

THE OPINIONS BY THE ATTORNEY GENERAL AND THE OFFICE OF LEGAL COUNSEL: HOW AND WHY THEY ARE SIGNIFICANT

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ABSTRACT

Although much research has been done on the opinions issued by the Office of Legal Counsel (OLC) regarding the power of President Bush to order enhanced interrogations of captured enemy combatants, and the power of the President, as commander in chief, to act to address the events of September 11, 2001, and prevent future attacks, there has been much less research on explaining the source of the power and significance of OLC opinions within the Executive Branch. This article will focus on the historical basis and legal significance of opinions by the Attorney General, and later those of the OLC. This article will explain why and how opinions on the meaning and applicability of the law issued by the Attorney General, dating from those of General Randolph to General Holder and those of the OLC, have historically been quasi-judicial in approach and determinative within the Executive Branch.

I. INTRODUCTION

After the attacks of September 11, 2001, the Bush Administration's Department of Justice OLC issued a series of memos that stated that the President had the exclusive constitutional power (1) to detain enemy combatants, (2) to bypass the Uniform Code of Military Justice (UCMJ) and initiate military commissions to try such combatants, and (3) to determine what types of techniques could be initiated to secure information from captured enemy combatants from the military operations in

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Afghanistan and Iraq.¹ Subsequent to the issuance of these memos much ink has been spilled on the legality of the actions made by the Bush Administration.² What all of these critiques have not included

¹ For example, see JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (1st ed. 2007); *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* (David Cole ed., 2009); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (1st ed. 2006); Janet Cooper Alexander, *John Yoo's War Powers: The Law Review and the World*, 100 CALIF. L. REV. 331 (2012); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455 (2005); Arthur H. Garrison, *Hamiltonian and Madisonian Democracy, the Rule of Law and Why the Courts Have a Role in the War on Terrorism*, 2008 J. INST. JUST. & INT'L STUD. 120; Arthur H. Garrison, *Hamdan v. Rumsfeld, Military Commissions, and Acts of Congress: A Summary*, 30 AM. J. TRIAL ADVOC. 339 (2006); Arthur H. Garrison, *The Judiciary in Times of National Security Crisis and Terrorism: Ubi Inter Arma Enim Silent Leges, Quis Custodiet Ipsos Custodes?*, 30 AM. J. TRIAL ADVOC. 165 (2006); Arthur H. Garrison, *The War on Terrorism on the Judicial Front, Part II: The Courts Strike Back*, 27 AM. J. TRIAL ADVOC. 473 (2004); Arthur H. Garrison, *Hamdi, Padilla and Rasul: The War on Terrorism on the Judicial Front*, 27 AM. J. TRIAL ADVOC. 99 (2003); David J. Gottlieb, *How We Came to Torture*, 14 KAN. J.L. & PUB. POL'Y 449 (2005); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SECURITY L. & POL'Y 409 (2005); Dawn E. Johnsen, *All the President's Lawyers: How to Avoid Another "Torture Opinion" Debacle*, AM. CONST. SOC'Y FOR L. & POL'Y, July 2007; Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007); Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration*, 62 ME. L. REV. 155 (2010); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811 (2005); Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297 (2006); Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9 (2005); Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389 (2010); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

² See, e.g., Johannes van Aggelen, *A Response to John C. Yoo, "The Status of Soldiers and Terrorists under the Geneva Conventions"*, 4 CHINESE J. INT'L L. 167 (2005) (commenting on and refuting John Yoo's article defending his actions of supporting denial of protection under the Geneva Convention to detainees in the War on Terrorism); Julie Angell, *Current Developments 2004–2005, Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557 (2005) (questioning whether OLC lawyers can be held ethically accountable for torture of prisoners at Abu Graib as a result of the very narrow interpretation of the word torture as defined by the Bybee Memo written to President Bush in 2002); David Brennan, *Torture of Guantánamo Detainees with the Complicity of Medical Health Personnel: The Case for Accountability and Providing a Forum for Redress for These International Wrongs*, 45 U.S.F. L. REV. 1005 (2011) (discussing the participation of medical personnel in the torture that took place at Guantanamo and other camp locations due to deliberate deviation by the Bush administration of its legal obligations); Arthur H. Garrison, *The Office of Legal Counsel "Torture Memos": A Content Analysis of What the OLC Got Right and What They Got Wrong*, 49 CRIM. L. BULL. (forthcoming 2012) (explaining that the political assessment of the OLC memos to the Bush administration regarding torture did not incorrectly interpret federal torture law, and that the acceptance of legal definitions of torture does not equate to authorization of torture); Steven Giballa, *Saving the Law from the Office of Legal Counsel*, 22 GEO. J. LEGAL ETHICS 845 (2009) (discussing the immunization effect of quasi-third party advice in relation to Office of Legal Counsel memos to the White House, and advocating that Model Rules of Professional Conduct should be interpreted to exclude the OLC from delivering legal opinions that advocate for unconventional legal interpretations);

is an analysis of why the opinions by the Attorney General and the OLC³ were determinative within the executive branch.

Aaron R. Jackson, Comment, *The White House Counsel Torture Memo: The Final Product of a Flawed System*, 42 CAL. W. L. REV. 149 (2005) (detailing how loyalty by the OLC to the President leads to flawed legal advice, and elucidating the constant tension between OLC's loyalty to the President and their professional and ethical responsibilities); Lavitt, *supra* note 1 (discussing whether or not members of the Bush administration should be prosecuted for their involvement in the torture that occurred during the early years of the War on Terrorism, and whether or not attorneys in the Office of Legal Counsel can be held accountable for the torture that occurred as a result of their legal advice to the administration); Bradley Lipton, Short Essay, *A Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV. L. & POL'Y REV. 249 (2010) (illustrating how the OLC, in permitting wiretapping without warrants within the United States, violated legal norms, and how the political nature of the OLC is what caused problems within the OLC during the Bush administration, and giving suggestions for institutional reform); Marisa Lopez, Note, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685 (2005) (scrutinizing the OLC for providing in the Torture Memo a piece of persuasive advocacy rather than a neutral consideration of the issue, and examining the professional responsibility of the OLC at the time this memo was written); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (examining how precedent shapes legal advice given by the OLC, and looking to how often precedent is followed or departed from, examining specifically the exceptional departure seen in the Torture Memo); Fran Quigley, *Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch*, 20 CORNELL J.L. & PUB. POL'Y 271 (2010) (evaluating the impunity the Bush administration benefited from that resulted from a flaw in the oversight of the President by the Attorney General due to the President's ability to appoint and remove the Attorney General, and suggesting that the Attorney General should not be solely in charge for prosecuting the executive branch); Rouillard, *supra* note 1 (considering what amounts to torture under international law and if torture may ever be justified, using the Standards of Conduct Memorandum as the backdrop); Rachel Ward Saltzman, Note, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439 (2010) (considering the institutional tradition of the OLC supporting executive power by examining the OLC's response to the war on terrorism within the Torture Memo); Robert F. Turner, *What Went Wrong? Torture and the Office of Legal Counsel in the Bush Administration*, 32 CAMPBELL L. REV. 529 (2010) (examining how and why the OLC made poor legal interpretations regarding torture in their quest to gain intelligence from al-Qaeda, and discussing the importance of holding such wrongdoers accountable); Tung Yin, *Great Minds Think Alike: "The Torture Memo," Office of Legal Counsel, and Sharing the Boss's Mindset*, 45 WILLIAMETTE L. REV. 473 (2009) (analyzing the criticism that the Torture Memo, a work by John Yoo, is flawed and unethical, discussing the essential nonexistence of a neutral analysis in the legal context, and concluding that requiring more transparency by the OLC, rather than asserting professional conduct standards, is more likely to restrain the OLC); Ross L. Weiner, Note, *The Office of Legal Counsel and Torture: The Law as Both a Sword and Shield*, 77 GEO. WASH. L. REV. 524 (2009) (explaining why the OLC needs greater oversight, using the juxtaposition between the Status Memo and the Torture Memo as an example of how the OLC can abuse its powers).

³ Until recently, there was very little written about OLC whether popular press or scholarly work. Indeed, until the George W. Bush administration, with few exceptions, the scholars who researched OLC were OLC alums themselves. . . .

Despite all of the attention by former OLC attorneys and the popular media, and the obvious attention to political scientists to the executive branch, laws, public policy and the like, there is very little about the Office of Legal Counsel written by political scientists.

Tobias T. Gibson, *Office of Legal Counsel: Inner Workings and Impact*, 18 L. & CTS. (Am. Pol. Sci. Ass'n, Wash., D.C.) no. 2, 2008 at 7, 7 (internal citations omitted). Even the well-cited

Every President from Washington to Obama has received legal advice regarding a proposed action or policy.⁴ Foreign policy and domestic policy under our Constitution is measured by its legality. All presidents seek to act within the law and the Constitution. The Constitution itself requires and obligates the President to “take [c]are that the [l]aws [are] faithfully executed[.]”⁵ It is this responsibility that requires the President to first determine what the law requires and then to act accordingly.⁶ Historically, the main agency within the executive branch to aid the President in both maintaining and obeying the law has been the Office of the Attorney General.⁷ This article will focus on two issues. First, what is the historical purpose and authority of the Office of the Attorney General?⁸ And second, how has the Office of the Attorney General, and later the OLC, developed into the plenary legal opinion agency within the executive branch? This article traces the history of the

Luther A. Huston only allocates one section to the history and purpose of the Office of Legal Counsel almost as an afterthought. LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* 60–61 (Ernest S. Griffith & Hugh Langdon Elsbree eds., 1967). For a discussion of the OLC by past Attorneys General, see Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993) and Frank M. Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A. J. 33 (1971), which discuss the tasks and duties of the OLC. For a general study on the roles and duties of government lawyers, see the special symposium issue, Symposium, *Government Lawyering*, 61 LAW & CONTEMP. PROBS. 1 (1998).

⁴ See HUSTON, *supra* note 3, at 60.

⁵ U.S. CONST. art. II, § 3.

⁶ David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 114 (1993).

