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) [hereinafter Morrison, *Stare Decisis*] (and citations therein).

42. See GOLDSMITH, *supra* note 6, at 32.

43. See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 501 (1993).

44. See *supra* note 39.

The President must choose a course of action. He goes to the OLC for advice. Ideally, the OLC will provide him good advice about the legality of the course of action. It will not provide him political advice and other relevant types of advice. The President wants to maximize his political advantage,<sup>45</sup> and so he will follow the OLC's advice only if the legal costs that the OLC identifies are greater than the political benefits. On this theory, the OLC will always give the President neutral advice, and the President will gratefully accept it although not necessarily follow it.

If the story ended here, then it would be hard to see what the controversy over OLC could be about. As an adviser, the OLC possesses no ability to constrain the executive. If it does its job properly, it merely supplies predictions about how other legal actors will react to the President's proposed action. The executive can always choose to ignore the OLC's advice, so OLC cannot serve as a constraint on executive power in any meaningful sense. Instead, the OLC merely conveys information to the President about the constraints on executive power that are imposed from outside the executive branch.

There is an important twist that complicates the analysis. The President can choose to publicize the OLC's opinions. Naturally, the President will be tempted to publicize only favorable opinions. When Congress<sup>46</sup> alleges that a policy is illegal, the President can respond that his lawyers advised him that the policy is legal. This response at least partially deflects blame from the President. There are two reasons for this. First, the Senate consented to the appointment of the head of the OLC, so, if the OLC gave bad advice, the Senate must share the blame. Second, OLC lawyers likely care about their future prospects in the legal profession, which will turn in part on their ability to avoid scandals and to render plausible legal advice, and they may also seek to maintain the office's reputation. When the OLC's opinions are not merely private advice but are used to justify actions, then the OLC takes on a quasi-judicial function. Presidents are not obliged to publicize the OLC's opinions, but clearly they see an

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45. This assumption should be uncontroversial. If the President seeks to act lawfully, then institutional constraints are hardly necessary.

46. Or other relevant audiences, including courts, the press, and the public; for simplicity, I will generally refer to Congress.

advantage to doing so, and in this way, they have given the OLC quasi-judicial status.<sup>47</sup>

If the President publicizes all OLC opinions, he takes the risk that the OLC will publicly advise him that an action is illegal. If OLC approval helps deflect blame from the President, then OLC disapproval will tend to concentrate blame on a President who ignores its advice. Congress and the public will note that after all the President is ignoring the advice of lawyers that he appointed and thus presumably trusts, and this can only make the President look bad. To avoid such blame, the President may refrain from engaging in a politically advantageous action. In this way, the OLC might be able to prevent the President from taking an action that he would otherwise prefer. At a minimum, the OLC raises the political cost of the action.

I have simplified greatly, but this basic logic has led some scholars to believe that the OLC constrains the President.<sup>48</sup> But this is a mistake. The OLC strengthens the President's hand in some cases and weakens it in others, but overall it extends his power and serves as enabler, not constraint.

To see why, consider an example in which the President must choose an action that lies on a continuum, such as electronic surveillance. At one extreme, the President can engage in actions that are clearly lawful—for example, spying on criminal suspects after obtaining warrants from judges. At the other extreme, the President can engage in actions that are clearly unlawful—for example, spying on political opponents. OLC opinions will not affect Congress's or the public's reaction to either the obviously lawful or the obviously unlawful actions. But then there are middle cases. Consider Policy *L*, which is just barely legal, and Policy *I*, which is just barely illegal. The President would like to pursue Policy *L* but fears that Congress and others will mistakenly believe that Policy *L* is illegal. As a result, political opposition to Policy *L* will be greater than it would be otherwise.

In such a case, a favorable advisory opinion from a neutral legal body that has credibility with Congress will help the President.<sup>49</sup> OLC approval of Policy *L* would cause political

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47. Cf. Morrison, *Constitutional Alarmism*, *supra* note 39, at 1722–23.

