RELIANCE ON EXECUTIVE CONSTITUTIONAL INTERPRETATION

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ABSTRACT

Federal executive officials routinely authorize government personnel to violate otherwise applicable laws based on contestable constitutional interpretations. This practice raises an important and unresolved question, one that arose in connection with the George W. Bush Administration's interrogation practices and that could easily arise again: What legal effect, if any, should internal executive guidance on constitutional questions have in subsequent civil or criminal litigation against officials who relied on it?

This Article systematically analyzes this question. Building on existing case law in related areas, it argues that any sound reliance defense in this area must balance three competing constitutional considerations: (1) a fairness principle, reflecting the intuitive unfairness of penalizing officials who relied in good faith on internally authoritative legal guidance; (2) an antisuspending principle, reflecting separation-of-powers limitations on the executive branch's authority to eliminate or disregard applicable statutory constraints; and (3) a departmentalism principle, reflecting the longstanding assumption that the executive branch holds at least some authority to interpret the Constitution independently from courts in performing executive functions. Contrary to past accounts, which have tended to argue categorically against or in favor of a general reliance defense, properly balancing these competing considerations

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should yield a set of calibrated defenses that vary according to the nature of the executive determination and the character of the litigation.

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INTRODUCTION

Following the controversial selection of a Central Intelligence Agency ("CIA") Director who previously worked on aggressive counterterrorism operations, the CIA's use of "enhanced interrogation" during the George W. Bush Administration was recently back in the news.[1] Despite renewed soul-searching over past abuses, however, a key legal question presented by this program—whether executive-branch legal opinions approving it immunized participants against future liability—remains unanswered.

Although the government has announced no plan to resume such interrogation methods, numerous other controversial activities—from overseas drone strikes and electronic surveillance to ethics arrangements and spending for diplomacy, national security, border security, or law enforcement in violation of appropriations restraints—might well depend on internal legal opinions concluding, as the Justice Department's Office of Legal Counsel ("OLC") did with respect to enhanced interrogation, that civil or criminal statutory prohibitions are inapplicable for constitutional reasons.[2] Indeed, amid a recent weeks-long shutdown of certain agencies due to an appropriations lapse, the Trump Administration apparently sought ways to keep government functions running,[3] notwithstanding a criminal statute that prohibits obligating funds without a supporting appropriation.[4] As with enhanced interrogation in the Bush years, government personnel or others acting in reliance on internal legal guidance or presidential directives in any of these areas might commit crimes, civil violations, or torts if the guidance they followed turns out to be mistaken.

If the basic legal issue regarding reliance on executive constitutional interpretation has not gone away, the political context in which it operates has changed significantly. Though it was polarized enough in the Bush years, American politics since then has only grown more brutal and partisan. This trend increases the chances that future controversies will not be resolved through informal means, such as the prosecutorial forbearance applied to exempt Bush

[1] Shane Harris & Karoun Demirjian, *Senate Confirms Haspel to Be First Female CIA Head*, WASH. POST, May 18, 2018, at A01 ("The Senate voted Thursday to confirm Gina Haspel as the next CIA director after several Democrats were persuaded to support her despite lingering concerns about the role she played in the brutal interrogation of suspected terrorists captured after 9/11.").

[2] *See infra* Section I.A.

[3] *See, e.g.*, Dep't of the Interior—Activities at National Parks During the Fiscal Year 2019 Lapse in Appropriations, B-330776, 2019 WL 4200991, at *1 (Comp. Gen. Sept. 5, 2019) (finding that Department of Interior illegally obligated funds during shutdown to maintain certain services at national parks).

[4] 31 U.S.C. §§ 1341-1342, 1350 (2018). For my observations at the time of the shutdown, see Zachary Price, *The Constitutional Law of Shutdowns*, TAKE CARE BLOG (Jan. 8, 2019), https://takecareblog.com/blog/the-constitutional-law-of-shutdowns [https://perma.cc/H9ZE-BMBF] (observing that, due to current partisan animosity, "[s]hutdowns may become a political weapon" and "[t]he executive may then be tempted to get around funding restraints through aggressive theories of executive power").

Administration interrogators from sanction.[5] Next time, key constituencies may well demand heads on spikes, leaving it to courts to sort out whether past reliance affords any current legal defense. Courts would then confront the question: Is the executive-branch lawyer's power to advise ever also a power to immunize?

This Article articulates a legal framework for resolving this question. In hopes of providing guidance ahead of the next crisis (and perhaps forestalling it altogether), the Article aims to address the problem outside the heat of any immediate controversy while nonetheless using real-world examples as illustrations. As I will explain, case law has recognized reliance defenses, based on due process in the penal context and qualified immunity in the civil tort context, that are potentially available to government officials or others who relied on internal guidance to take actions later deemed unlawful.[6] Yet past accounts viewing these defenses as either categorically available[7] or categorically unavailable[8] in the federal context are mistaken. Reliance questions in this area instead implicate a paradox that defies easy resolution: while protecting reliance may encourage executive officials to seek legal advice, by the same token it may create incentives to corrupt the advice-giving process to ensure desired outcomes. Squaring this circle requires taking account of three complex and largely incommensurate structural principles, each with constitutional underpinnings.

The first and most intuitive of these principles relates to fairness. All else being equal, providing official assurance that planned actions are lawful renders it grossly unfair to turn around and hold those who undertook such actions accountable for lawbreaking. The second principle, which conflicts with the first, is what I call an "antisuspending" principle. One basic constitutional limitation on federal executive authority is that executive officials may not hold unchecked authority to eliminate (or "suspend") governing legal requirements. Any reliance doctrine in this context must take account of this principle too. The third principle, which is unique to the particular problem addressed here, is a departmentalism principle. Under longstanding constitutional theory and practice, each branch of the federal government holds some authority to interpret

[5] For discussion and critique of the Obama Administration's forbearance from interrogation-related prosecutions, see DAVID LUBAN, TORTURE, POWER, AND LAW 275-76 (2014).

[6] *See infra* Section I.B.

[7] *See, e.g.*, Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 WAKE FOREST L. REV. 93, 97 (2008) (purporting to "demonstrate that, in virtually every situation, government employees who rely on an Attorney General opinion in taking action will likely be absolved from any legal sanction").

[8] *See, e.g.*, David Kurtz, *Mark This Day*, TALKING POINTS MEMO (Feb. 7, 2008, 12:24 PM), https://talkingpointsmemo.com/edblog/mark-this-day [https://perma.cc/AA6X-8YW9] (condemning Justice Department's refusal to investigate OLC-approved waterboarding and wiretapping during the Bush Administration). *See generally* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 234 (2012) (describing civil rights advocates' push for prosecution of interrogators despite OLC opinions).

the Constitution for itself in performing its central constitutional functions. In at least some instances, this principle might support protecting individuals' reliance on an internally authoritative executive-branch view even if courts, as a distinct branch of government, would have reached a different legal conclusion de novo.

Reconciling these three principles, this Article contends, should yield three basic doctrinal rules:

> (1) Reliance on a signed OLC or Attorney General opinion should provide a due process defense in any subsequent civil or criminal government enforcement action, but only insofar as the opinion's conclusions were objectively reasonable.
>
> (2) Reliance on any other executive directive, including presidential signing statements and legal determinations reached through interagency dialogue, should support such a defense only insofar as the legal conclusions at issue either accorded closely with past OLC or Attorney General opinions or were objectively correct in the reviewing court's view.
>
> (3) In other litigation contexts, including private damages suits against federal officers, reliance on executive-branch legal conclusions should provide no particular defense.