⁷ See Arthur H. Garrison, *The Role of the OLC in Providing Legal Advice to the Commander-in-Chief after September 11th: The Choices Made by the Bush Administration Office of Legal Counsel*, 32 J. NAT’L ASS’N ADMIN. L. JUD. (forthcoming 2012) (on file with author) (reviewing articles written about the Attorney General and how the Torture Memos stand as an aberration of the Attorney General’s job to be a quasi-judicial legal interpreter for the executive branch).

⁸ For early histories and descriptions of the Office of the Attorney General, see Frank Buckley, *The Department of Justice—Its Origin, Development and Present Day Organization*, 5 B.U. L. REV. 177, 178–79, 182–83 (1925) (outlining the history of the Attorney General position and its modern incarnation); Tom Clark, Attorney General of the United States (ret.), *The Office of the Attorney General*, Address Before the Tennessee Bar Association (Nov. 1, 1945), in 19 TENN. L. REV. 150, 151 (1946); John A. Fairlie, *The United States Department of Justice*, 3 MICH. L. REV. 352, 352 (1905) (discussing the advisory positions of early Attorneys General as Crown Attorneys to the King of England and his ministers); Henry Barrett Learned, *The Attorney-General and the Cabinet*, 24 POL. SCI. Q. 444, 445 (1909) (outlining the reform and evolution of the Attorney General position); Ross L. Malone, Jr., *Department of Justice: The World’s Largest Law Office*, 39 A.B.A. J. 381, 382–83 (1953) (outlining the chain of command for federal government agencies under the auspices of the Office of the Attorney General); Rita W. Nealon, *The Opinion Function of the Federal Attorney General*, 25 N.Y.U. L. REV. 825 (1950) (discussing the role of the Attorney General in U.S. history in issuing advisory opinions for the executive branch); Edward H. Levi, *The Justice Department: Some Thoughts on Its Past, Present and Future*, 64 ILL. B. J. 216, 216 (1975) (detailing the role of the Attorney General by former Attorney General Edward H. Levi).

Office of the Attorney General and the OLC to meet a gap in the literature on presidential legal policymaking and the role of the rule of law that governs executive decision-making; specifically, it is a detailed review of the origin and purpose of the Office of the Attorney General and the *why* that underlies the purpose and unique role of this office to act as defender of the rule of law⁹ regardless of political and policy expediencies.¹⁰ After the attacks of 9/11, it was the OLC, not President Bush himself, which received almost unprecedented attention by the legal community.¹¹ It is by clearly understanding the history and historic role of the OLC can the significant attention given to the Bush OLC be understood.

II. THE ORIGIN AND PURPOSE OF THE OFFICE OF THE ATTORNEY GENERAL

The position of Attorney General was not always among the pantheon of cabinet secretaries within the executive branch.¹²

⁹ As one observer commented, although

[a]ny cabinet officer is bound to act lawfully and not disobey the law. . . . [N]o other cabinet officer is the “custodian of the law” within the executive branch the way the Attorney General is That is, the office [of the Attorney General] is created to provide within the executive branch a quasi-judicial person—a member of the bar—who keeps the executive branch under law, and to whom the President and other executive officials can look for a uniform, authoritative pronouncement of the law, at least short of the courts.

DAVID J. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 118 (1980).

¹⁰ In drawing an analogy between the office of the U.S. Attorney General and the English Attorney General, Professor John Edwards observed the importance of the duty of the Attorney General to protect the public interest:

A point that was made earlier—one that would be familiar to an English Attorney General—is that there is a residual responsibility for the public interest. It is not, I think, without significance that historically, certainly for the past few centuries, the Attorney General of England has always been described as the guardian of the public interest. He is both a member of the Administration and more. . . . He is required to rise above the partisan obligations of being a member of the prevailing Administration. . . . He has to have regard to the wider community. It is a difficult tightrope he has to walk between these several obligations. And it is only to the extent that he keeps them distinct, where there appears to be a conflict.

Id. at 119–20. To this, former U.S. Attorney General Griffin Bell responded, “I was going to follow up on what John Edwards said. I think our concept of the Attorney General is, or it should be, just what he describes as being the case in England.” *Id.* at 121.

¹¹ See *supra* notes 1–2, 7 and accompanying text.

¹² For general histories on the Attorney General and the operation of the Department of Justice, see NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789–1990* 48–51 (1992) (explaining the power the Attorney General was given through the Judiciary Act and Edmund Randolph’s early experiences as Attorney General); GRIFFIN B. BELL WITH RONALD OSTROW, *TAKING CARE OF THE LAW* 174–77 (1982) (explaining the creation of the Justice Department and the expansion of the role of the Attorney General); LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE*

Former Attorney General William Barr, in a presentation at Cardozo Law School, observed that the position was originally a part-time position with no staff, office space, or supplies, with an annual salary of half of the other cabinet secretaries.¹³ Since the Attorney General was authorized only to handle legal matters and cases in which the U.S. government had an interest, and not to enforce the law as it is now constituted,¹⁴ “[i]n offering the job to Edmund Randolph, the first Attorney General, George Washington suggested that *it would help him attract clients*.”¹⁵ While advocating for support for elevating the Office of the Attorney General to full-time status with a salary and administrative support equal to other cabinet secretaries, as well as seeking support for legislation placing control of all government legal affairs under the direction of the Attorney General, Attorney General Caleb Cushing,

RULE OF LAW 48–50 (1987) (explaining a memo regarding the roles of and relationship between the Attorney General and Solicitor General); CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 11 (Stephen J. Wayne ed., 1992); HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 16–18 (1937) (explaining that the Attorney General was to appear only in the U.S. Supreme Court, and that the power to appoint such a position was given to the President and the Senate); JAMES S. EASBY-SMITH, *THE DEPARTMENT OF JUSTICE: ITS HISTORY AND FUNCTIONS* 4–7 (1904) (explaining the law creating the office, and the “many defects” in its early definition of the office’s duties); CHARLES FRIED, *ORDER & LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 14 (1991) (comparing the expansion of the Attorney General position to the Solicitor General position, which has remained static); LUTHER A. HUSTON ET AL., *AM. ENTER. INST. FOR PUB. POL’Y RESEARCH, ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* (1968); HUSTON, *supra* note 3, at 15–25 (explaining the roles of the Attorneys General between the years 1789–1870); DOUGLAS W. KMIEC, *THE ATTORNEY GENERAL’S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT* (1992); ALBERT LANGEUTTIG, *INST. FOR GOV’T RESEARCH, THE DEPARTMENT OF JUSTICE OF THE UNITED STATES* 6–8 (F.W. Powell ed., 1927) (discussing the organization and funding of the Office of the Attorney General, the administration of Attorney General Caleb Cushing, and when the Attorney General was made the Chief Law Officer); JIM MCGEE & BRIAN DUFFY, *MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION’S CRIMINAL LAWS AND GUARD ITS LIBERTIES* 326–27, 332–33 (1996) (evaluating the relationship between the Office of the Attorney General and other federal intelligence agencies); REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 70–77 (1992) (examining the relationship between the Office of the Attorney General and the Office of the Solicitor General); RAYMOND WOLTERS, *RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AND BLACK CIVIL RIGHTS* (1996); Buckley, *supra* note 8, at 178–82; John O. McGinnis, *Principle Versus Politics: The Solicitor General’s Office in Constitutional and Bureaucratic Theory*, 44 *STAN. L. REV.* 799 (1991) (reviewing CHARLES FRIED, *ORDER & LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 14 (1991)).

¹³ William P. Barr, Attorney General of the United States, Remarks at Benjamin N. Cardozo School of Law (Nov. 15, 1992), in 15 *CARDOZO L. REV.* 31, 31 (1993).

¹⁴ *Id.* at 32.

¹⁵ *Id.* at 31 (citing HUSTON ET AL., *supra* note 12, at 5–6) (emphasis added). General Barr, commenting on President Washington’s enticement strategy for filling the position, observed, “[s]o much for government ethics in those days.” Barr, *supra* note 13, at 31.

in an 1854 opinion, explained to President Franklin Pierce how President Washington convinced Edmond Randolph to take the appointment.¹⁶ Attorney General Caleb Cushing noted:

When the office of Attorney General was created, and for long afterwards, inequality existed between his salary and that of other officers of the same class. The reason why he received less than the others is given by Washington in his letter to Mr. Edmund Randolph, tendering to him the first appointment of Attorney General, in which he says: "The salary of this office appears to have been fixed at what it is from a belief that the station would confer pre-eminence on its possessor, and procure for him a decided preference of professional employment." On this basis things continued until a very late period, the Attorney General receiving less salary than his associates, but being invited, as it were, by the nature of the office, into private professional practice in the courts, for which his near association with the Government, united to the professional qualifications which, from his being appointed to the office, he may be assumed to possess, would serve to give him great advantages.¹⁷

The Attorney General did not have a department to supervise for eighty-one years after its creation.¹⁸ The United States Justice Department came into existence on July 1, 1870,¹⁹ with the purpose

¹⁶ Office and Duties of Attorney General: Exposition of the Constitution of the Office of Attorney General as a Branch of the Executive Administration of the United States, 6 Op. Att'y Gen. 326, 352 (1854) [hereinafter *Office and Duties of Attorney General*].

¹⁷ *Id.* at 352–53.

¹⁸ Seth P. Waxman, *Presenting the Case of the United States As It Should Be: The Solicitor General in Historical Context*, 23 J. SUPREME CT. HIST. 3, 15 (1998).