48. See, e.g., GOLDSMITH, *supra* note 6.

49. See Morrison, *Constitutional Alarmism*, *supra* note 39, at 1722.

opposition (to the extent that it is based on the mistaken belief that Policy *L* is unlawful) to melt away. Thus, the OLC enables the President to engage in Policy *L*, when without OLC participation that might be impossible. True, the OLC will not enable the President to engage in Policy *I*, assuming OLC is neutral. Indeed, OLC's negative reaction to Policy *I* might stiffen Congress's resistance. Nevertheless, the President will use the OLC only because he believes that on average, the OLC will strengthen his hand.

An analogy to contract law might be illuminating. People enter contracts because they enable them to do things *ex ante* by imposing constraints on them *ex post*. For example, a debtor can borrow money from a creditor only because a court will force the debtor to repay the money *ex post*. It would be strange to say that contract law imposes "constraints" on people because of *ex post* enforcement. In fact, contract law enables people to do things that they could not otherwise do—it extends their power. If it did not, people would not enter contracts.

A question naturally arises about the OLC's incentives. I have assumed that the OLC provides neutral advice, in the sense of trying to make accurate predictions about how other agents like Congress and the courts would react to proposed actions. It is possible that the OLC could be biased—either in favor of the President or against him. If the OLC were biased against the President, he would stop asking it for advice (or would ask for its advice privately and then ignore it).<sup>50</sup> This danger surely accounts for OLC jurisprudence being pro-executive.<sup>51</sup> But it would be just as dangerous for OLC to be excessively biased in favor of the President because it would mislead him and lose its credibility with Congress.<sup>52</sup> As a result, the OLC could not help the President engage in *L* policies. So the OLC must be neither excessively pro-President nor anti-President. If it can avoid these

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50. See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 716–17 (2005) (“[T]he more critically OLC examines executive conduct, the more cautious its clients are likely to be in some cases about seeking its advice.”).

51. See Morrison, *Stare Decisis*, *supra* note 41, at 1501.

52. See Morrison, *Constitutional Alarmism*, *supra* note 39, at 1722 (“[I]f OLC says yes too readily to its clients, it will no longer be useful to them,” because its opinions must “be taken seriously as a sober work of legal analysis by officials not precommitted to the outcome” to mollify critics.”).

extremes, it will be an enabler; if it cannot, it will be ignored. In no circumstance could it be a constraint.<sup>53</sup>

If the OLC cannot constrain the President, why have people contended that the OLC can constrain the President? What is the source of this mistake?

One possibility, which I already have noted, is that commentators might look only at one side of the problem. Scholars note that the OLC may “prevent” the President from engaging in barely illegal actions without also acknowledging that it can do so only if at the same time it enables the President to engage in barely legal actions. This is simply a failure to look at the full picture.

For example, President Bush arguably abandoned a scheme of warrantless wiretapping without authorization from the Foreign Intelligence Surveillance Court because the OLC declared the scheme illegal, and top Justice Department officials threatened to resign unless President Bush heeded OLC advice.<sup>54</sup> This seems like a clear example of constraint, but it is important to look at the whole picture. If the OLC had approved the scheme, and later executive branch agents in the

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53. There is a second twist to the analysis. The President and the OLC have developed a mechanism for limiting the downside of negative advice. That is the process under which the OLC first gives the President legal advice orally and privately, and then memorializes it in writing only if it is favorable (or otherwise if the President consents). If this system worked perfectly, then the OLC would enable the President to engage in all *L* policies without affecting his ability to engage in *I* policies. As a result of OLC advice, Congress will drop its opposition to Policy *L*; while in the absence of OLC advice, Congress’s opposition to Policy *I* will remain moderate because of its uncertainty about whether Policy *I* is illegal. As a result of OLC’s participation in executive branch decisionmaking, the political opposition to Policy *L* drops to zero, while political opposition to Policy *I* remains unchanged. See Morrison, *Stare Decisis*, *supra* note 41, at 1468–70.