These ground rules adapt existing reliance case law to the background constitutional principles that are necessarily implicated in this context. My proposal, furthermore, draws strength from governing principles in other related areas. Under the familiar *Chevron* and *Mead* doctrines from administrative law, maximum judicial deference to executive legal determinations often depends on both the institutional identity of the interpreter (i.e., whether it is interpreting a statute it administers) and the degree of process the interpreter followed (i.e., whether it employed notice-and-comment procedures).[9] Here, by rough analogy, the degree of after-the-fact judicial deference, in the form of reliance protection for potential defendants, should track whether the executive decision-making process was both institutionally and procedurally designed to give maximum force to legal values. At the same time, to preserve overall judicial primacy in constitutional interpretation, courts should retain authority to formulate independent legal conclusions in at least some litigation contexts.

My argument here for these conclusions is essentially doctrinal. I aim to sketch the path forward that, by aligning "justification" and "fit" in conventional Dworkinian fashion, best adapts existing case law to relevant structural considerations and normative values that should shape its further elaboration.[10]

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[9] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 228-30 (2001) (outlining circumstances under which agency interpretations of governing statutes receive judicial deference).

[10] *See* RONALD DWORKIN, LAW'S EMPIRE 255 (1986) (advocating that judges "decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their

Apart from its practical utility, however, my analysis contributes to some important theoretical debates. As a function of partisan polarization and the deep substantive disagreements animating American politics, legal and constitutional interpretation appears to be growing more fractious, with different institutional actors—federal executive agencies, courts, members of Congress, states, and commentators—vying to shape public perception of legal issues. At the same time, some recent scholarship suggests that the federal executive branch's own decision-making is growing more "porous," with multiple rivalrous actors vying internally with OLC and the Attorney General to shape ultimate legal positions.[11]

The analysis offered here provides a concrete case study of how our legal system might accommodate these pressures without abandoning basic rule-of-law commitments. If legal decision-making is indeed becoming both more rivalrous and more flexible, we may well need to think about executive constitutionalism with Oliver Wendell Holmes, Jr.'s "bad man" in mind,[12] focusing not so much on what outcomes would be ideal in any single instance as on what remedial understandings may best preserve institutional structures and constrain tactical behavior in the long run.[13]

community"); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1096-98 (1975) (discussing methods of an ideal judge). The approach I employ here, which I take to be the conventional approach to precedent in the American legal system, employs Dworkin's basic method of seeking an attractive normative justification that fits existing legal authorities but eschews the overt goal of moral advancement that Dworkin embraced and instead seeks a justification more squarely rooted in the legal materials themselves. *Cf.* Thomas Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 592 & n.179 (2018) (characterizing this approach to precedent as "Burkean").

[11] *See* Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 848-78 (2017); *see also* Robert F. Bauer, *The National Security Lawyer, in Crisis: When the "Best View" of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175, 259 (2018) (arguing that executive-branch lawyers, including OLC, should aim to provide "reasonable" guidance rather than the "best view" of law in national security crises).

[12] Oliver W. Holmes, Jr., Justice, Mass. Supreme Judicial Court, Address at Boston University School of Law: The Path of the Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 461 (1897) (discussing "bad man's" conception of legality based primarily on consequences).

[13] I do not address here the question whether executive-branch lawyers themselves should be subject to discipline or civil liability for flawed constitutional advice. Such sanctions or liability could serve to maintain appropriate professional standards for executive-branch lawyers but would not vindicate the primary conduct prohibitions that lawyers advised government officials or others to disregard. For analysis of lawyers' potential liability, see, for example, HAROLD H. BRUFF, BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR 294-95 (2009) (advocating for ethical discipline for lawyers involved in torture controversy); Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT'L SECURITY L. & POL'Y 507, 520 (2012) ("There are strong reasons for the public to insist on higher standards, both to guide government attorneys in the future, and to assure a commitment to democracy, constitutional government, and the rule of law."); Mark Stepper, Note, *A Government Lawyer's Liability Under* Bivens, 20 CORNELL J.L. & POL'Y 441, 466-67 (2010) (addressing potential civil liability for government lawyers).

My argument proceeds as follows. Part I highlights the range of contexts in which reliance on executive constitutional interpretation may come into play. It also offers a brief overview of existing scholarship and its shortcomings. Part II turns to normative analysis of reliance on federal executive constitutional interpretation. It begins by addressing the nature of the due process inquiry. Although some cases have recognized constitutional protection against the unfairness of punishing individuals for conduct the government assured them was lawful, any doctrine building on this case law must also take account of structural values and limitations. Part II then identifies and describes the three key principles—fairness, antisuspending, and departmentalism—that come into play in this context. Part III articulates and defends a doctrinal framework that, by properly balancing these key considerations, could mold existing doctrines into forms suited to the institutional setting of federal executive-branch constitutional interpretation. The Article closes with a brief conclusion reflecting on this framework's relevance in navigating ongoing partisan and intragovernmental conflicts over constitutional meaning.

I. SKETCHING THE PROBLEM

To help ground the inquiry and provide examples for later analysis, I begin here in Section I.A by sketching a variety of circumstances in which officials may place reliance on executive constitutional interpretation. My examples are illustrative rather than exhaustive; I aim simply to sketch the problem's contours. Section I.B then briefly surveys existing scholarship on this reliance problem, with a focus on identifying shortcomings in past accounts.

A. *Executive Interpretation's Many Manifestations*

The CIA's notorious use of waterboarding and other forms of "enhanced" interrogation against terrorism suspects at Guantanamo Bay, the Abu Ghraib prison, and other overseas locations during President George W. Bush's "War on Terror" is a recent example of the problem under consideration here. Although this example was particularly acute and troubling, however, the basic problem of reliance on dubious executive-branch constitutional interpretation is potentially extensive and arises across a variety of domains.

To start with the torture example, during the George W. Bush Administration, CIA officials and other personnel engaged in coercive interrogation techniques in reliance on certain OLC opinions known to history as the "Torture Memos."[14]

[14] *See generally* Memorandum from Jay Bybee, Assistant Attorney Gen., Office of Legal Counsel, for John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency, on Interrogation of al Qaeda Operative (Aug. 1, 2002) [hereinafter Classified Bybee Memo], https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf [https://perma.cc/VH6H-9ML7] (deeming particular severe interrogation techniques lawful); Memorandum from Jay Bybee, Assistant Attorney Gen., Office of Legal Counsel, for Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002) [hereinafter Unclassified Bybee Memo], https://www.justice.gov/olc/file/886061/download [https://perma.cc/96FF-9ZPL]

An Act of Congress in fact prohibited torture, defined in the relevant provision as action "under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person" in custody.[15] Nevertheless, OLC opinions formulated in the pressured aftermath of the September 11, 2001, attacks not only construed this prohibition narrowly but also concluded that applying any such statute to punish interrogations ordered by the President for national security reasons would violate the President's Article II constitutional authorities.[16]

OLC itself later withdrew these opinions as unsound; the next administration actively considered legal action against officials who relied on them; and an internal Justice Department ethics investigation concluded that the opinions reflected "poor judgment" and "overstate[d] the certainty of [their] conclusions."[17] In the ethics investigation, the Department ultimately deemed it a "close question" whether the key lawyer involved "intentionally or recklessly provided misleading advice to his client."[18] It stopped short of finding professional misconduct mainly because the positions advanced in the opinions were sincerely held by their lead author.[19] As for criminal prosecution, although the Obama Administration appointed a special prosecutor to investigate officials

(concluding that "only extreme acts" violate criminal prohibitions on torture); Memorandum from John Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, for William J. Haynes, II, Gen. Counsel, Dep't of Def., on Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003) [hereinafter Yoo Memo], https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-combatantsoutside unitedstates.pdf [https://perma.cc/XFH8-6MLB] (concluding that certain enhanced interrogation practices were legal under both American and international law).