¹⁹ See 1870 ATT'Y GEN. ANN. REP. 1, 1; Act of June 22, 1870, ch. 150, 16 Stat. 162. The Act creating the U.S. Justice Department also created the Office of the Solicitor General and placed all solicitors in the Departments of the Treasury, Navy, Internal Revenue, and State, the supervisory authority over District Attorneys (what we call U.S. Attorneys today), U.S. Marshalls, and the duties of the auditor of the Post Office Department were transferred to the Department of Justice. See 16 Stat. at 163; LLOYD MILTON SHORT, INST. FOR GOV'T RESEARCH, THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES 332–33 (1923). The Attorney General was also authorized to supervise all litigation involving the United States and required executive branch agencies to seek the opinion of the Attorney General when the meaning and/or application of a statute was in doubt. Waxman, *supra* note 18, at 3, 5. The first proposal to propose the creation of a Law Department was made by President Andrew Jackson in 1829 with the transference of all law officers and legal interests to the supervision of the Attorney General, but the requests were ignored as were subsequent requests by President Polk in 1845 and Secretary of the Interior Stuart in 1851. U.S. DEPT OF JUSTICE, 200TH ANNIVERSARY OF THE OFFICE OF THE ATTORNEY GENERAL, 1789–1989 13 (1990). Rather than authorizing the Attorney General to control all litigation in the federal courts, Congress acceded to requests by several departments to establish their own legal solicitors. Waxman, *supra* note 18, at 6, 7, 19 n.28. On December 16, 1867, the

of centralizing litigation involving the United States under the authority of the Attorney General.²⁰ Although the Attorney General was granted authority to oversee all criminal and civil litigation involving the national government by the 1870 statute,²¹ actual administrative, supervisory, and budgetary control over all litigation attorneys within the national government was not completely established until 1966.²² The modern Justice

Senate passed a resolution asking Attorney General Henry Stanbery “[w]hether the present force in the Attorney General’s office is sufficient for the proper business of that office” and “[w]hether the solicitors and clerks, acting as such, in the various departments and in the Court of Claims, cannot be dispensed with, and the duties they perform be discharged under the direction of the Attorney General” SEN. EXEC. DOC. NO. 40-13, at 1 (1867). Attorney General Henry Stanbery answered the Senate on December 20th by explaining the high cost of employing special counsel to appear before the Supreme Court, in which he concluded that [t]he present force in the office of the Attorney General is not sufficient for the proper business of that office. As to the mere administrative business of the office the present force is sufficient; but as to the proper duties of the Attorney General, especially in the preparation and argument of cases before the Supreme Court of the United States, and the preparation of opinions on questions of law referred to him, some provision is absolutely necessary to enable him properly to discharge his duties. After much reflection it seems to me that this want may best be supplied by the appointment of a solicitor general. With such an assistant, the necessity of employing special counsel in the argument of such cases in the Supreme Court of the United States would be in a great measure, if not altogether, dispensed with.

... On the third point of inquiry, in my opinion the various law officers now attached to the other departments and the Court of Claims might, with advantage to the public service, be transferred to the Attorney General’s office, so that it may be made the law department of the government, and thereby secure uniformity of decision, of superintendence, and of official responsibility.

Id. at 2. See also CONG. GLOBE, 40th Cong., 2d Sess. 309 (1868); SHORT, *supra*, at 330–33; Waxman, *supra*; U.S. DEPT OF JUSTICE, 200TH ANNIVERSARY OF THE OFFICE OF THE ATTORNEY GENERAL, 1789–198 12–14 (1990) (noting the similarly-aimed efforts of other government officials with regard to the creation of a law department). By 1868, three House Committees were working on legislation to create a law department and on February 25, 1870, a bill was reported out of the House Committee on Retrenchment to establish a Department of Justice which was passed by Congress and signed by President Grant on June 22, 1870. SHORT, *supra*, at 331–32. General Waxman observed in his remarks on the history of the Solicitor General’s Office that “[c]uriously, with the creation of the Office of Solicitor General, the requirement originally set out in the 1789 Judiciary Act—that the Attorney General be ‘learned in the law’—was dispensed with, and no longer appears in the statutes.” Waxman, *supra*, at 11 (citing Act of June 22, 1870, ch. 150 § 1, 16 Stat. 161, 162; Rev. Stat. §§ 346, 347 (1878); 28 U.S.C. § 503 (2012); Charles Fahy, *The Office of the Solicitor General*, 28 A.B.A. J. 20, 22 (1942)).

²⁰ See MEADOR, *supra* note 9, at 10.

²¹ Griffin B. Bell, *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1053 (1978); see Robert Kramer & Nathan Siegel, *The Attorney General of England and the Attorney General of the United States*, 1960 DUKE L.J. 524, 524 (1960).

²² Act of Sept. 6, 1966, Pub. L. No. 89-554, § 516, 80 Stat. 611, 613 (codified as amended at 28 U.S.C. § 516 (2006)). Attorney General Bell described the Department of Justice and his authority of federal litigators in 1978 as follows:

Shortly after I took office, the President asked me to determine the total number of

Department only came into existence in 1934 when it was given a centralized location and an office building.²³ From its questionable start, the Attorney General has grown to be described as a position “quite apart from the Department, [as] a symbol of the effort of a democracy to achieve a form of justice,”²⁴ because, in part,

the Attorney General’s office was created originally and has been continued in the Judiciary Act, not in the executive branch statutes. The . . . duty of the Attorney General [is] to act as professional custodian of the law for the executive departments [T]here is [a] separate responsibility that the Attorney General has, and that no other cabinet department has, to uphold and preserve the law and to do so according to legal standards[,]²⁵

not political ones.

Originating with the Judiciary Act of 1789, the Attorney General was authorized to advise both the President and agency heads on questions of law.²⁶ The position of the Attorney General was

lawyers in the government and their functions. I learned that such information had not been gathered in several years, so we started an inventory of every department and agency in the government. We discovered 19,479 lawyers who are performing “lawyer-like” functions—litigating, preparing legal memoranda, giving legal advice, and drafting statutes, rules, and regulations. These lawyers are distributed throughout the departments and agencies, and practically no agency is too small to have its own “General Counsel.”

Some of the 15,673 federal lawyers in government agencies outside the Department of Justice are handling litigation themselves; some are involved in direct support of the Justice Department’s litigation efforts. Others are involved in other administrative law functions within their agencies. About one-fourth of all the federal government’s lawyers, 5,247 to be exact, are in the Department of Defense and the military services where they administer a totally separate court-martial system under the Uniform Code of Military Justice.

Although I am the chief legal officer in the executive branch, I have learned that I have virtually no control or direction over the lawyers outside the Department of Justice, except indirectly in connection with pending litigation.

Bell, *supra* note 21, at 1050 (emphasis added).

²³ CLAYTON, *supra* note 12, at 45 n.120 (1992) (“In its frugality Congress had never provided a central office building for the new department. . . . [Attorney General] Moody’s appeal convinced Congress, and money for the new building was appropriated, though construction was not completed until 1934.”); Michael Herz, *The Attorney Particular: The Governmental Role of the Agency General Counsel* 5 (Oct. 27, 2006) (unpublished manuscript) (on file with author) (“DOJ never had centralized or sufficient office space until the present building was completed in 1934.”).

²⁴ MEADOR, *supra* note 9, at 122 (discussing a statement made by then FBI Director William Webster on a discussion panel on the Office of the Attorney General).

²⁵ *Id.* at 118–19 (statement by then-U.S. Assistant Attorney General Maurice Rosenberg).

²⁶ Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (“And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to

modeled after the English Attorney General and those of the several states.²⁷ The Attorney General was not considered a political member of the administration but the government officer responsible for representing the United States in court.²⁸ From its inception, the Attorney General was viewed in a judicial light, as evidenced by the wording of the original draft of the bill creating the office, which placed the appointment authority in the federal judiciary.²⁹ The Office of the Attorney General was not provided any staff or funding after its creation and from the appointment of the first Attorney General in 1789 through those of the mid-nineteenth and early twentieth centuries, successive Attorneys General sought to establish and maintain the credibility, necessity, and prestige of the office within the executive branch.³⁰

In 1854, Attorney General Caleb Cushing provided President Franklin Pierce with a detailed opinion on the executive functions of the various departments, the powers enjoyed by the President as the chief executive of the nation, and the role and duties of the Office of the Attorney General.³¹ Cushing's 1854 opinion is the first formal explanation, by an Attorney General, on the "quasi-judicial" stature of the office.³² Cushing wrote that the position of Attorney General was created within the Judiciary Act of 1789, not as a separate government department as the departments of State, War, and Treasury were created.³³ The creation of the Attorney General within the Judiciary Act has significance in understanding the role of the Attorney General in determining and settling questions of law, legal policy, and public policy raised by the President and/or heads of the executive departments.³⁴ Cushing opined that the

give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.") The Office of the Attorney General was created one month after Congress created the War, Treasury, and State Departments in late August and early September 1789. CLAYTON, *supra* note 12, at 15. President Washington signed the Federal Judiciary Act on September 24, 1789. *Id.*

²⁷ Kramer & Siegel, *supra* note 21, at 524.

²⁸ See *id.* at 525–27 (explaining that the Attorney General originally did not sit with the cabinet, but was in charge of a number of federal programs, and was responsible for giving legal advice to the President as well as for enforcing criminal and civil laws).

²⁹ *Id.* at 525.

³⁰ See SHORT, *supra* note 19, at 330–43 (detailing the creation of the Department of Justice in 1870 and its subsequent developments).

³¹ *Office and Duties of Attorney General*, *supra* note 16, at 327–30, 333–35, 347–48.

³² Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 441 (1993) [hereinafter Lund, *Rational Choice*].

³³ See *Office and Duties of Attorney General*, *supra* note 16, at 339–40.

³⁴ Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 453 (1855)

Attorney General has “quasi-judicial” power within the executive branch to provide the President and his heads of departments with authoritative and final determinations on the meaning of the law.³⁵

Cushing opined in 1855:

If an administrative act involve [sic] legal questions, as to which the President or a Head of Department entertains doubt, or as to which doubts may exist in the public mind, and require to be removed or encountered, then the opinion of the Attorney General is demanded. If that opinion is accepted, as it usually is, as the law of the case, although the responsibility of action still is participated in by all the coactors, yet of course a greater relative weight of responsibility devolves on the Attorney General.³⁶

In an opinion a year before, Cushing described the judicial power of the Attorney General within the executive branch as follows:

It frequently happens that questions of great importance, submitted to him for determination, are elaborately argued by counsel; and whether it be so or not, he feels, in the performance of this part of his duty, that he is not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation.³⁷

In the discharge of this authority to provide answers to “questions of great importance,” Cushing explained that

the action of the Attorney General is quasi judicial. His opinions officially define the law, in a multitude of cases,

[hereinafter *Relation of the President*]. President Pierce asked the Attorney General: “Are instructions issued the Heads of Department to officers, civil or military, within their respective jurisdictions, valid and lawful, without containing express reference to the direction of the President; and is or not such authority implied in any order issued by the competent Department?” *Id.* General Cushing answered:

As a general rule, the direction of the President is to be presumed in all instructions and orders issuing from the competent Department. Official instructions, issued by the Heads of the several Executive Departments, civil and military, within their respective jurisdictions, are valid and lawful, without containing express reference to the direction of the President.