It would be wrong to exaggerate the significance of this mechanism. If the OLC never publicly gave the executive negative advice, then it would lose its credibility, and if the executive offers no OLC defense for certain actions when it has done so in the past, Congress and others will naturally infer that the OLC has privately given negative advice to the President. So for certain types of actions, Congress will expect an OLC opinion and draw a negative inference if none is forthcoming. See Morrison, *Constitutional Alarmism*, *supra* note 39 at 1732–33; Morrison, *Libya*, *supra* note 39, at 67–68. Still, the President’s freedom to deny OLC’s opinion to Congress creates some noise in the system, as it is always possible that the OLC failed to give advice rather than gave negative advice, and all this works to the executive’s advantage.

54. *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys: Hearings Before the S. Comm. on the Judiciary, 110th Cong.*, 218–20 (2007) [hereinafter *Comey Testimony*] (statement of James B. Comey, former Deputy Attorney General).

National Security Agency had been prosecuted and punished by the courts, then the OLC's credibility as a supplier of legal advice would have been destroyed. This outcome would have been terrible for the President. As I have argued, a credible OLC helps the President accomplish his agenda in barely legal cases. Without taking into account those cases where OLC advice helps the President's agenda *ex post* as well as the cases where OLC advice hurts the President's agenda *ex post*, one cannot make an overall judgment about the OLC's *ex ante* effect on executive power.

Another possible source of error is that scholars imagine that neutral advice will almost always prevent the President from engaging in preferred actions, rather than enabling the President to engage in preferred actions. The implicit assumption is that a President will normally want to break the law, and that under the proper interpretation of the Constitution and relevant standards the President can accomplish very little. So if OLC is in fact neutral and the President does obey its advice, then it must constrain the President.

But this theory cannot be right, either. If the OLC constantly told the President that he cannot do what he wants to do, when, in fact, Congress and other agents would not object to the preferred actions, then the President would stop asking OLC for advice. As noted above, for the OLC to maintain its relevance, it cannot offer an abstract interpretation of the Constitution that is divorced from political realities; it has to be able to make realistic predictions about how other legal agents will react to the President's actions. This practical reality has led the OLC to develop a pro-executive jurisprudence in line with the long-term evolution of executive power.<sup>55</sup> If the OLC tried to impose constraints other than those imposed by Congress and other institutions with political power, then the President would ignore it.

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55. See Morrison, *Stare Decisis*, *supra* note 41, at 1501–02 (noting the “generally pro-executive tenor in OLC opinions”).

### C. Evidence

#### 1. Testing the Three Hypotheses

We have three hypotheses about the OLC on the table. The first is that the OLC acts as an ex ante constraint on presidential power, serving a role similar to that of Congress and the courts. The second is that OLC is an ex ante enabler of presidential power. The third hypothesis is Professor Ackerman's rubber-stamp theory that the OLC serves neither as a constraint nor as an enabler because it cannot say no ex post.<sup>56</sup> This section will briefly discuss the evidence for each hypothesis.

It is easy enough to distinguish Professor Ackerman's hypothesis from the other two: if the OLC never or rarely says no, then Professor Ackerman is right. In addition, Professor Ackerman is right even if the OLC sometimes says no but the President ignores the OLC in those cases.

Distinguishing the constraint and enabler hypotheses is more difficult. Both hypotheses predict some ex post rejections of presidential preferences. To distinguish the hypotheses, one would need to look at the other side of the ledger: the cases where the OLC has enabled the President to act where otherwise Congress would have opposed him. Unfortunately, it would be hard to identify such cases.

#### 2. Statistical Evidence

In a study of written OLC opinions, Professor Trevor Morrison found that seventy-nine percent approved the President's position, eight percent provided a mixed answer, and thirteen percent disapproved the President's position.<sup>57</sup> In several cases, OLC rejected the White House position on issues of significance.<sup>58</sup> In addition, Professor Morrison notes that because the OLC usually provides negative advice orally, the written record reflects a selection bias in favor of approvals.<sup>59</sup>

But there is less here than meets the eye. First, one must keep in mind that the executive is a "they," not an "it." When the President cannot resolve policy differences among his major

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56. See ACKERMAN, *supra* note 7, at 68.