For discussion of the memos' background and later withdrawal, see Memorandum from David Margolis, Assoc. Deputy Attorney Gen., Office of the Deputy Attorney Gen., for Eric Holder, Attorney Gen., Office of the Attorney Gen., on Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (Jan. 5, 2010) [hereinafter Margolis Memo], https://fas.org/irp/agency/doj/opr-margolis.pdf [https://perma.cc/YJT7-EKSE].

[15] 18 U.S.C. §§ 2340(a), 2340A(a) (2018) (defining torture and criminalizing it in some circumstances).

[16] *See* Unclassified Bybee Memo, *supra* note 14, at 2 ("[I]n the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war."); Yoo Memo, *supra* note 14, at 1 (stating that applying criminal laws of general applicability under the circumstances "would conflict with the Constitution's grant of the Commander in Chief power solely to the President").

[17] *See* Margolis Memo, *supra* note 14, at 68.

[18] *See id.* at 67.

[19] *Id.* ("I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client.").

who exceeded the Justice Department's legal authorizations, President Obama and Attorney General Eric Holder declined to pursue officials who acted in accordance with authoritative OLC opinions.[20] At the same time, Congress enacted legislation generally immunizing the officials in question from civil liability.[21]

Although this troubling chapter was thus resolved by political action without any litigation over reliance defenses, the basic phenomenon it illustrates is pervasive. Another salient recent opinion controversially rejected statutory and constitutional objections to launching overseas drone strikes against American citizens suspected of plotting terrorist attacks.[22] Other public OLC opinions in recent years have interpreted the Free Exercise Clause to allow certain federal loans in defiance of a statutory restriction,[23] authorized diplomatic activities in

[20] *See* Eric H. Holder, Jr., Attorney Gen., Office of the Attorney Gen., Remarks Regarding a Preliminary Review into the Interrogation of Certain Detainees (Aug. 24, 2009), https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees [https://perma.cc/7ZFB-F6JU] ("[T]he Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees."). For general background on this decision, see GOLDSMITH, *supra* note 8, at 233-36.

[21] Due to statutes enacted in 2005 and 2006, federal law now provides:

> In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, *it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful*. *Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful*. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

42 U.S.C. § 2000dd-1(a) (2018) (emphasis added).

[22] Memorandum from David J. Barron, Assistant Attorney Gen., Office of Legal Counsel, for Eric Holder, Attorney Gen., Office of the Attorney Gen., on Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010) [hereinafter Drone Memo], https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2014/06/6-23-14_Drone_Memo-Alone.pdf [https://perma.cc/L4UF-657U] (approving drone strike targeting U.S. citizen overseas).

[23] *See* Religious Restrictions on Capital Financing for Historically Black Colleges and Universities, 43 Op. O.L.C., 2019 WL 4565486, at *1 (Aug. 15, 2019) [hereinafter OLC HBC Memo].

defiance of specific appropriations limitations,[24] approved an extensive military campaign in Libya without congressional authorization,[25] and allowed a controversial form of immigration relief for millions of undocumented immigrants[26]—all based on disputed theories of executive authority.

To the extent the legal and constitutional analysis underlying these actions is flawed, officials carrying out these policies might well be violating applicable statutory restraints. Drone strikes, for example, could conceivably violate statutory prohibitions on murder and war crimes.[27] In addition, any spending in support of unlawful actions could violate the Antideficiency Act ("ADA"), a penal statute that bars any expenditure or obligation of federal funds without specific congressional authority.[28] Indeed, in a controversial prisoner exchange in 2014, the Obama Administration transferred prisoners held at the Guantanamo Naval Base in open defiance of statutory limits on such transfers. When the Government Accountability Office determined that this action violated the ADA, the executive branch responded by asserting that the appropriations limits should be read countertextually to avoid constitutional concerns.[29] More generally, any commitment of funds amid increasingly frequent government "shutdowns" due to lapses of annual appropriations could violate the ADA if the legal or constitutional interpretations on which officials relied were flawed.

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[24] *See* Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C., 2009 WL 2810454, at *1 (June 1, 2009) [hereinafter OLC 2009 Appropriations Memo].

[25] *See* Authority to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at *1 (Apr. 1, 2011) [hereinafter OLC Libya Memo].

[26] *See* The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C., 2014 WL 10788677, at *1-2 (Nov. 19, 2014) [hereinafter OLC Immigration Memo].

[27] *See generally* Drone Memo, *supra* note 22, at 12-35 (addressing and rejecting potential application of various statutes to drone strike against U.S. citizen).

[28] 31 U.S.C. §§ 1341-1342, 1350 (2018) (outlining limits on obligation of funds and penalties for violations). The ADA includes a criminal provision for "knowing[] and willful[]" violations. *Id.* § 1350. Insofar as willfulness requires consciousness of wrongdoing, reliance on an OLC opinion should normally prevent criminal liability under this provision so long as the official in question had no reason to know the legal opinion was flawed. Other administrative sanctions under the statute, however, do not require this mens rea. *See, e.g.*, *id.* § 1349(a) (providing for "appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office"). In such cases, therefore, only a due process reliance defense could bar liability. In addition, government officials may sometimes be personally responsible for unlawful expenditures. *See id.* § 3528 (rendering certain officials liable for overpayments they authorized).

[29] *See* Dep't of Def.—Compliance with Statutory Notification Requirement, B-326013, 2014 WL 4100408, at *1 (Comp. Gen. Aug. 21, 2014) (concluding that Department of Defense violated an appropriations restriction, and thus the ADA, by transferring detainees from Guantanamo Bay to Qatar).

In another form of executive constitutional interpretation, Presidents routinely issue signing statements and other directives claiming authority to defy various putatively unconstitutional provisions in particular bills.[30] In President Trump's first signing statement, for example, he asserted constitutional authority to defy statutory appropriations restrictions on activities as varied as diplomacy, military detention, military command control, and marijuana enforcement.[31] Recent accounts of executive-branch legalism, furthermore, have highlighted alternative mechanisms for formulating executive legal positions that may circumvent OLC and the Attorney General altogether, even on important constitutional questions.[32] During the Obama Administration, according to some accounts, important national security questions were apparently often resolved by a "Lawyers Group" composed of multiple agency lawyers, without necessarily seeking any formal legal guidance from OLC.[33] In another noteworthy example, President Obama adopted the view expressed in testimony from the State Department Legal Adviser, rather than OLC, to justify continuing a bombing campaign in Libya beyond the sixty-day limit in the War Powers Resolution.[34] These examples illustrate how executive officials may take multiple paths to formulating highly consequential internal constitutional judgments.

B. *Existing Scholarship and Its Limitations*

Reliance on executive constitutional interpretation, then, is widespread. Federal executive officials going about their business may be required, in some cases on pain of termination or other penalties, to rely on constitutional determinations by other officials within their own government. To date, the political system has generally protected such officials from later civil or criminal

[30] For general discussion of signing statements and their value, see Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 312-16 (2006).

[31] Presidential Statement on Signing the Consolidated Appropriations Act, 2017, 2017 DAILY COMP. PRES. DOC. 312 (May 5, 2017) [hereinafter Trump 2017 Appropriations Act Signing Statement], https://www.govinfo.gov/content/pkg/DCPD-201700312/pdf/DCPD-201700312.pdf [https://perma.cc/ZB45-ZW4V].

[32] *See, e.g.*, Renan, *supra* note 11, at 837-40 (positing that national security legal decision-making within executive branch has grown more informal and diffuse).

[33] CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY 64 (2015) (describing interagency national security lawyers group as "elite council of the top lawyers from each of the core national security-foreign policy agencies"); Renan, *supra* note 11, at 837 (describing group as consisting of "leadership from the legal offices of the key national security agencies, as well as the head of OLC and the legal advisor to the National Security Council inside the White House").