Id. This answer has been true ever since. The purpose of the opinion was to make clear that all executive heads conduct their duties under the general power of the President under Article II of the Constitution and specific statutes passed by Congress. *See id.* at 460.

³⁵ *Office and Duties of Attorney General*, *supra* note 16, at 334.

³⁶ *Relation of the President*, *supra* note 34 at 478. As opined by Cushing, when the President and/or the heads of departments need clarification on law, the Attorney General’s opinion settles the meaning of the law within the executive branch. *Id.* But when the President seeks policy advice from his heads of department, the Attorney General’s opinion is equal to all others. *See id.*

³⁷ *Office and Duties of Attorney General*, *supra* note 16, at 334.

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.

Accordingly, the opinions of successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice.³⁸

Cushing further opined to the President that opinions and answers of the Attorney General are binding upon all other members of the government.³⁹

Although the act, requiring this duty of the Attorney General, does not expressly declare what effect shall be given to his opinion, yet the general practice of the Government has been to follow it;—partly for the reason already suggested, that an officer going against it would be subject to the imputation of disregarding the law as officially pronounced, and partly from the great advantage, and almost necessity, of acting according to uniform rules of law in the management of the public business: a result only attainable under the guidance of a single department of assumed special qualifications and official authority.⁴⁰

Cushing concluded his broad discussion on the general authority of the Attorney General to answer questions of law by making clear that the power was limited to questions in which the United States was a party having an interest in the question, and the Attorney General was prohibited from providing advice to government employees concerning private matters or to subordinate officers within the government.⁴¹

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *id.* at 334–35. On this last prohibition, see also The Attorney General and Local Officers of the Government, 6 Op. Att’y Gen. 21, 22–23 (1853) (“It is not [the Attorney

Cushing's view on the quasi-judicial nature of the Office of the Attorney General had been asserted by both prior and subsequent Attorneys General.⁴² Lincoln's Attorney General, Edward Bates, said of his office: "the office I hold is not properly *political*, but strictly *legal*; and it is my duty, above all other ministers of state, to uphold the law and to resist all encroachment, from whatever quarter, of mere will and power."⁴³ Attorney General Hugh S. Legaré explained similarly in 1842 that he would handle land grant cases judiciously by accepting opinions and arguments before he made a decision but would not communicate with the disputed parties after receiving their formal arguments.⁴⁴ He explained "[t]he function which I exercise in such cases is quasi-judicial, and you will see at once the necessity of my adhering to the stern rules which govern judicial inquiry."⁴⁵ Attorney General William Wirt similarly explained the quasi-judicial approach that the Attorney General should take when issuing opinions on the law in a letter to Secretary of War John C. Calhoun in February 1820:

I need not add that my official opinion is at your service whenever you choose to call for it, & the opinion which I should give as Attorney General is that which I should give as an arbitrator: for in giving an official opinion I do not consider myself as the advocate of the government, but as a judge, called to decide a question of law, with the impartiality and integrity which characterizes [*sic*] the judiciary; I should consider myself as dishonoring the high-minded government whose officer I am in permitting my judgment to be warped, in deciding any question officially, by the one-sided artifice of the professional advocate. I state this merely for the purpose of shewing that nothing would be gained or lost, either to the one side or the other, by my

General's] duty to solve the various hypothetical or prospective legal difficulties, which may occur from day to day, to any and all of the subordinate officers of the Government, in the discharge of their functions under the acts of Congress.").

⁴² See CUMMINGS & MCFARLAND, *supra* note 12, at 91 (1937) (noting that Attorney General Hugh S. Legaré held this view, evidenced by a letter he wrote to Charles F. Sibbald); Nelson Lund, *The President as Client and the Ethics of the President's Lawyers*, 61 LAW & CONTEMP. PROBS. 64, 65 (1998) [hereinafter Lund, *The President as Client*]; Lund, *Rational Choice*, *supra* note 32, at 438.

⁴³ Lund, *The President as Client*, *supra* note 42, at 65 (quoting Arthur S. Miller, *The Attorney General as the President's Lawyer*, in THE ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 41, 51 (1968)).

⁴⁴ See CUMMINGS & MCFARLAND, *supra* note 12, at 91.

⁴⁵ *Id.* (quoting Letter from Hugh S. Legaré, U.S. Att'y Gen., to Charles F. Sibbald (Dec. 1, 1842)).

laying down the character of Attorney General and assuming that of an arbitrator for the purpose of deciding the legal questions in this case.⁴⁶

Attorney General Reverdy Johnson opined in 1849, on the authority granted to the Attorney General by the Judiciary Act of 1789 to provide advice on the law to the President and government department heads:

The act does not declare what effect shall be given to such advice and opinion, but it is believed that the practice of the government has invariably been to follow it. This has been done from the great advantage and almost absolute necessity of having uniform rules of decision in all questions of law in analogous cases—a result much more certain under the guidance and decision of a single department, constituted for the very purpose of advising upon all questions, and with supposed special qualifications for such a duty. In my opinion this practice should be considered as law.⁴⁷

Various Attorneys General have reflected on the approach of Wirt and Legaré that an Attorney General opinion should be approached in similar matter to that of a judge.⁴⁸ Similar to a judge, the Attorney General is bound to make determinations of law,⁴⁹ not to rule on hypothetical cases,⁵⁰ and prior Attorneys General opinions have precedential authority on subsequent Attorneys General.⁵¹ Attorney General William Moody summarized the prevailing view on the authority of an Attorney General opinion when he opined in 1904:

Of course the opinion of the Attorney-General, when rendered in a proper case—as must be the presumption

⁴⁶ Letter from William Wirt to John C. Calhoun (Feb. 3, 1820), in 4 THE PAPERS OF JOHN C. CALHOUN, 1819–1820 633 (W. Edwin Hemphill ed., 1969) (alteration in original).

⁴⁷ Opinions of Attorneys General and Decisions of Auditors, 5 Op. Att’y Gen. 97, 97 (1849).

⁴⁸ *Office and Duties of Attorney General*, supra note 16, at 333–34 (describing the role of the Attorney General as quasi-judicial).

⁴⁹ Attorney-General—Question of Fact, 20 Op. Att’y Gen. 384, 386–87 (1892) [hereinafter *Question of Fact*].

⁵⁰ Chinese—Attorney General, 20 Op. Att’y Gen. 729, 730 (1894) (“I can not undertake to give an opinion until the cases actually arise.”); Attorney-General, 13 Op. Att’y Gen. 531, 531 (1871).

⁵¹ See District Attorney—Extra Compensation, 20 Op. Att’y Gen. 654, 654 (1895) (“The question was also submitted to my immediate predecessors, Attorneys-General Garland and Miller, each of whom, in an official opinion, held that the practice was correct. I see nothing which would warrant me to reverse their decisions. Your question is therefore answered in the affirmative.”); Attorney-General, 20 Op. Att’y Gen. 383, 383–84 (1892) [hereinafter *Attorney-General*] (declaring that the opinions of the Attorney General must have authority). But see *Question of Fact*, supra note 49, at 386–87 (declining to follow precedent).

always from the fact that it is rendered—must be controlling and conclusive, establishing a rule for the guidance of other officers of the Government, and must not be treated as nugatory and ineffective.

....

If a question is presented to the Attorney-General in accordance with law—that is, if it is submitted by the President or the head of a Department—if it is a question of law and actually arises in the administration of a Department, and the Attorney-General is of opinion that the nature of the question is general and important . . . and therefore conceives that it is proper for him to deliver his opinion, I think it is final and authoritative under the law, and should be so treated . . .

. . . I entertain no doubt whatever that the Attorney-General's opinion should not only be justly persuasive . . . but should be controlling and should be followed . . . unless contrary to some authoritative judicial decision which puts the matter at rest. It is always to be assumed that an Attorney-General would not overlook or ignore such a decision in announcing his own conclusion.⁵²

An opinion issued by past Attorneys General and those by the OLC serve as precedent that governs current opinion-making by the OLC.⁵³ One significant attribute of the two centuries of Attorneys General and OLC opinions is that they create an institutional legal foundation and tradition that governs current opinion-making regardless of the personal views of a current Attorney General or head of OLC.⁵⁴ Legal opinions need not nor should not be guided by the personal, political, or academic opinions held by the writer of

⁵² Attorney-General—Opinions—Detail of Registry Clerk to the White House, 25 Op. Att'y Gen. 301, 303–04 (1904) [hereinafter *Detail of Registry Clerk*] (citations omitted); see also Jurisdiction of Attorney General to Determine Meaning of the Term “Adjustments” as Used in Executive Order No. 6440 of November 18, 1933, as Amended, and Inclusion of Definition of Term in Proposed Order, 37 Op. Att'y Gen. 562, 563 (1934) (“I understand that the elimination was made because of the conflicting decision of the Comptroller General and his expressed intention not to follow the opinion of the Attorney General. The question involved is one of law clearly without the jurisdiction of the Comptroller General and within that of the Attorney General. The opinions of the Attorney General as the chief law officer of the Government should be respected and followed in the administration of the executive branch of the Government.”).

⁵³ See *Question of Fact*, *supra* note 49, at 386–87; *Attorney-General*, *supra* note 51, at 383–84.

⁵⁴ See *Detail of Registry Clerk*, *supra* note 52, at 303–04 (holding that the Attorney General's opinion, once issued, is both final and conclusive).

the opinion. Both precedent and institutional tradition obligate the writer to produce opinions that provide the best view of the law taking into account past opinions by the OLC and Attorneys General so as to protect the continuity of the law.⁵⁵ As Walter Dellinger, in addressing the difference in his views on presidential power to deploy the military without prior congressional approval when he was a professor and when he was head of the OLC, observed,

I expect that I would have seen a distinction between the planned deployment in Haiti and the sending of half a million troops into battle against one of the world's largest and best-equipped armies. Even apart from that, however, I am not sure I agree with the apparent assumption of Professor Tribe's letter and the *Washington Times* editorial—that it would be wrong for me to take a different view at the Office of Legal Counsel from the one I would have been expected to take as an academic. It might well be the case that I have actually learned something from the process of providing legal advice to the executive branch—both about the law (from the career lawyers at the Departments of Justice, State, and Defense and the National Security Council) and about the extraordinary complexity of interrelated issues facing the executive branch in general and the President in particular.