57. Morrison, *Constitutional Alarmism*, *supra* note 39, at 1717–18.

58. See *id.* at 1718 (providing examples).

59. *Id.* at 1719.

advisers, he may well be indifferent about the OLC's reaction and indeed welcome a legal resolution ("sorry, my hands are tied"). Second, the relevant focus, for the purpose of my argument, is OLC advice on national security issues. On this topic, there only appear to be four documented, unclassified cases in the OLC's entire history in which it said "no" to the executive: the rejection of the Bush Administration's argument that the Geneva Conventions do not apply to terrorists in Iraq in 2002,<sup>60</sup> the rejection of certain forms of coercive interrogation in 2003,<sup>61</sup> the rejection of an electronic surveillance program that circumvented the Foreign Intelligence Surveillance Court in 2003,<sup>62</sup> and the rejection of the Libya intervention in 2011.<sup>63</sup>

Even these cases turn out to be ambiguous. The OLC first said "yes" on coercive interrogation and electronic surveillance and then changed its mind a few years later.<sup>64</sup> In addition, the OLC's "no" on coercive interrogation turned out to be less than absolute. It continued to authorize waterboarding even after the earlier memorandum was withdrawn.<sup>65</sup> Unfortunately, evaluating the empirical evidence is even harder than Professor Morrison indicates. The problem is not just that negative advice is confidential; the problem is that we do not know how the executive responded to this negative advice. Did it desist from its conduct? Modify it along the margins? Or ignore the OLC?

A further methodological problem concerns whether a "no" blocks an important policy or simply requires certain i's to be dotted or t's to be crossed. OLC officials often emphasize that their job is to help the White House find a legally acceptable

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60. See GOLDSMITH, *supra* note 6, at 39–42.

61. See *id.* at 141–61.

62. See *id.* at 180–82; see also *Comey Testimony*, *supra* note 54, at 218–20.

63. See, e.g., Morrison, *Libya*, *supra* note 39, at 65. Former OLC officials report that OLC has on numerous occasions provided a classified no, which the President has complied with. See, e.g., Morrison, *Constitutional Alarmism*, *supra* note 39, at 1718. It is impossible to argue with someone who cites secret evidence. Without doubting their sincerity, one can question whether they know the complete story, or have thought about the evidence systematically and considered alternate hypotheses. In any event, dependent as I am on public sources, my argument will proceed accordingly.

64. See GOLDSMITH, *supra* note 6 at 140–46 (discussing original OLC opinion on coercive interrogation); *Comey Testimony*, *supra* note 54, at 214–15 (discussing "re-evaluation" of electronic surveillance program).

65. Morrison, *Constitutional Alarmism*, *supra* note 39, at 1726 n.144.



method of accomplishing their aims.<sup>66</sup> Even the early Bush Administration OLC drew the line on certain forms of torture, such as mock executions, the use of insects to exploit fears, and so on, and established guidelines to ensure the safety of detainees.<sup>67</sup> The problem with treating this advice as a “no” is that it is not clear that the executive cared about these details, as opposed to the broad agenda of using coercive interrogation practices. The Administration no doubt wanted legal advice so as to minimize the risk of legal liability.

Finally, President Obama ignored the OLC’s position on the Libya intervention. In that case, the OLC took a brave stand, only to be pushed to the sidelines. This major event offered unusually rapid confirmation of Professor Ackerman’s assertion that the executive can avoid negative advice from the OLC by soliciting advice from the White House Counsel’s Office. (President Obama also received favorable advice from the State Department legal counsel.) Professor Morrison argued before this event that the President faces strong disincentives to doing an end-run around the OLC.<sup>68</sup> Afterward, he could only criticize the President, allege that the President suffered from negative political fallout, and note that he hoped that this sort of thing does not happen often.<sup>69</sup> Although the President was criticized, there is simply no evidence that his evasion of the OLC has hurt him politically. As is so often case, the (apparent) success of the operation provides its own justification.

These examples provide some evidence that OLC serves as enough of an ex post constraint to undermine Professor Ackerman’s extreme thesis, but still is weak evidence of robust constraints. It is hard, on this evidence, to distinguish between the constraint and enabler hypotheses. In other words, it is possible that the OLC serves as either a weak constraint or a weak enabler.