[34] *See* Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 62 n.2 (2011) (discussing Obama Administration's legal position).

penalties based on their reliance.[35] Yet such forbearance could easily fall prey in the future to the country's fraying political cohesion. If such a reversal occurs, the question for courts in the resulting litigation will be whether and to what degree past reliance on executive constitutional views should provide a legal defense as a matter of due process.

Although courts have never yet grappled adequately with this problem, a number of commentators have addressed it. Their accounts have tended, however, to overreach in one direction or another. Some commentators have advocated a near-complete defense based on a trilogy of cases[36] in which the Supreme Court protected private parties' reliance on government assurances of legality regarding conduct that was in fact criminal.[37] But while these cases may support arguments for protecting official reliance on government legal opinions,[38] understanding them to establish a blanket defense both misreads the cases and shortchanges important structural considerations that must factor into the analysis.[39] Simply put, a government official's reliance on the government's own self-authorizing legal opinions raises concerns that are absent when the only issue is the governmental bait-and-switch of mistakenly assuring some private party that particular planned conduct was lawful.

Others have argued that officials who relied on authoritative legal guidance should at least hold a defense of qualified immunity against civil tort liability.[40]

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[35] *Cf.* GOLDSMITH, *supra* note 8, at 233-36 (describing decision of President Obama and Attorney General not to pursue officials who acted in accordance with OLC opinions).

[36] United States v. Penn. Indus. Chem. Corp. (*PICCO*), 411 U.S. 655, 675 (1973) (holding that appellant should have been allowed to "present evidence in support of its claim that it had been affirmatively misled" about legality of its actions by Army Corps of Engineers); Cox v. Louisiana, 379 U.S. 559, 571 (1965) (holding that conviction for illegal picketing near courthouse violated Due Process Clause because police officials previously assured appellant his demonstration was not "near" courthouse); Raley v. Ohio, 360 U.S. 423, 426 (1959) (holding that three appellants' convictions violated Due Process Clause because Ohio convicted them "for exercising a privilege which the State had clearly told [them] was available").

[37] For commentary advocating a reliance defense, see, for example, Pines, *supra* note 7, at 97-98; Martin S. Lederman, *A Dissenting View on Prosecuting the Waterboarders*, BALKINIZATION (Feb. 8, 2008, 3:33 AM), https://balkin.blogspot.com/2008/02/dissenting-view-on-prosecuting.html [https://perma.cc/J2KV-Q97F] (suggesting that cases stand for "broad proposition that criminal culpability may not be imposed for conduct undertaken in reasonable reliance upon the representation of government officials that the conduct was lawful").

[38] *See infra* Section III.A.

[39] *Cf.* Lederman, *supra* note 37 (noting potential exception "*if* the OLC memos on torture, and the subsequent CIA General Counsel directives, were so patently wrong that any reasonable CIA operative or contractor should have been aware of that fact").

[40] *See* Edward C. Dawson, *Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice*, 110 NW. U. L. REV. 525, 557 (2016) (advocating for immunity based on reliance on legal opinions generally); Pines, *supra* note 7, at 122-31 (advocating for immunity based on reliance on guidance from Attorney General).

Qualified immunity is itself controversial,[41] but even holding aside questions about its validity, this immunity arose to address a quite different problem from executive constitutional self-authorization. By protecting government officials from liability unless the legal principles they violated were "clearly established" by prior case law,[42] qualified immunity addresses the unfairness and potential chilling effects of holding individual officers personally liable for actions that they could not anticipate courts would consider unlawful. By contrast, the key problem here is self-authorizing governmental interpretation that allows conduct a court would not.

Yet another account has pointed to law-of-war limits on the "Nuremberg defense" of following superior orders as a model for any defense of OLC reliance.[43] But this defense is also a poor fit for the problem of reliance on executive constitutional guidance. Under the modern understanding, soldiers are normally entitled to presume their orders are lawful; the "superior orders" defense gives way only if under the circumstances the order in question was "so manifestly unlawful that no reasonable combatant would have misperceived [its] criminality."[44] The defense thus serves principally to encourage law-of-war instruction and compliance with certain basic rules that largely accord with ordinary moral intuitions.[45] It is not obvious what comparably intuitive standard nonlawyers (or even many lawyers) could apply in assessing whether an asserted interpretation of Article II's vague and open-ended provisions adequately justifies disregarding a statutory prohibition.

At the opposite extreme, some commentators have suggested that no reliance defense should be available at all, at least when the conduct in question is criminal.[46] Yet this view carries the opposite defect: it ignores the cases just noted that recognize at least some protection for reliance as a matter of due

[41] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 45 (2018) (arguing that "qualified immunity doctrine is unlawful and inconsistent with conventional principles of statutory interpretation").

[42] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

[43] *See* Mark W.S. Hobel, Note, *"So Vast an Area of Legal Irresponsibility"? The Superior Orders Defense and Good Faith Reliance on Advice of Counsel*, 111 COLUM. L. REV. 574, 575 (2011).

[44] *See id.* at 591.

[45] *See id.*

[46] *See, e.g.*, HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES 8 (2011), https://www.hrw.org/sites/default/files/reports/us0711webwcover.pdf [https://perma.cc/EP6F-8MB7] ("While US officials who act in good faith reliance upon official statements of the law generally have a defense under US law against criminal prosecution, this does not mean that the Justice Department should embrace the sweeping view that all officials responsible for methods of torture explicitly contemplated under OLC memoranda are protected from criminal investigation."). *See generally* GOLDSMITH, *supra* note 8, at 234 (describing civil rights advocates' push for prosecution of interrogators despite OLC opinions).

process and likewise overlooks ways in which reliance protection could advance rule-of-law values by encouraging officials to seek legal guidance.

Past commentary on the reliance problem has thus fallen short. As noted, however, the question could easily cease to be academic. The increasingly fractious and contested character of legal interpretation in our polarized Republic may make it more likely that future administrations and litigants will seek sanctions against officials who relied on past constitutional guidance. For example, if the Trump Administration engages in torture or some comparable statutory abuse—or indeed if it undertakes spending, law enforcement, or military action in violation of applicable statutory restraints—a future Democratic administration might face considerable pressure to prosecute without regard to any internal legal opinions issued earlier. Members of that administration, in turn, might face threats of prosecution from a succeeding Republican administration for any violations of their own. Meanwhile, if federal executive-branch legal decision-making is indeed growing more "porous" and informal—that is, if legal determinations are increasingly the outputs of a rivalrous interagency process that may facilitate cherry-picking of favorable advice—then executive legal determinations might lose credibility with outside observers, even though individual officials will almost inevitably place considerable reliance on them.

Courts confronting any resulting litigation will face an important task of doctrinal elaboration. In undertaking this effort, they should neither throw up their hands and reject reliance arguments across the board nor shoehorn novel reliance claims into existing doctrines developed for different purposes. The effort instead requires navigating between fit and justification, in conventional common-law fashion. More specifically, it requires accounting for existing legal authorities and established practices while also identifying the relevant structural and normative considerations that should shape those authorities' application in the context at hand. The remainder of this Article elaborates how this analysis should unfold.

II. FRAMING THE INQUIRY

Crafting a reliance doctrine in this context requires extrapolating from existing case law to develop a due process doctrine informed by relevant structural considerations. Existing decisions already invite framing the analysis in these terms: they call for a structurally informed theory of due process rather than blanket protection (or nonprotection) for reliance on official assurances of legality. In this context, at least three cross-cutting structural considerations come into play: (1) a departmentalism principle supporting independent elaboration of constitutional meaning by the executive branch, (2) an antisuspending principle limiting executive authority to undo statutory restraints, and (3) a fairness principle protecting government officials from egregious entrapment for doing their jobs. After explaining in Section II.A how the due process case law invites structural analysis, I sketch each of these three considerations and their relevance in Section II.B.