Moreover, unlike an academic lawyer, an executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. Lawyers in the executive branch have thought and written for decades about the President's legal authority to use force. Opinions of the Attorneys General and of the Office of Legal Counsel, in particular, have addressed the extent of the President's authority to use troops without the express prior approval of Congress. Although it would take us too far from the main subject here to discuss at length the stare decisis effect of these opinions on executive branch officers, the opinions do count for something. When lawyers who are now at the Office of Legal Counsel begin to research an issue, they are not expected to turn to what I might have written or said in a floor

⁵⁵ See, e.g., Brian J. Shoot, *Overruling by Implication and the Consequent Burden Upon Bench and Bar*, 75 ALB. L. REV. 841, 841–43 (2012).

discussion at a law professors' convention. They are expected to look to the previous opinions of the Attorneys General and of heads of this office to develop and refine the executive branch's legal positions. That is not to say that prior opinions will never be reversed, only that there are powerful and legitimate institutional reasons why one's views might properly differ when one sits in a different place.⁵⁶

Both tradition and fidelity to the rule of law are important in justifying the authority of the Attorney General to issue legal opinions which are binding on the operations of the executive branch.⁵⁷ Another reason is protection of the unitary President and the power of the President to control the operation of the executive branch. As General Bell observed,

[a]s a matter of good government, it is desirable generally that the executive branch adopt a single, coherent position with respect to the legal questions that arise in the process of government. Indeed, the commitment of our government to due process of law and to equal protection of the laws probably requires that our executive officers proceed in accordance with a coherent, consistent interpretation of the law, to the extent that it is administratively possible to do so. It is thus desirable for the President to entrust the final responsibility for interpretations of the law to a single officer or department. The Attorney General is the one officer in the executive branch who is charged by law with the duties of advising the others about the law and of representing the interests of the United States in general litigation in which questions of law arise. The task of developing a single, coherent view of the law is entrusted to the President himself, and by delegation to the Attorney General. That task is consistent with the nature of the office of Attorney General.⁵⁸

As discussed below, the traditional view of the Office of the Attorney General regarding the quasi-judicial authority and status of legal opinions issued by the Attorney General is institutionalized within the OLC, the Department of Justice, and the executive

⁵⁶ Walter Dellinger, *After the Cold War: Presidential Power and the Use of the Military Force*, 50 U. MIAMI L. REV. 107, 109–10 (1995).

⁵⁷ *Detail of Registry Clerk*, *supra* note 52, at 303–04 (1904).

⁵⁸ Bell, *supra* note 21, at 1068.

branch.

III. PURPOSE AND ROLE OF THE ATTORNEY GENERAL OPINION WRITING AND THE RISE OF THE OLC

The forerunner of the OLC was the creation of the position of Assistant Solicitor General in 1933 by an Act of Congress⁵⁹ which required presidential appointment and confirmation by the Senate and placement within the Justice Department. The Assistant Solicitor General was initially placed within the Office of the Solicitor General, and served as the head of the Civil Division from August 4 to December 31, 1933.⁶⁰ The Civil Division was abolished by administrative order of the Attorney General on December 30, 1933, and the Assistant Solicitor General was made head of the Office of the Assistant Solicitor General with the exclusive task of preparing legal opinions to be rendered by the Attorney General for the President and various executive and administrative agencies and departments.⁶¹ The Assistant Solicitor General, by the December 1933 order of the Attorney General, was placed under the direct authority of the Attorney General and enjoyed independence from the Office of the Solicitor General.⁶² In an effort to organize administrative operations within the national government, Congress passed the Reorganization Act of 1949,⁶³ and in compliance with the Act, President Truman submitted to Congress on March 13, 1950, the Reorganization Plan No. 2 of 1950 for the

⁵⁹ Independent Offices Appropriations Act of 1934, ch. 101, § 16, 48 Stat. 283, 307–08 (1933).

(a) There shall be in the Department of Justice an Assistant Solicitor General to assist the Solicitor General in the performance of his duties, who shall be appointed by the President, by and with the advice and consent of the Senate. Said Assistant Solicitor General shall be allocated to the same classification grade and be paid the same rate of compensation as apply to Assistant Attorneys General and shall perform such additional duties as may be required of him by the Attorney General. (b) One of the existing positions of Assistant Attorney General is hereby abolished.

Id.

⁶⁰ 1934 ATT'Y GEN. ANN. REP. 119.

⁶¹ *Id.* On August 10, 1933, Franklin D. Roosevelt issued Executive Order 6247, followed by Executive Order 7298 (February 18, 1936), which required all proposed Executive Orders and proclamations be submitted to the Assistant Solicitor General for review for consideration by the Attorney General before submission to the President. Exec. Order No. 7298, 1 Fed. Reg. 2284 (1936); Exec. Order No. 6247 (Aug. 10, 1933); 1937 ATT'Y GEN. ANN. REP. 125; 1936 ATT'Y GEN. ANN. REP. 119.

⁶² 1935 ATT'Y GEN. ANN. REP. 129.

⁶³ Reorganization Act of 1949, ch. 226, 63 Stat. 203 (codified as amended at 5 U.S.C. §§ 901–12 (2006)).

Justice Department,⁶⁴ which recommended increasing the number of Assistant Attorneys General, and which was authorized by Congress in 1950.⁶⁵ Attorney General J. Howard McGrath eliminated the Office of the Assistant Solicitor General and transferred the duties of the Assistant Attorney General over to the new Executive Adjudications Division on May 24, 1950,⁶⁶ which was renamed the Office of Legal Counsel by Attorney General Herbert Brownell on April 3, 1953.⁶⁷

The Assistant Attorney General for the OLC and a core of four Deputy Assistant Attorneys General, who in turn supervise a staff of attorney advisors and team of support staff, supervise the work of the office.⁶⁸ The purpose and goals of the OLC have not changed since they were established in 1933.⁶⁹ The four goals of the OLC are:

- Provide critical legal advice to the White House, the Attorney General, and other Executive Branch agencies
- Resolve intra-Executive Branch disputes over legal questions
- Advise other components of the Department of Justice where litigation or proposed legislation raises

⁶⁴ *The Office of Legal Counsel: A Survey of Its Role and History*, 1997 A.B.A. SEC. ADMIN. L. & REG. PRAC. 1, 3 [hereinafter *OLC: A Survey of Its Role and History*]. This is a policy paper prepared for an event sponsored by the ABA Section of Administrative Law and Regulatory Practice, “Dinner Honoring Former Assistant Attorneys General of the Office of Legal Counsel U.S. Department of Justice” on October 16, 1997. *Id.*

⁶⁵ Reorganization Plan No. 2, § 4, 64 Stat. 1261 (eff. May 24, 1950); *see also* 28 U.S.C. § 506 (2012) (authorizing eleven positions for Assistant Attorneys General).

⁶⁶ 1952 ATT’Y GEN. ANN. REP. 148. *See also* HUSTON, *supra* note 3, at 61; *OLC: A Survey of Its Role and History*, *supra* note 64, at 3.

⁶⁷ 1953 ATT’Y GEN. ANN. REP. 168; Att’y Gen. Exec. Ord. No. 9-53 (1953). The OLC is first mentioned by name as an agency in the 1953 *Annual Report of the Attorney General*. *Id.* The Attorney General reported in fiscal year 1953 that the OLC provided legal work on 159 proposed executive orders and proclamations, issued 82 formal and informal opinions for government agencies and officers, 193 intradepartmental opinions, legal work on 39 gifts and bequests to the United States, 1860 conscientious objector cases, and legal assistance on 10 reorganization plans. 1953 ATT’Y GEN. ANN. REP. 77–78. (1953). Past Attorney General reports (1950–1952) listed legal opinions under “Report[s] of the Attorney General” and in reports prior to that (1934–1949), legal opinions were listed under “Report[s] of the Assistant Solicitor General.” *Compare* 1934 ATT’Y GEN. ANN. REP. 119 (using the name “Report of Assistant Solicitor General Angus D. MacLean”), *with* 1952 ATT’Y GEN. ANN. REP. 5 (using the name “Report of the Attorney General”).

⁶⁸ U.S. DEPT OF JUSTICE, OFFICE OF LEGAL COUNSEL, PERFORMANCE BUDGET: CONGRESSIONAL SUBMISSION, FISCAL YEAR 2010 exh. A (2009).

⁶⁹ *See* Kmiec, *supra* note 3, at 337; Sudha Setty, *No More Secret Laws: How Transparency of the Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 583–84 (2009) (citing BAKER, *supra* note 12, at 10–11).

constitutional issues or other legal issues of general concern to the Executive Branch

- Approve for form and legality all Executive Orders and Orders of the Attorney General[.]⁷⁰

The OLC receives “requests for opinions and legal advice from the Counsel to the President; general counsels of [the] O[ffice of] M[anagement and] B[udget] and other Executive Office of the President components; general counsels of Executive Branch departments and agencies; the Attorney General and other Department of Justice officials,”⁷¹ all of which have significant impact on how the executive branch interprets the law.⁷² Although the OLC is a small government agency (a total of thirty-seven full-time employees, twenty-five of whom are attorneys with a budget of 7.6 million dollars),⁷³ the OLC wields significant inter-branch power due to its authority to review and opine on the constitutionality of proposed legislation,⁷⁴ specifically regarding separation of powers issues⁷⁵ pending within Congress, as well as its quasi-judicial

⁷⁰ PERFORMANCE BUDGET, *supra* note 68, at 7.

⁷¹ *Id.* at 4.

⁷² *See id.* at 5.

⁷³ *Id.* at 2.