Why has the OLC been so weak? First, the constellation of factors that drive decisionmaking in the executive branch might prevent the President from using the OLC to solve a time-inconsistency problem. The President benefits from neu-

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66. *See id.*

67. *See, e.g.,* Interrogation Memorandum, *supra* note 32, at 14 (insisting that only harmless insects can be used and that subjects be informed that the insects cannot cause death or severe suffering).

68. *See Morrison, Constitutional Alarmism, supra* note 39, at 1741.

69. Morrison, *Libya, supra* note 39, at 74.

tral advice and from the ability to cite OLC approval. When the OLC blocks the President, however, short-term political considerations trump the medium-term advantages of maintaining a neutral OLC. Meanwhile, OLC lawyers yield to political pressure either for careerist reasons or to prevent the President from cutting the OLC out of the process. Private lawyers face similar pressures, but the market in legal services might provide some additional discipline.<sup>70</sup>

Second, the problem might lie in the nature of foreign relations and national security. These areas of action have been notoriously difficult to bring under legal control. Courts have frequently been asked to adjudicate national security disputes between Congress and the President. Generally speaking, courts have resisted these requests, treating these issues as political questions or nonjusticiable for other reasons.<sup>71</sup> The usual explanation for this resistance is that courts are not experts on these issues; that the highly fluid, frequently changing nature of foreign relations and national security makes them unsuitable for slow, rule-bound, public, and decentralized resolution; and that, accordingly, courts fear that if they intervene, the executive branch will ignore their rulings, provoking a constitutional crisis.<sup>72</sup>

The supposed solution to this problem is to ask an advisory office in the executive branch to assume a function that the courts have repudiated. A small executive branch office might overcome certain problems that courts face relating to secrecy and speed, but the fundamental problem is that foreign relations are not susceptible to regulation by rules.<sup>73</sup>

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70. See generally Lund, *supra* note 43, at 447–59.

71. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 25 (D.C. Cir. 2000) (Silberman, J., concurring) (arguing that the triggering of the War Powers Resolution involves a nonjusticiable political question, and collecting cases).

72. To give a stark example, as the Supreme Court considered the case of German saboteurs captured on American soil during World War II, President Roosevelt told his Attorney General that he planned to execute them regardless of the Court's decision. "The Supreme Court got the message as well," and it approved the executions. GOLDSMITH, *supra* note 6, at 52; see also POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 1, at 31 (discussing weaknesses of judicial decisionmaking).

73. See generally ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* (2010).

3. *A Case Study: Military Intervention Without Congressional Authorization*

Given the inconclusive nature of the statistical evidence, one might also consider the evidence in a qualitative fashion. In this Section, I undertake such an analysis, focusing on military intervention.

The executive has on a number of occasions sought to send military forces into foreign countries without congressional consent. A lively controversy exists over whether the President has such authority. The U.S. Constitution gives Congress the power to declare war. Yet founding era sources suggest that opinion at that time was that the President could unilaterally use force in certain circumstances—for example, to repel invasions. Since the Founding, the executive has used force on foreign territory (rather than to repel invasions) on numerous occasions without congressional authorization.<sup>74</sup> Such actions gave rise to the view within the executive branch that tradition sanctioned the unilateral use of force even in foreign countries, albeit subject to ill-defined limits.<sup>75</sup> After the Vietnam War, which was widely blamed on the executive despite congressional acquiescence, Congress passed the War Powers Resolution over the President's veto. This Act required the President to withdraw troops from hostilities within sixty days unless he received congressional authorization.<sup>76</sup>

Both before and after September 11, the OLC fought off these twin constraints on executive power. In 1992, for example, President George H.W. Bush ordered American troops into Somalia where they engaged in combat with local militias. The OLC resolved the constitutional question by arguing that the executive has constitutional authority to send troops onto foreign soil to protect Americans and American property.<sup>77</sup> In 1994, President Clinton prepared to launch a military invasion of Haiti after a coup overthrew the government, but the new government of Haiti backed down, and American troops entered Haitian territory to conduct peacekeeping operations. President Clinton did not have congressional authorization for the transfer

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74. See LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 91 (2000).