A. *Structurally Informed Due Process*

Due process, as we have already seen, is at least plausibly implicated by the governmental bait-and-switch of prosecuting officials or private parties for conduct the government itself earlier indicated was lawful.[47] Under the modern fairness-oriented conception of due process, the Fifth and Fourteenth Amendments, as well as the federal Administrative Procedure Act's related protection against "arbitrary and capricious" government action, often preclude retroactive or unforeseeable liability.[48] Thus, for example, the Supreme Court has invalidated vague criminal statutes,[49] required "fair warning" of administrative constructions,[50] protected reliance on some past enforcement policies that reflected an apparent interpretation of governing law,[51] and generally adopted a robust presumption (though not an outright prohibition) against retroactive liability for previously lawful conduct.[52] Most relevant here, in three cases stretching from 1959 to 1973—*Raley v. Ohio*,[53] *Cox v. Louisiana*,[54] and *United States v. Pennsylvania Industrial Chemical Corp*. (*PICCO*)[55]—the Court held that, in some circumstances, due process precludes subsequent punishment for conduct that government agents specifically invited with assurances of legality.[56]

These decisions confirm the intuitive unfairness of holding government officials to account for actions their superiors assured them were lawful and directed them to undertake. If, as the Supreme Court has held, it would amount to "the most indefensible sort of entrapment" to punish a witness for asserting a

[47] *See supra* Section I.B.

[48] *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 268 (1994) (adopting strong presumption against retroactive application of statutes).

[49] *See, e.g.*, Johnson v. United States, 135 S. Ct. 2551, 2556-57 (2015) (finding Armed Criminal Career Act's residual clause unconstitutionally vague for failing to give adequate notice of conduct it punished).

[50] *See, e.g.*, FCC v. Fox Television Stations, Inc., 567 U.S. 239, 254, 258 (2012) (finding that FCC violated due process when it changed its policy regarding indecency statute without giving defendants adequate notice).

[51] *See, e.g.*, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2169-70 (2016) (refusing to defer to agency's current interpretation in part because agency appeared to follow contrary view in past and regulated parties placed reliance on that understanding).

[52] *See, e.g.*, *Landgraf*, 511 U.S. at 268 (adopting presumption that statutes do not apply retroactively); *see also* Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1102-03 (D.C. Cir. 2001) (discussing presumption against retroactive application of new regulations).

[53] 360 U.S. 423, 425-26 (1959) (holding that convicting defendant for "exercising a privilege which the State had clearly told him was available to him" violated Due Process Clause).

[54] 379 U.S. 559, 574 (1965) (noting that due process requires "laws and regulations to be drawn so as to give citizens fair warning as to what is illegal").

[55] 411 U.S. 655, 674-75 (1973) (allowing defendant to produce evidence of reliance on agency statements).

[56] For my prior analysis of these cases, see Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 971-77 (2017).

privilege that the regulatory body in question said was valid[57] or to prosecute misconduct that applicable regulatory guidance deemed lawful at the time,[58] then it surely raises considerable fairness concerns to punish government personnel for taking actions that their superiors assured them were lawful. Such officials, after all, might also have faced sanctions or at least adverse career repercussions had they not taken the actions in question.

Nevertheless, for reasons I have addressed at greater length elsewhere,[59] these cases themselves invite consideration of more than just intuitive fairness. Although the Supreme Court purported to establish a general balancing test in the central modern due process case, *Mathews v. Eldridge*,[60] structural considerations suffuse the pattern of case outcomes, if not always the decisions' explicit reasoning, in the reliance context.[61]

For example, although the Supreme Court has understood due process to support a robust presumption against retroactive legislation that disrupts significant reliance interests,[62] the Court has generally limited this presumption to so-called "primary" retroactivity, i.e., unanticipated legal liabilities resulting from completed past conduct. The Court has declined to include "secondary" retroactivity, i.e., disruption of an expected continuation of existing laws into the future.[63] Such secondary reliance may be quite substantial and entirely reasonable—as many business plans and private investments presume that anticipated activities will remain legal and tax rates stable—but due process cannot protect it because doing so would unduly infringe upon legislatures' ongoing authority to alter existing substantive laws.[64]

Cases addressing reliance on executive assurances reflect similar structural imperatives. In particular, although the Supreme Court's trilogy of anti-entrapment cases—*Raley*, *Cox*, and *PICCO*—recognized that official assurances of legality may sometimes bar future prosecution, lower courts have limited these cases' application in two important ways: First, courts have restricted them to circumstances in which government officials provide official assurance of

[57] *See Raley*, 360 U.S. at 438.

[58] *See PICCO*, 411 U.S. at 657.

[59] *See* Price, *supra* note 56, at 944 (positing that "reliance defenses require balancing separation of powers concerns against considerations of individual fair notice").

[60] 424 U.S. 319 (1976) (assessing whether procedures violated Due Process Clause by weighing "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest").

[61] Price, *supra* note 56, at 967.

[62] *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 268 (1994) (holding that retroactive legislation has potential for unfairness and is generally disfavored).

[63] *See, e.g.*, United States v. Carlton, 512 U.S. 26, 33-34 (1994) (holding that, despite plaintiff's reliance on continuity of tax law, "tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code").

[64] *See id.* ("An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process.").

legality, as opposed to a mere promise of enforcement forbearance.[65] And second, courts have restricted their application to circumstances in which reliance is "reasonable in light of the identity of the [government] agent, the point of law misrepresented, and the substance of the misrepresentation."[66]

Though ostensibly justified by fairness, both these limitations in fact reflect structural concerns. Without fully understanding the lawyerly distinction between enforcement and interpretation, nonlawyers may readily misjudge whether they should reasonably rely on nonenforcement assurances as opposed to assurances of legality.[67] By the same token, nonlawyers may easily misjudge the reasonableness of assurances that the law permits particular conduct.[68] Yet formally protecting reliance on either type of assurance might enable executive officials to change the law without valid authority to do so; they could effectively cancel substantive legal prohibitions by inviting reliance on mistaken assurances.[69] Both these limitations thus serve to cabin reliance claims, even though doing so risks causing considerable intuitive unfairness in individual cases.[70]

In sum, due process protections based on official assurances generally require balancing fairness considerations against separation-of-powers principles, with the scales tilted in most cases toward maintaining structural norms and the continued enforceability of underlying substantive laws.[71] The same balance is implicated here, but it takes on additional dimensions when the form of legal assurance at issue is a self-authorizing constitutional interpretation by the federal executive branch. In this context, the balance implicates three conflicting and largely incommensurate principles, each with constitutional underpinnings.

[65] *See, e.g.*, United States v. Bader, 678 F.3d 858, 886 (10th Cir. 2012) (citing United States v. Apperson, 441 F.3d 1162, 1204-05 (10th Cir. 2006)) (requiring defendant to show that government official actively misled defendant about the law); United States v. Hancock, 231 F.3d 557, 567 (9th Cir. 2000) (citing United States v. Tallmadge, 829 F.2d 767, 773 (9th Cir. 1987)) (explaining that entrapment-by-estoppel defense only applies where "authorized government official tells the defendant that certain conduct is legal and the defendant believes the official").

[66] *See, e.g.*, *Bader*, 678 F.3d at 886 (quoting *Apperson*, 441 F.3d at 1204-05).

[67] *See* Price, *supra* note 56, at 981-82 (noting that, in the reliance-defense context, "[e]ven quite egregious unfairness triggers no due process barrier to prosecution when separation of powers concerns are acute").

[68] *See id.* at 979.

[69] For elaboration of this argument, see generally *id.*

[70] *See id.* at 981-82.

[71] *See id.* (reviewing jurisprudence on reliance defenses).