⁷⁴ *See, e.g.*, Constitutionality of the OLC Reporting Act of 2008, 32 Op. O.L.C. 1, 1 (2008) (“[T]he ‘OLC Reporting Act of 2008,’ which would require the Department of Justice to report to Congress on a wide range of confidential legal advice that is protected by constitutional privilege, is unconstitutional.”); Constitutionality of D.C. Voting Rights Act of 2007, 31 Op. O.L.C. 1, 1 (2007) (declaring unconstitutional a bill that proposed adding (1) representation for the District of Columbia, and (2) an additional seat for Utah, to the House of Representatives).

⁷⁵ The OLC has traditionally defended executive power and presidential privilege. *See, e.g.*, Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 32 Op. O.L.C. 1, 1 (2009) (“Section 7054 . . . which purports to prohibit all funds . . . from being used to pay the expenses for any United States delegation to a specialized UN agency . . . that is chaired or presided over by a country . . . that the Secretary of State has determined supports international terrorism, unconstitutionally infringes on the President’s authority to conduct the Nation’s diplomacy, and the State Department may disregard it.”); Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff, 32 Op. O.L.C. 1, 7–8, 11 (2008) (“[T]he content of the subpoenaed documents [at issue] falls squarely within the presidential communications and deliberative process components of executive privilege. . . . [and] because the subpoenaed documents are from law enforcement files, the law enforcement component of executive privilege is also implicated.”); Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199 (1994) (“[T]here are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional.”); *Presidential Signing Statements Under the Bush Administration: A Threat to Checks and Balances and the Rule of Law?: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 7, 9 (2007) (statement of John P. Elwood, Deputy Assistant Att’y Gen., Off. Legal Counsel) (“The subtitle of today’s hearing asks whether the President’s use of . . . [signing] statements poses a threat to checks and balances and the rule of law. The answer to that question, I think, is clearly ‘no’ for three reasons.”).

power⁷⁶ to issue binding determinations of the law within the executive branch and adjudicate executive branch intra-agency legal disputes.⁷⁷ The foundation of the OLC's authority to issue binding opinions on the rest of the executive branch is based on the authority of the Attorney General to issue such opinions, and administrative traditions within the Department of Justice and the executive branch.⁷⁸

As a constitutional matter, the power of the Attorney General to issue opinions flows from the Article II power of the President.⁷⁹ In a 2007 opinion by Steven Bradbury, the OLC explained the Article II power as follows:

We nonetheless believe that an interpretation issued by the President that has not been repudiated (even if, as explained below, it is no longer formally in effect) should have

⁷⁶ See, e.g., *Authority of the Former Inspector General of the Federal Housing Finance Board to Act as Inspector General for the Federal Housing Finance Agency*, 33 Op. O.L.C. 1, 4, 5 (2009) (interpreting the applicable statute to preclude the former FHFB Inspector General from exercising certain powers and duties designated to another office). The OLC was asked to decide a dispute between the General Counsel of the Federal Housing Finance Agency (FHFA) and the former Inspector General for the Federal Housing Finance Board (FHFB). *Id.* at 1. In its role in adjudicating legal disputes both within and between executive branch government agencies, the disputing sides are required to submit legal opinions supporting a particular point of view after which the OLC issues a binding opinion on the legal arguments submitted by the opposing parties.

You have taken the view that because the position of FHFA Inspector General is a new office requiring presidential nomination and Senate confirmation under the Reform Act, this office must remain vacant until an Inspector General for the FHFA is properly appointed. Under your view, because the President has not designated the former FHFB Inspector General to act as Inspector General for the FHFA, the former Inspector General may not exercise the powers and duties of the FHFA Inspector General. The former FHFB Inspector General argues, in contrast, that he automatically assumed these powers and duties by operation of the Reform Act. . . .

In our judgment, the applicable statutes do not enable the former FHFB Inspector General to exercise the authority he claims.

Id. at 4.

⁷⁷ *Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(A) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs*, 33 Op. O.L.C. 1, 1 (2009) ("The Office of Legal Counsel's conclusion . . . is binding on all Executive Branch agencies."); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel (Mar. 1, 2005), *available at* <http://www.fas.org/sgp/news/2005/03/omb031105.pdf> ("This memorandum is being distributed to ensure that general counsels of the Executive Branch are aware that the Office of Legal Counsel . . . has interpreted this . . . law . . . and to provide a reminder that it is OLC that provides authoritative interpretations of law for the Executive Branch."); see also *Legality of EEOC's Class Action Regulations*, 28 Op. O.L.C. 1, 1 (2004) ("The Office of Legal Counsel has the authority to resolve the legal questions the Postal Service raised with respect to the Equal Employment Opportunity Commission's class action regulations.").

⁷⁸ 28 U.S.C. § 512 (2006).

⁷⁹ *Days of Service by Special Government Employees*, 31 Op. O.L.C. 1, 6 (2007).

particular weight in *our* analysis of the position to be taken by the Executive Branch. Under Article II of the Constitution, the President has the authority to determine the Executive Branch's interpretation of the law:⁸⁰

The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.⁸¹

As discussed above, the Judiciary Act of 1789 established the position of the Attorney General,

whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments⁸²

This responsibility has been codified⁸³ and transferred to the OLC.⁸⁴ The exclusive authority held by the OLC to determine the interpretation of the law for the executive branch is based on the authority historically and statutorily bestowed upon the Attorney General—"because the Attorney General's opinions are treated as 'final and conclusive' they necessarily become the executive branch interpretation of the law."⁸⁵

During World War I, President Wilson issued Executive Order No. 2877 (May 31, 1918), in which he ordered, among other things, "that any opinion or ruling by the Attorney General upon any question of law arising in any Department, executive bureau, agency or office shall be treated as binding upon all departments,

⁸⁰ *Id.*

⁸¹ *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)) (internal quotation marks omitted) (citations omitted).

⁸² Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 23, 93.

⁸³ 28 U.S.C. §§ 510–13 (2006).

⁸⁴ 28 C.F.R. § 0.25 (2012).

⁸⁵ Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1321 (2000).

bureaus, agencies or offices therewith concerned.”⁸⁶ Although the executive order was based on an Act of Congress,⁸⁷ which lapsed six months after the end of World War I, the order continued to support the traditional foundation for the legal exclusivity and binding authority of Attorneys General opinions on the rest of the executive branch.⁸⁸

In 1987, the OLC defended its quasi-judicial jurisdiction to issue opinions binding on executive branch agencies when the Department of Labor (Labor), in a dispute with the Department of Housing and Urban Development (HUD) over the meaning of the Davis-Bacon Act, asserted that it (Labor), not the OLC, had exclusive and definitive jurisdiction to interpret the meaning of the Davis-Bacon Act.⁸⁹ The position of Labor was a frontal assault on the proposition that an opinion of the OLC was binding on all the parties of the dispute.⁹⁰ The OLC in its opinion asserted that under 28 U.S.C. § 512, the Secretary of HUD had a right to an OLC opinion since the dispute involved the interpretation of federal law.⁹¹ The OLC also defended its authority by citing Executive Order 12146⁹² which was issued by President Carter in 1979. The pertinent part of President Carter’s order reads as follows:

1–4. Resolution of Interagency Legal Disputes

1–401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular

⁸⁶ Exec. Order No. 2877 (May 31, 1918), *reprinted in* WASH. GOV’T PRINTING OFFICE, TRADING WITH THE ENEMY ACT AND AMENDMENTS THERETO 44 (1919).

⁸⁷ Act of May 20, 1918, ch. 78, 40 Stat. 556, 556. Wilson’s order was also an early attempt to operationally place most federal litigation under the Attorney General:

I . . . hereby order that all law officers of the Government excepting those in the Philippine Islands, including all law officers attached to any executive bureau, agency or office specially created for the prosecution of the existing war, shall “exercise their functions under the supervision and control of the head of the Department of Justice,” in like manner as is now provided by law with respect to the Solicitors for the principal Executive Departments and similar officers; that all litigation in which the United States or any Department, executive bureau, agency or office thereof, are engaged shall be conducted under the supervision and control of the head of the Department of Justice. Exec. Order No. 2877 (May 31, 1918); *see also* Exec. Order No. 6166 § 5 (June 10, 1933) (explaining that Franklin D. Roosevelt placed all litigation activities by department solicitors, U.S. Attorneys, and U.S. Marshalls under the authority of the Attorney General).

⁸⁸ Moss, *supra* note 85, at 1320 n.67.

⁸⁹ Application of the Davis-Bacon Act to Urban Development Projects That Receive Partial Federal Funding, 11 Op. O.L.C. 92, 93–94, 98 (1987) [hereinafter *Application of the Davis-Bacon Act*].

⁹⁰ *See* Kmiec, *supra* note 3, at 370.

⁹¹ *See Application of the Davis-Bacon Act*, *supra* note 89, at 95.

⁹² Exec. Order No. 12,146, 3 C.F.R. 409 (1979) codified as amended at 28 U.S.C. §§ 509, 928–29 (2006).

program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

1–402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.⁹³

The OLC asserted that “Executive Order No. 12146 thus expands the authority of the Attorney General to render legal opinions beyond his statutory obligation to render opinions at the request of the heads of executive departments on questions of law arising in the administration of their departments,” and more specifically, section 1–402 “*requires* the agencies to submit legal disputes they are unable to resolve to the Attorney General” unless federal law specifically places the responsibility elsewhere.⁹⁴ The OLC opined that even under a statute that allows for another executive agency to hold the authority to determine the meaning of a statute, Executive Order 12146 still provides for an executive department to seek an OLC opinion when in a dispute with another department; and once a request is made, the OLC is required to provide an answer.⁹⁵ The OLC concluded that since federal law authorizes the Attorney General to control the litigation of the United States,⁹⁶ prohibits executive departments from hiring outside counsel to handle litigation, and requires that all litigation issues be transferred to the Department of Justice,⁹⁷ the Opinions of the Attorneys General—and the OLC by delegation—on the meaning of the law, are binding within the executive branch.⁹⁸

The OLC maintained that

[t]he Attorney General’s authority to conduct litigation on behalf of the United States necessarily includes the exclusive

⁹³ *Id.*

⁹⁴ *Application of the Davis-Bacon Act*, *supra* note 89, at 97.