75. *Id.*

76. See 50 U.S.C.A. § 1544(b) (Supp. 2009).

77. Authority to Use U.S. Military Forces in Somalia, 16 Op. O.L.C. 6-7 (1992).

of American troops onto potentially hostile soil. Instead, the OLC argued that the deployment of troops accorded with an appropriations bill that barred the use of appropriated funds for military operations in Haiti unless justified by U.S. national security interests.<sup>78</sup> The appropriations bill did not by its terms authorize anything. The OLC further explained that the President did not need congressional authorization under the Declaration of War Clause in part because because “the deployment . . . [took] place, with the full consent of the legitimate government of the country involved.”<sup>79</sup> Such an event is not a “war” even if it could quickly turn into war. In addition, the War Powers Resolution does not apply “where the risk of sustained military conflict [is] negligible.”<sup>80</sup>

In 1995, President Clinton decided U.S. forces should enter Bosnia and Herzegovina to enforce a fragile peace agreement. The OLC found itself unable to rely on an appropriations bill. Instead of citing a statute, the OLC noted the President has the “power to deploy troops abroad without the initiation of hostilities,” citing historical practice and the President’s Commander-in-Chief power, the much criticized constitutional basis for many Bush-era OLC opinions.<sup>81</sup> In this case, the risk of sustained military conflict was not negligible.<sup>82</sup> But that risk no longer mattered. Because the parties had consented to the deployment of troops, there is still no “war” and neither the Declaration of War clause nor the War Powers Resolution applied.

In 1999, President Clinton ordered a massive air bombardment of Serbia. Congress again refused authorization; indeed, the bill to authorize military operations was voted on but failed to pass on a tie vote. It was impossible to argue that the risk of sustained military conflict was negligible or that the Serbs consented to the bombardment of their own country. The OLC rested its case on an appropriations statute enacted after the

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78. Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 173, 173–75 (1994).

79. *Id.* at 177–78.

80. *Id.* at 176.

81. Proposed Deployment of Troops into Bosnia, 19 Op. O.L.C. (1995), <http://www.justice.gov/olc/bosnia2.htm>.

82. *Id.* (“Although, combat conceivably may occur during the course of the operation, it is not likely that the United States will find itself involved in extensive or sustained hostilities.”).

commencement of hostilities.<sup>83</sup> President Clinton sent American troops into action and then dared Congress to deny them funding. Trapped, Congress reluctantly authorized funds. For the OLC, the War Powers Resolution did not stand in the way of the war because of the appropriations statute even though the War Powers Resolution said that appropriations statutes do not count as congressional authorization.

During the George W. Bush Administration, the OLC took aggressive positions on a range of issues, including the use of coercive interrogation (despite a statute that banned torture) and warrantless surveillance (despite a statute that restricted surveillance).<sup>84</sup> OLC opinions relied heavily on the constitutional authority of the executive, using it to justify narrow interpretations of the statutes.<sup>85</sup> The OLC later withdrew these memos.<sup>86</sup>

In 2011, President Obama ordered U.S. forces to participate in a NATO bombardment of Libya. Again, Congress refused to authorize the action. The OLC advised the President that he could intervene without congressional authorization, citing its earlier opinions on military intervention.<sup>87</sup> Two months later, in response to questions about whether the intervention complied with the War Powers Act's sixty-day limit, the White House released a document to Congress with a one-page legal analysis. Consistent with previous OLC doctrine, the President argued that "the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad."<sup>88</sup> In addition, the President argued that the War Powers Resolution did not require congressional authorization because the action in Libya was not really a "war":

U.S. military operations are distinct from the kind of "hostilities" contemplated by the Resolution's 60 day termination provision. U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Na-

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83. Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 1, 3-4 (2000).

84. See Interrogation Memorandum, *supra* note 32.

85. See O.L.C., Memorandum Opinion for the Deputy Attorney General, December 30, 2004, available at <http://www.justice.gov/olc/18usc23402340a2.htm>.