B. *Three Relevant Principles*

1. The Departmentalist Tradition of Executive Constitutionalism

The first relevant principle falls under the heading of "departmentalism," the theory that each branch of the federal government may interpret the Constitution independently in performing its own functions.[72]

Courts today play the preeminent role in interpreting and enforcing the Constitution; the Supreme Court has even described this authority as exclusive.[73] Yet the other two branches of the federal government engage in constitutional interpretation too.[74] In particular, as we have seen, the executive branch routinely claims authority to disregard particular statutory provisions based on its own independent judgment that such provisions are unconstitutional. To repeat earlier examples, administrations of both parties routinely claim authority to disregard limitations on conduct of diplomacy; the executive branch has developed a controversial internal jurisprudence regarding use of military force; the Trump Administration has claimed authority to disregard funding limitations on law enforcement; and in particular instances the executive branch has justified disregarding statutory limits on prisoner releases, interrogation practices, and even targeted killings based on debatable internal constitutional analysis.[75]

To some degree, this executive practice of independent constitutional interpretation reflects basic practical imperatives. Because our constitutional system (unlike some others) lacks any mechanism for advisory judicial opinions, executive officials must make legal determinations on their own in the first instance, with fingers crossed that courts will approve their conclusions in any after-the-fact litigation.[76] Yet executive-branch constitutional interpretation also has deeper conceptual underpinnings.

a. *Departmentalism in Theory and Practice*

Under the theory of departmentalism, the constitutional separation of powers properly implies that each branch (or "department") of the federal government

[72] *See, e.g.*, Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 489 (2018) (defining departmentalism as the view that "each branch or department of government should interpret the Constitution for itself, without any branch's interpretation necessarily binding the others").

[73] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437 (2000) (explaining that Congress cannot legislatively contradict Supreme Court's interpretation of law); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (noting that Court's prior interpretation of Fourteenth Amendment "is the supreme law of the land").

[74] *See* Fallon, *supra* note 72, at 491 ("Our system is not, never has been, and probably never could be one of pure judicial supremacy.").

[75] *See supra* Section I.A.

[76] *See, e.g.*, Muskrat v. United States, 219 U.S. 346, 362 (1911) (explaining that federal courts cannot "give opinions in the nature of advice concerning legislative action").

may interpret the Constitution for itself in carrying out its core functions.[77] Courts thus interpret the Constitution in the course of deciding particular cases that come before them.[78] But Congress does so as well when deciding what laws to pass, and so does the executive branch when deciding how those laws should be executed. Article II of the Constitution, after all, obligates the President to "take Care that the Laws be faithfully executed."[79] Given that the Constitution is the nation's paramount law, the executive branch must give effect to the Constitution, rather than any statute or other sub-constitutional law, in carrying out its core function of executing federal law—or so at least Presidents and executive-branch lawyers have long claimed.[80]

This theory has strong and weak forms, depending on the degree of independence other branches assert from judicial interpretation. Some towering Presidents, most notably Presidents Jefferson and Lincoln, asserted the theory in strong form, claiming authority to completely disregard judicial precedent in formulating executive views on constitutionality.[81] For reasons good and bad (and despite some academic criticism), actual government practice today no longer reflects such strong-form departmentalism. Presidents and Congresses since at least the end of World War II have generally asserted interpretive independence in the gaps and interstices of judicial precedent, not in outright defiance of it.[82]

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[77] The term "departmentalism" appears to have originated with Edward Corwin, who distinguished between "juristic" and "departmentalist" conceptions of judicial review. *See* EDWARD S. CORWIN, COURT OVER CONSTITUTION 4-6 (1938). For an account of Corwin's insight, see generally KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 29-30 (2007) (describing Corwin's "innovative reconceptualization of the doctrine of judicial review"). For recent defenses of departmentalism, see, for example, Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1628-48 (2008) (arguing that, based on history and structure of Constitution, Presidents should not enforce unconstitutional statutes); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 228-82 (1994) (theorizing that executive has coequal constitutional interpretation power with other branches).

[78] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[79] U.S. CONST. art. II, § 3.

[80] For an early statement of this theory, see Letter from Thomas Jefferson, President, U.S., to Edward Livingston, U.S. Attorney, Dist. of N.Y. (Nov. 1, 1801), *in* 8 WRITINGS OF THOMAS JEFFERSON 57, 57-58 (Paul L. Ford ed., 1892-1899) (asserting that executive branch need not enforce unconstitutional laws because they are "nullit[ies]").

[81] *See generally* HAROLD H. BRUFF, UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 63-66, 136-37 (2015) (discussing view of Presidents Jefferson and Lincoln that they could independently determine constitutionality of statutes).

[82] *See, e.g.*, Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1221 (2012) ("I think it is a fact—perhaps a contingent fact, perhaps on some views a historically or normatively unjustified fact, but a fact nonetheless—that a court-centric understanding of constitutional interpretation is deeply entrenched in both government officials and the public.").

Today, indeed, even declining to defend statutes in court may provoke controversy. At the least, the Obama Administration sparked considerable controversy by declining to defend the Defense of Marriage Act against an equal-protection challenge, even though the Administration sought to facilitate

An extensive body of scholarship has addressed questions regarding executive-branch constitutional interpretation, including the appropriate balance between departmentalism and judicial supremacy. *See generally* Samuel A. Alito, Jr., *Change in Continuity at the Office of Legal Counsel*, 15 CARDOZO L. REV. 507 (1993) (arguing that changes in administrations and executive-branch interests impact OLC's constitutional interpretation); David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61 (claiming that "constitutional meaning is shaped by, and should be shaped by, the institutional location of the interpreter"); Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 CARDOZO L. REV. 313 (1993) (advocating interpretive approach grounded on unitary executive theory); Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513 (1993) (arguing that stricter OLC policies will protect Office "from its own eagerness to please"); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007) (articulating best practices for OLC advice-giving); Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993) (surveying OLC practice); Peter Margulies, *Foreword: Risk, Deliberation, and Professional Responsibility*, 1 J. NAT'L SECURITY L. & POL'Y 357 (2005) (discussing ethical concerns about government lawyer's role following September 11 terrorist attacks); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993) (analyzing different approaches to OLC's opinion-writing function); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000) (arguing that executive-branch lawyer should work "within the framework of the best view of the law" while also "work[ing] within the framework and tradition of executive branch legal interpretation and seek[ing] ways to further the legal and policy goals of the administration he serves"); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005) (arguing that "our current executive constitutionalism is underdeveloped even for the modest role that judicial supremacy leaves it" and discussing possible reforms); Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137 (1993) (articulating criteria for addressing conflicts between Supreme Court and executive branch over constitutional interpretation); Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993) (analyzing *Ex parte Merryman* as "most famous and extreme example of autonomous executive constitutional interpretation"); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113 (1993) (refuting theory "that the President is sometimes entitled to claim direct access to 'the Constitution,' unmediated by constitutional law as the courts have developed it"); W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333 (2009) (advocating "middle ground" that "hold[s] on to the distinction between faithful interpretation of, and advising on, the law, and improper politicization of the role of government lawyers, while acknowledging that considerations of democratic legitimacy require that the President have considerable discretion to establish a substantive, ideologically nonneutral policy agenda").

ultimate judicial resolution of the question by continuing to enforce the statute and pursuing appeals from adverse judgments.[83] The Trump Administration has likewise faced strong criticism for advancing a debatable severance theory in litigation regarding the Affordable Care Act.[84] The political firestorm that surely would have attended a decision to disregard either statute altogether may illustrate just how far we have descended from the high water mark of anti-Court departmentalism set by President Lincoln.