⁹⁵ *Id.* at 98.

⁹⁶ 28 U.S.C. § 516 (2006) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”); *see also* 28 U.S.C. § 519 (2006) (“Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.”).

⁹⁷ 5 U.S.C. § 3106 (2006).

⁹⁸ *See supra* note 77.

and ultimate authority to determine the position of the United States on the proper interpretation of statutes before the courts. Thus . . . the Attorney General has both the authority and the obligation to decide the question presented by the Secretary of HUD.⁹⁹

In a separate opinion arising out of the same dispute,¹⁰⁰ the OLC opined that section 1–401 authorizes the Attorney General to issue an opinion when a head of an executive department submits a request for an opinion, but does not require unanimity among the disputing parties for submission of the legal dispute to the Attorney General for resolution.¹⁰¹ To hold otherwise, the OLC opined, would provide each agency within a dispute a veto over the requirement of Executive Order 12146—to have disputes resolved by the Attorney General.¹⁰² Affirming its opinion to the Secretary of HUD, the OLC held that it had the authority to provide a binding opinion answering the legal question posed by the Veterans Administration.¹⁰³

IV. CONCLUSION

Over the past 221 years, under the United States Constitution, forty-three men have served as President of the United States.¹⁰⁴ Under these forty-three men, eighty-one men and one woman have served as Attorney General, and thirty-five men and two women have served these Attorneys General as legal advisors on the law.¹⁰⁵ Although today the Office of the Attorney General is among the most important and coveted cabinet secretary positions within the executive branch, and the Attorney General, as head of the Department of Justice, is specifically tasked to enforce and protect the rule of law, the Office of the Attorney General was not originally so designed or valued. At the founding of what are now the four top

⁹⁹ *Application of the Davis-Bacon Act*, *supra* note 89, at 98.

¹⁰⁰ Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities, 12 Op. O.L.C. 89 (1988).

¹⁰¹ *Id.* at 92.

¹⁰² *Id.*

¹⁰³ *Id.* at 93.

¹⁰⁴ *The Executive Branch*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/our-government/executive-branch> (last visited Dec. 19, 2012) (stating that while there have been forty-four presidents, forty-three men have served, Grover Cleveland was elected to two separate, non-consecutive terms, so he is credited with being the nation's twenty-second and twenty-fourth president).

¹⁰⁵ See *infra* Appendix One (showing the Justice Department's legal counsel chronologically by Presidential appointment).

cabinet positions in 1789 (Secretaries of State, Defense, Treasury, and the Attorney General), the Office of the Attorney General was a part-time, half-paid position, without a staff or a departmental designation.¹⁰⁶ The Attorney General did not enjoy any staff support until 1819 (appointment of a clerk),¹⁰⁷ was not a full time position until 1853,¹⁰⁸ did not enjoy equal pay with the other cabinet secretaries until 1853,¹⁰⁹ did not enjoy any authority over federal district attorneys or U.S. Marshalls until 1861,¹¹⁰ did not have a department to oversee until 1870,¹¹¹ was not formally recognized as the fourth cabinet secretary in the line of succession until 1886,¹¹² did not have statutory exclusive control over litigation in the federal appeals courts until 1898,¹¹³ and did not have statutory authority to direct the performance of the legal duties of all department solicitors and district attorneys until 1906.¹¹⁴ The Office of the Attorney General required two presidential executive orders in 1918 and 1933 to prevail over various congressional and bureaucratic exceptions and interferences to his authority over all federal criminal and civil litigation (and over the various departmental solicitors).¹¹⁵ The Attorney General did not have a central and physical department location until 1934¹¹⁶ and did not enjoy full recognition of final authority over all federal civil and criminal litigation within the executive branch until 1966.¹¹⁷

Despite these administrative handicaps, by the middle of the nineteenth century the opinion of the Attorney General on the meaning of the law was recognized as dispositive within the executive branch.¹¹⁸ The power of the Attorney General and the OLC to issue binding opinions of law within the executive branch is based on the opinions by Attorneys General Cushing, Legaré, Writ, Lincoln, Moody, Cummings, Johnson, Olney, and Bates, and Solicitor General Aldrich on the binding and quasi-judicial nature of

¹⁰⁶ Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

¹⁰⁷ Act of Apr. 20, 1818, ch. 87, § 6, 3 Stat. 445, 447.

¹⁰⁸ HUSTON ET AL., *supra* note 12, at 5–6.

¹⁰⁹ Act of Mar. 3, 1853, ch. 97, § 4, 10 Stat. 189, 212.

¹¹⁰ Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285.

¹¹¹ Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162, 162.

¹¹² Bell, *supra* note 21, at 1055.

¹¹³ *Id.*

¹¹⁴ See Act of June 30, 1906, ch. 3935, 34 Stat. 816 (codified as amended at 28 U.S.C. § 515(a) (2006)).

¹¹⁵ Bell, *supra* note 21, at 1056.

¹¹⁶ CLAYTON, *supra* note 12, at 30 n.120.

¹¹⁷ See *supra* notes 21–22.

¹¹⁸ Bell, *supra* note 21, at 1064.

their legal opinions;¹¹⁹ administrative tradition¹²⁰ within the Executive Branch to honor the legal opinions of the Attorney General as legally binding; Executive Order 2877 issued by President Wilson (1918);¹²¹ Executive Orders 6166 (1933),¹²² 6247 (1933),¹²³ and 7298 (1936)¹²⁴ issued by President Franklin D. Roosevelt;¹²⁵ Executive Order 12,146 issued by President Carter (1979);¹²⁶ the creation of the Assistant Solicitor General (1933) with the specific task of preparing presidential orders and providing legal opinions to executive departments and the President under the name of the Attorney General;¹²⁷ the transference of these responsibilities to the OLC (1953);¹²⁸ and subsequent opinions issued by the OLC.¹²⁹

¹¹⁹ See *supra* notes 31–33, 35, 41–45, 47–49 and accompanying text. See Kramer & Siegel, *supra* note 21, for a general discussion of the history of the position of the Attorney General.

¹²⁰ Moss, *supra* note 85, at 1320 n.66 (quoting Letter from William Wirt, Att’y Gen., to Hugh Nelson, Judiciary Comm. Chairman, U.S. House of Representatives, in 2 JOHN KENNEDY, MEMOIRS OF THE LIFE OF WILLIAM WIRT 62 (1850); *Attorney-General*, *supra* note 51, at 384 (“[I]t is understood that the heads of the departments consider the advice of the law officer conclusive.”)).

¹²¹ Exec. Order No. 2877 (May 31, 1918).

¹²² Exec. Order No. 6166 (June 10, 1933).

¹²³ Exec. Order No. 6247 (Aug. 10, 1933); Exec. Order No. 6166 (June 10, 1933).

¹²⁴ Exec. Order No. 7298, 1 Fed. Reg. 2284 (1936).

¹²⁵ *Supra* note 61.

¹²⁶ Exec. Order No. 12,146, 3 C.F.R. 409 (1979) codified as amended at 28 U.S.C. § 509, 928–29 (2006).

¹²⁷ Independent Offices Appropriation Act of 1934, ch. 101, § 16, 48 Stat. 283, 307–08; see also *supra* note 59 (discussing the IOAA of 1934); 1934 ATT’Y GEN. ANN. REP. 119.

¹²⁸ See generally *supra* notes 66–67 (discussing the process by which these duties were transferred to the OLC).

¹²⁹ See Moss, *supra* note 85, at 1305 (“Few, however, dispute the proposition that whether for legal reasons, to promote uniformity and stability in executive branch legal interpretation, or to avoid the personal risk of being “subject to the imputation of disregarding the law as officially pronounced,” executive branch agencies have treated Attorney General (and later the Office of Legal Counsel) opinions as conclusive and binding since at least the time of Attorney General William Wirt.”).

Id. at 1319–20 (citing Letter from William Wirt, Att’y Gen., to Hugh Nelson, Judiciary Comm. Chairman, U.S. House of Representatives, in 2 JOHN KENNEDY, MEMOIRS OF THE LIFE OF WILLIAM WIRT 62 (1850); *Attorney-General*, *supra* note 51, at 384. Although Moss overlooks the OLC opinions addressing the revolt by the Department of Labor in 1987, and thus overstates the case that “we have been able to go for over two hundred years without conclusively determining whether the law demands adherence to Attorney General Opinions,” he is correct in his conclusion that “agencies have in practice treated these opinions as binding.” *Id.* at 1320. See Jurisdiction of Attorney General to Determine Meaning of the Term “Adjustments” as Used in Executive Order No. 6440 of November 18, 1933, 37 Op. Att’y Gen. 562 (1934) (stating that the Attorney General and not the Comptroller General determines the meaning of a term in an executive order); *Detail of Registry Clerk*, *supra* note 52, at 301 (1904) (explaining that an opinion issued by the Attorney General to the Treasury is final and authoritative under the law); *Attorney-General*, *supra* note 51 at 383 (discussing the weight of authority afforded to Attorneys General opinions); Opinions of Attorneys General and Decisions of Auditors, 5 Op. Att’y Gen. 97 (1849) (describing the rationale for

Today the Attorney General, when exercising the power to determine the meaning of law, is the final authority over the interpretation of the law within the executive branch.¹³⁰ The Attorney General is also the final statutory authority regarding litigation by the United States in the federal courts.¹³¹ The only exception to this final authority over litigation is when Congress specifically grants an independent regulatory agency independent authority to litigate cases in the federal courts including the Supreme Court.¹³² The authority to supervise and conduct appeals to the U.S. Courts of Appeals and the Supreme Court has been delegated to the Solicitor General¹³³ under the supervision of the Attorney General.¹³⁴

V. EPILOGUE: THE MOTTO OF JUSTICE

Prior to the formation of the Department of Justice in 1870, the Office of the Attorney General adopted a seal with a motto to be placed on all official records and documents of the Office of the Attorney General.¹³⁵ The motto “[*q*]ui pro domina justitia sequitur”¹³⁶ is roughly translated to mean “now comes he who prosecutes on behalf of justice” and was formally placed on the seal of the U.S. Department of Justice in 1872.¹³⁷

The motto originated in 1849 when Congress passed an “Act for Authenticating Certain Records,” which required the Attorney

holding that opinions of the Attorney General are binding).