86. *Id.*

87. See Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (April 1, 2011).

88. White House Admin., *United States Activities in Libya* 25 (2011), available at <http://info.publicintelligence.net/ObamaLibyaJustification.pdf>.

tions Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.<sup>89</sup>

The narrow definition of “hostilities” echoed the narrow definition of “torture” used by the Bush-era OLC. The reliance on UN Security Council authorization echoed President Truman’s reliance on Security Council authorization for the U.S. military intervention in Korea (also not authorized by Congress).<sup>90</sup>

Press reports later revealed that the OLC refused to issue an opinion advising the President that the use of military force in Libya was consistent with the War Powers Act, and that the President instead relied on the advice of the State Department legal adviser and the White House Counsel.<sup>91</sup>

What are we to make of this history? One view is that it confirms the rubber-stamp hypothesis. The OLC has always rubber stamped legal interventions up until 2011, and when it declined to do so, the White House ignored it.

The rubber-stamp hypothesis raises some questions: why would the OLC go to such elaborate lengths to provide narrow justifications for military interventions in the early years, and why would the OLC finally draw the line on Libya? It seems likely that the OLC sought to prevent its credibility from eroding completely. An OLC that is truly a rubber stamp would be of no value to the President and might as well be disposed of completely.

At the same time, the OLC could not in the end constrain the executive from pursuing the military intervention in Libya. If the OLC preserved its credibility by rendering a “no,” it could not provide the checking function of Congress and the judiciary. The President’s decision to disregard OLC advice is more in the spirit of the enabler hypothesis than the constraint hypothesis;

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89. *Id.*

90. See S.C. Res. 83, ¶7, U.N. SCOR, 5th Year, U.N. Doc. S/INF/4/Rev. 1 at 5 (June 27, 1950); S.C. Res. 82, ¶4–7, 8–10, U.N. SCOR, 5th Year, U.N. Doc. S/INF/4/Rev.1 at 4 (June 25, 1950).

91. See Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, N.Y. TIMES, June 17, 2011, at A1.

the President made what one hopes was a rational decision to weaken his hand with Congress in future confrontations because he believed that the stakes were too high in the Libya intervention to withdraw the troops. The gamble might well have paid off. The President's success in Libya in the face of congressional opposition might have the long-term effect of eroding the War Powers Act rather than weakening the executive; in that case, President Obama acted wisely by overruling the OLC.

#### *D. Alternatives*

Despairing of both the traditional external checks on the executive (as intended by Madison) and internal checks on the executive (as advocated by Professor Goldsmith), Professor Ackerman suggests the creation of an executive tribunal that would have the power to review presidential assertions of power and restrict such assertions when unlawful.<sup>92</sup> Professor Neal Katyal proposed vesting the OLC's quasi-judicial authority in an executive branch official who enjoys more independence than the head of the OLC currently possesses.<sup>93</sup> Neither approach, however, solves the underlying problem that has resulted in executive discretion. Because unanticipated national security emergencies call for powers that cannot be stipulated in advance, the executive's actions at such times are not susceptible to traditional rule-bound legal analysis. Therefore, either the external official or tribunal will honestly apply the law and end up interfering with policies needed to protect national security, or he (or it) will enjoy *de facto* policymaking authority, which will not be regarded as legitimate in a political appointee.

#### CONCLUSION

Professor Holmes's medical protocol analogy does not provide any reason for doubting the deference thesis. Rules are valuable in many settings, including emergencies, but it does not follow from that observation that courts and legislatures rather than the executive should create and enforce the rules. Each institution has specific advantages; the executive's advantages are salient during emergencies.

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92. ACKERMAN, *supra* note 7, at 143–46.

93. Katyal, *supra* note 40, at 2337.

The notion that the executive can be constrained by its own components is a paradoxical idea and has little to recommend it. In the end, someone must have discretion to respond to unforeseen events, and in the U.S. system that role has been given to the President. The theory that the OLC or some similar office within the executive branch could constrain the President rests on a confusion between rational self-binding, which the President may, albeit with difficulty, engage in, and external constraint, which the President will resist. The OLC may serve as a device for rational self-binding, which extends the executive power; it is highly unlikely, however, that it can serve as a constraint.