That said, current political dynamics could conceivably cause departmentalist practice to strengthen. According to one leading political science account, the "domesticated" departmentalism of our time is typical for periods of relatively stable constitutional politics, whereas more brazen presidential defiance of judicial constitutional understandings typically arises in periods of political transition, such as those that surrounded the Jefferson, Lincoln, and Franklin Delano Roosevelt Administrations.[85] To the extent we are entering a new period of political reconfiguration, another such period of sharp conflict might well arise, making the questions addressed here even more acute.[86]

Whether or not such adjustments occur, however, even the more modest, interstitial departmentalism of recent times leaves considerable space for weighty independent legal determinations by Presidents and their lawyers. Again, based just on recent internal opinions and signing statements, executive officials might engage in diplomatic activities, criminal prosecutions, prisoner transfers, or even targeted killings or interrogation practices based on debatable internal constitutional analysis.[87] As such examples illustrate, some degree of executive authority over constitutional interpretation is an entrenched feature of government practice, notwithstanding the risk it inevitably carries of inducing reliance on flawed executive views.

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[83] For discussion of this controversy, see, for example, Meltzer, *supra* note 82, at 1186, 1213-15.

[84] *See* Nick Bagley, *Texas Fold 'Em*, TAKE CARE BLOG (June 7, 2018), https://takecareblog.com/blog/texas-fold-em [https://perma.cc/Y55S-FWDV].

[85] *See* WHITTINGTON, *supra* note 77, at 23, 53-55.

[86] In fact, following the recent bitter controversy over Justice Kavanaugh's appointment to the Supreme Court, some progressives have called for aggressive deployment of departmentalist theories or other forms of resistance by current or future Democratic Presidents or state officials. *See, e.g.*, Joshua Holland, *Don't Just Pack the Court. Reimagine It.*, THE NATION (June 4, 2019), https://www.thenation.com/article/supreme-court-reform-court-packing-term-limits/ [https://perma.cc/9LFU-66YN] (characterizing progressive use of departmentalism as a "straightforward but risky" option); Dylan Matthews, *Court-Packing, Democrats' Nuclear Option for the Supreme Court, Explained*, VOX (Oct. 5, 2018, 3:49 PM), https://www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court [https://perma.cc/N8HA-SELF] (discussing progressive calls for court-packing).

[87] *See supra* Section I.A.

b. *The Justice Department's Institutional Role*

Beyond the theory and practice of departmentalism itself, the institutional authorities and attributes of the Justice Department in general and OLC in particular further support recognizing some independent executive authority over interpretation. The President, of course, heads the executive branch, and departmentalist theory often associates executive interpretive authority with the President's constitutional authority and electoral accountability.[88] But the Attorney General and his or her assistants also hold relevant authorities. By statute, the U.S. Attorney General is the nation's chief legal officer, with authority to direct most federal criminal enforcement.[89] In addition, he or she holds specific authority to provide legal advice and opinions when requested by the President or heads of civil or military departments.[90] This function—the Attorney General's oldest, predating by half a century the Justice Department's establishment as a law enforcement agency[91]—has long entailed effective authority to resolve contested legal questions for the executive branch. Today, by delegation from the Attorney General, the Assistant Attorney General for OLC typically exercises this function.[92]

A number of conventional understandings, expectations, and practices reinforce these formal statutory authorities. For one thing, as a matter of practice, if not law, OLC opinions are binding throughout the executive branch, unless and until they are overturned by the President or Attorney General.[93] Reflecting

[88] *See, e.g.*, Fallon, *supra* note 72, at 495-97 (discussing connection between departmentalism and popular constitutionalism).

[89] *See* 28 U.S.C. § 516 (2018) ("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 therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *id.* § 547(1) ("[E]ach United States attorney, within his district, shall . . . prosecute for all offenses against the United States.").

[90] *Id.* § 511 ("The Attorney General shall give his advice and opinion on questions of law when required by the President."); *id.* § 512 ("The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."); *id.* § 513 ("When a question of law arises in the administration of the Department of the Army, the Department of the Navy, or the Department of the Air Force, the cognizance of which is not given by statute to some other officer from whom the Secretary of the military department concerned may require advice, the Secretary of the military department shall send it to the Attorney General for disposition.").

[91] *See* Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 566-67 (explaining limited power of Attorney General when position was first created).

[92] *See* 28 C.F.R. § 0.25 (2019) (delegating Attorney General's opinion-writing function and other tasks to Assistant Attorney General for OLC).

[93] Morrison, *supra* note 34, at 63 ("[O]nce OLC arrives at an answer, it is treated as binding within the executive branch unless overruled by the Attorney General or the President."); *see also* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 96 (2007) [hereinafter GOLDSMITH, THE TERROR PRESIDENCY] (noting widespread assumption that prosecution for conduct approved by OLC is "practically

this norm, independent agencies generally must agree to be bound by OLC's opinion before OLC will address a matter that concerns them.[94]

Much like a court, furthermore, OLC presumptively adheres to internal precedent across administrations, a practice that encourages bipartisan consistency and integrity in interpretation, even if the resulting precedents typically take broad views of executive authority.[95] As a matter of reputation and self-understanding and even in some cases professional ethics,[96] OLC lawyers also conventionally understand their institutional role to center on providing credible, objective legal advice.[97] In other words, while mission-driven agencies may naturally lean towards legal interpretations that advance their own particular policy objectives, OLC's bureaucratic function, as a matter of both legal authority and institutional self-understanding, is uniquely focused on providing credible, generalist advice.[98] Accordingly, although OLC's lawyers may face cross-cutting pressure to approve administration programs, the Office's head signing a legal opinion at least risks significant reputational harm if the opinion lacks credibility in the broader legal community.[99]

impossible"); Jack Goldsmith, *Executive Branch Crisis Lawyering and the "Best View*," 31 GEO. J. LEGAL ETHICS 261, 274 (2018) ("If the Justice Department signs off, those who rely on it in good faith are effectively immunized from subsequent prosecution."). Civil service lawyers throughout the executive branch of course play a vital role in upholding law-bound governance. *See* David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 42 (2012) ("Civil service lawyers have the final word on executive-branch law in a large number of situations."). Administrative agencies also may engage in constitutional analysis or at least resolve questions with constitutional implications. *See generally* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013) (arguing that federal administrative agencies frequently interpret the Constitution). Nevertheless, the Justice Department in general and OLC in particular are generally assumed to have unique authority to authoritatively resolve constitutional questions for the executive branch as a whole.

[94] *See, e.g.*, Memorandum from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, for the Attorneys of the Office 2 (July 16, 2010) [hereinafter OLC Best Practices Memo], https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf [https://perma.cc/8TRN-9HE2].

[95] In a survey of public opinions through 2009, Professor Trevor Morrison found that OLC fairly reliably adhered to its own prior precedents over time. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1458, 1480-84 (2010) (discussing degree of OLC's adherence to precedent); *see also*, *e.g.*, GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 93, at 35-36 (noting that OLC's decision-making process involves examining both judicial precedent and executive-branch precedent).

[96] For a discussion of ethical principles applicable to government lawyers generally and OLC specifically, see LUBAN, *supra* note 5, at 234-40.

[97] *See, e.g.*, GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 93, at 37-38 (describing "cultural norms" of "detachment and professional integrity that permeate OLC and that transcend particular administrations").

[98] *See id.*

[99] *See* GOLDSMITH, *supra* note 8, at 238 (discussing "brutal recriminations" against authors of interrogation opinions).