¹³⁰ Moss, *supra* note 85, at 1321.

¹³¹ See 28 U.S.C. § 516 (2006).

¹³² Elliott Karr, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 GEO. WASH. L. REV. 1080, 1081, 1084 (2009).

¹³³ 28 C.F.R. § 0.20 (2012).

The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, in consultation with each agency or official concerned:

- (a) Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments
- (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing *en banc* and petitions to such courts for the issuance of extraordinary writs) and, in accordance with § 0.163, advising on the approval of settlements of cases in which he had determined that an appeal would be taken.
- (c) Determining whether a brief *amicus curiae* will be filed by the Government, or whether the Government will intervene, in any appellate court.

Id.

¹³⁴ See 28 U.S.C. § 518 (2006).

¹³⁵ See U.S. DEPT OF JUSTICE, *supra* note 19, at 36, 42.

¹³⁶ *Id.* at 36.

¹³⁷ *Id.* at 36, 37.

General to place an official seal upon all official documents and records.¹³⁸ It has been lost to history the exact authorship of the motto¹³⁹ used subsequent to the passage of the 1849 Act, but by 1854, Attorney General Cushing reported to the President that the Office of the Attorney General had an official seal and it was used on all official documents and records.¹⁴⁰ It is generally believed that the origin of the current motto and seal was devised by Attorney General Reverdy Johnson in 1849 and was the same one referred to by Attorney General Cushing.¹⁴¹ On March 5, 1872, Congress passed “An Act Transferring Certain Powers and Duties to the Department of Justice, and providing a Seal therefor,” which required that the seal of the Office of the Attorney General become the seal of the Department of Justice.¹⁴² Official Justice Department tradition asserts that the current motto was placed on the official Department of Justice seal in 1872 by Attorney General Jeremiah Black.¹⁴³

The significance of the motto is less in its pedigree and more in the assertion and proposition that it provides. The Attorney General was perceived from its inception and through to the modern day as the officer tasked with conducting his or her duties in the pursuit of law and justice, not politics.¹⁴⁴ It is this premise—that the Attorney General pursues justice under the law—which forms the foundation for the traditional administrative practice making

¹³⁸ Act of Feb. 22, 1849, ch. 61, § 3, 9 Stat. 346, 346–47 (codified as amended at 28 U.S.C. § 502 (2006)); see also U.S. DEP’T OF JUSTICE, *supra* note 19, at 36 (explaining that congressional action prompted the creation of the seal).

¹³⁹ See U.S. DEP’T OF JUSTICE, *supra* note 19 at 36; *DOJ Seal—History and Motto*, JUSTICE.GOV, <http://www.justice.gov/jmd/lis/dojseal.htm> (last updated Sept. 2012) (discussing doubts as to whether Attorney General Jeremiah Black selected the motto).

¹⁴⁰ U.S. DEP’T OF JUSTICE, *supra* note 19, at 36.

¹⁴¹ *DOJ Seal*, *supra* note 139.

¹⁴² Act of Mar. 5, 1872, ch. 30, § 2, 17 Stat. 35, 35 (codified as amended at 28 U.S.C. § 502 (2006)). Section 1 of the act required

[t]hat all and singular the powers conferred and duties enjoined by existing laws upon the Secretary of the Interior relating to the imprisonment or discharge of convicted offenders against the laws of the United States, or to the reform school and jail in the District of Columbia, be, and the same are hereby, transferred to the Department of Justice.

Id. § 1. Section 2 required

[t]hat the seal heretofore provided for the office of the Attorney General shall be the seal of the Department of Justice, with such change in the device as the President of the United States shall approve, and all books, papers, documents, and records in said Department of Justice may be copied and certified under seal in the same manner as those in the State Department, and with the same force and effect.

Id. § 2.

¹⁴³ U.S. DEP’T OF JUSTICE, *supra* note 19, at 36.

¹⁴⁴ See MEADOR, *supra* note 9, at 118, 119.

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his or her opinions on the meaning of the law binding within the executive branch.

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APPENDIX ONE: CHART OF JUSTICE DEPARTMENT LEGAL COUNSEL

President of the United States	United States Attorney General	Office of Assistant Solicitor General	Assistant Attorney General, Chief Executive Adjudications Division	Assistant Attorney General, Office of the Legal Counsel
George Washington, 1789–1797	Edmund Randolph William Bradford Charles Lee			
John Adams, 1797–1801	Charles Lee			
Thomas Jefferson, 1801–1809	Levi Lincoln, Sr. John Breckinridge Caesar A. Rodney			
James Madison, 1809–1817	Caesar A. Rodney William Pinkney Richard Rush			
James Monroe, 1817–1825	William Wirt			
John Quincy Adams, 1825–1829	William Wirt			
Andrew Jackson, 1829–1837	John M. Berrien Roger B. Taney Benjamin Franklin Butler			
Martin Van Buren, 1837–1841	Felix Grundy Henry D. Gilpin			
William Henry Harrison, 1841	John J. Crittenden			
John Tyler, 1841–1845	John J. Crittenden Hugh Swinton Legaré John Nelson			
James Knox Polk, 1845–1849	John Y. Mason Nathan Clifford Isaac Toucey			
Zachary Taylor, 1849–1850	Reverdy Johnson			

President of the United States	United States Attorney General	Office of Assistant Solicitor General	Assistant Attorney General, Chief Executive Adjudications Division	Assistant Attorney General, Office of the Legal Counsel
Millard Fillmore, 1850–1853	John J. Crittenden			
Franklin Pierce, 1853–1857	Caleb Cushing			
James Buchanan, 1857–1861	Jeremiah S. Black Edwin M. Stanton			
Abraham Lincoln, 1861–1865	Edward Bates James Speed			
Andrew Johnson, 1865–1869	James Speed Henry Stanberry William M. Evarts			
Ulysses Simpson Grant, 1869–1877	Ebenezer R. Hoar Amos T. Akerman George Henry Williams Edwards Pierrepont Alphonso Taft			
Rutherford Birchard Hayes, 1877–1881	Charles Devens			
James Abram Garfield, 1881	Wayne MacVeagh			
Chester Alan Arthur, 1881–1885	Wayne MacVeagh Benjamin H. Brewster			
Grover Cleveland, 1885–1889	Augustus H. Garland			
Benjamin Harrison, 1889–1893	William Miller			
Grover Cleveland, 1893–1897	Richard Olney Judson Harmon			

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President of the United States	United States Attorney General	Office of Assistant Solicitor General	Assistant Attorney General, Chief Executive Adjudications Division	Assistant Attorney General, Office of the Legal Counsel
William McKinley, 1897–1901	Joseph McKenna John W. Griggs Philander C. Knox			
Theodore Roosevelt, 1901–1909	Philander C. Knox William H. Moody Charles J. Bonaparte			
William Howard Taft, 1909–1913	George W. Wickersham			
Woodrow Wilson, 1913–1921	James C. McReynolds Thomas Watt Gregory Alexander Mitchell Palmer			
Warren Gamaliel Harding, 1921–1923	Harry M. Daugherty			
Calvin Coolidge, 1923–1929	Harry M. Daugherty Harlan F. Stone John G. Sargent			
Herbert Clark Hoover, 1929–1933	William D. Mitchell			
Franklin Delano Roosevelt, 1933–1945	Homer Stille Cummings Frank Murphy Robert H. Jackson Francis Biddle	Angus D. MacLean Golden W. Bell Charles Fahy		
Harry S. Truman, 1945–1953	Francis Biddle Tom C. Clark J. Howard McGrath James P. McGranery	Oscar S. Cox Harold W. Judson George T. Washington	Aldolphus J. Harris Joseph C. Dugan	
Dwight David Eisenhower 1953–1961	Herbert Brownell, Jr. William P. Rogers			J. Lee Rankin* Wilson White* Malcolm R. Wilkey* Robert Kramer*
John Fitzgerald Kennedy, 1961–1963	Robert F. Kennedy			Nicholas Katzenbach* Norbert A. Schlei*

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Lyndon Baines Johnson, 1963–1969	Robert F. Kennedy Nicholas Katzenbach Ramsey Clark			Norbert A. Schlei* Frank H. Wozencraft*
Richard Milhous Nixon, 1969–1974	John N. Mitchell Richard Kleindienst Elliot Richardson William B. Saxbe			William H. Rehnquist* Ralph E. Erickson* Roger C. Crampton* Robert G. Dixon*
Gerald Rudolph Ford, 1974–1977	William B. Saxbe Edward H. Levi			Antonin Scalia*
James Earl Carter, Jr., 1977–1981	Griffin Bell Benjamin Civiletti			John M. Harmon*
Ronald Wilson Reagan, 1981–1989	William French Smith Edwin Meese Dick Thornburgh			Theodore B. Olson* Charles J. Cooper* Douglas W. Kmiec*
George Herbert Walker Bush, 1989–1993	Dick Thornburgh William Barr			William P. Barr* J. Michael Luttig* Timothy E. Flanigan*
William Jefferson Clinton, 1993–2001	Janet Reno			Walter Dellinger* Beth Nolan** Dawn Johnsen** Randolph D. Moss*
George Walker Bush, 2001–2009	John Ashcroft Alberto Gonzales Michael Mukasey			Jay S. Bybee* Jack Goldsmith* Daniel Levin** Steven Bradbury**

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President of the United States	United States Attorney General	Office of Assistant Solicitor General	Assistant Attorney General, Chief Executive Adjudications Division	Assistant Attorney General, Office of the Legal Counsel
Barack Hussein Obama, 2009–Present	Eric Holder			David Barron** Jonathan G. Cedarbaum** Caroline Diane Krass*** Virginia A. Seitz*

* Confirmed by U.S. Senate

** Appointed Acting Assistant Attorney General

*** Career attorney temporary appointment¹⁴⁵

¹⁴⁵ See *OLC: A Survey of Its Role and History*, *supra* note 64, at 17; *Attorneys General of the United States, 1789-present*, USDOG.GOV, (last visited Sept. 3, 2012), <http://www.justice.gov/ag/aghlist.php?range=81>.