OLC's interpretive function, to be sure, is not exclusive. Through signing statements and other pronouncements, presidents themselves may take positions on constitutional questions (though even then they typically do so in consultation with OLC lawyers).[100] In addition, one scholar recently argued that the traditional "formalist" model of Justice Department legal guidance, in which agencies seek guidance from OLC in the form of well-crafted legal opinions, is withering.[101] On this account, OLC's traditional approach is giving way to an alternative "porous" model in which executive legal positions derive from a more open-ended set of discussions between affected agencies—discussions that are deliberately suffused with considerations of politics and policy as well as law.[102] Along similar lines, another scholar has highlighted ways in which the triggering event for an executive-branch legal determination may shape bureaucratic decision-making in potentially outcome-determinative ways.[103]

Nevertheless, and somewhat paradoxically, the institutional attributes that make OLC advice more credible (and thus in principle less manipulable) may also make it more politically valuable in some circumstances.[104] At the least, recent experience suggests some practical political imperative to follow the so-called formalist model on matters of significant controversy. The Obama Administration issued public OLC opinions on such matters as the permissibility of contested appointments,[105] the legality of military action,[106] and the validity of a controversial immigration program.[107] The Trump Administration has done

[100] *See, e.g.*, Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11, 14 (2007) ("Presidential signing statements are formal documents issued by the President, after wide consultation within the executive branch, when he signs an enacted bill into law."); *see also* Memorandum on Presidential Signing Statements, 2009 DAILY COMP. PRES. DOC. 1, 1-2 (Mar. 9, 2009) ("[E]xecutive branch departments and agencies are directed to seek the advice of the Attorney General before relying on signing statements issued prior to the date of this memorandum . . . .").

[101] *See* Renan, *supra* note 11, at 809-10. Although Attorneys General (and later OLC) have issued legal opinions since the beginning of the Republic, Renan argues that the formalist model had its "heyday" during the Carter Administration, when the President and Attorney General deliberately sought to reestablish legal credibility following the Nixon Administration's scandals. *Id.* at 817-18.

[102] *See id.*

[103] Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359, 421 (2013) (concluding that how a question is raised and framed as well as actors involved "play a dramatic role within the executive in forcing a decision to the fore and shaping every step of the process toward the ultimate substantive result").

[104] *See* Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 458 (1993) (noting President's likely desire for adverse advice in some circumstances).

[105] *See* Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C., 2012 WL 168645, at *1 (Jan. 6, 2012).

[106] OLC Libya Memo, *supra* note 25, at *1.

[107] OLC Immigration Memo, *supra* note 26, at *25.

so with respect to employment of a close relative in the White House,[108] defiance of certain congressional inquiries,[109] and replacement of a high-profile acting agency director,[110] among other things.[111] At the same time, critics blasted both Administrations for failing to produce public opinions supporting actions of comparable gravity, such as the Obama Administration's apparent disregard of the sixty-day War Powers Resolution deadline and the Trump Administration's use of military force in Syria.[112] In response to political pressure with respect to the latter question, OLC eventually released an opinion justifying one set of airstrikes.[113] In keeping with OLC's ethic of consistency across time, moreover, the opinion justified the strike's legality using a framework developed in prior opinions, including a prominent one from the previous administration.[114] Whatever forces shape the interpretive process in other instances, this pattern suggests at least some continuing, politically enforced expectation that the White House will obtain an OLC or Attorney General opinion on key constitutional questions.

In sum, both statutory and practical considerations support recognizing a special role for the Justice Department in general and OLC in particular in carrying out the executive branch's departmentalist function of independent constitutional interpretation. To the extent, however, that executive constitutional determinations are either legally or practically binding, presidents and their lawyers may hold the effective capacity to excuse the inexcusable and undermine the rule of law. This risk brings us to another key separation-of-powers principle: the principle that executive officials generally lack authority to suspend statutes.

2. Self-Authorizing and the Antisuspending Principle

Why is self-authorizing executive interpretation problematic? Naturally, any flawed legal analysis may violate rule-of-law principles if it licenses what the

[108] Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office, 41 Op. O.L.C., 2017 WL 5653623, at *1 (Jan. 20, 2017).

[109] Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C., 2017 WL 5653624, at *1 (May 1, 2017).

[110] Designating an Acting Director of the Bureau of Consumer Financial Protection, 41 Op. O.L.C., 2017 WL 10087535, at *1 (Nov. 25, 2017).

[111] *See, e.g.*, OLC HBC Memo, *supra* note 23, at *18 (concluding that restriction on certain educational loans violated Free Exercise Clause).

[112] *See, e.g.*, Bruce Ackerman, Opinion, *Obama's Illegal War in Libya*, N.Y. TIMES, June 20, 2011, at A27 (reproaching Obama Administration for exceeding War Powers Resolution deadline in Libya); Justin Florence & Allison Murphy, *The Syria War Powers Memo: Why It Matters*, LAWFARE BLOG (Feb. 14, 2018, 4:12 PM), https://www.lawfareblog.com/syria-war-powers-memo-why-it-matters [https://perma.cc/27H2-ASW9] (advocating release of reported Trump Administration legal opinion supporting Syria strikes because of "its relevance to ongoing and potential future military actions").

[113] April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C., 2018 WL 2760027, at *1 (May 31, 2018).

[114] *See id.* at *5-7 (discussing OLC Libya Memo).

law prohibits. Furthermore, serving as a judge in one's own case, as executive-branch interpreters effectively do by determining the law applicable to their own branch, is often described as violating a core background principle of natural justice and constitutional law.[115] Whatever the force of that principle in general,[116] however, concerns about self-authorization in the particular separation-of-powers context addressed here may draw force from a more specific limit on executive power: the principle that executive officials lack authority to "suspend" or cancel statutory restraints.

This principle is in fact at least one central meaning of the Take Care Clause itself. By obligating the President to ensure "that the Laws be faithfully executed,"[117] this Clause makes plain that Presidents, unlike the English monarchs of old, possess no authority to suspend statutes or grant dispensations from their application.[118] Presidents of course do hold authority to pardon federal criminal offenses after the fact.[119] But they cannot license violations or cancel statutory prohibitions ahead of time; their duty is to faithfully execute statutory law, not to wipe away laws they deem unwise or inconvenient.

Early federal decisions reflect this understanding. In the 1806 case *United States v. Smith*,[120] Supreme Court Justice William Paterson, riding circuit, deemed supposed presidential approval of an alleged criminal enterprise irrelevant for the simple reason that neither the Constitution nor applicable statutes gave a "dispensing power to the President."[121] Under our system of separated powers, Paterson argued, executive officials hold no constitutional power to "authorize a person to do what the law forbids"; any other rule "would

[115] *See, e.g.*, R.H. Helmholz, Bonham's Case*, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 335 (2009) ("There is no doubt, in the first place, that acting as a judge in one's own cause had long been regarded as a violation of the law of nature.").

[116] The rule against judging one's own case might in fact be too often "honored in the breach" to be considered a binding general norm. *See* Adrian Vermeule, *Contra* Nemu Iudex in Sua Causa*: The Limits of Impartiality*, 122 YALE L.J. 384, 416 (2012) (deriding this principle's "[f]acile invocation[]" as "the intellectual equivalent of burping at a dinner party" (alterations in original) (quoting Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1401 (2006))).

[117] *See* U.S. CONST. art. II, § 3, cl. 1.

[118] For my defense of this view, see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 768-69 (2014). *See also* Adam B. Cox & Cristina M. Rodriguez, *The President & Immigration Law Redux*, 125 YALE L.J. 104, 143 (2015) (noting general agreement that "President cannot decline to enforce altogether a law that is constitutional"). For a contrary view that the Take Care Clause does not embody an antisuspending principle but that Presidents nonetheless lack suspending power, see SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 92-93 (2015).

[119] U.S. CONST. art. II, § 2.

[120] 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342).

[121] *Id.* at 1229.

render the execution of the laws dependent on [the President's] will and pleasure," despite Congress's sole authority to change the law itself.[122]

Around the same time, the full Supreme Court held in *Little v. Barreme*[123] that executive "instructions . . . cannot legalize an act which without those instructions would have been a plain trespass."[124] Much as the court in *Smith* rejected any executive dispensing power, the Supreme Court in *Little* upheld the imposition of damages liability on an individual officer despite the officer's reliance on mistaken presidential assurances.[125] A few decades later, in *Kendall v. United States ex rel. Stokes*,[126] the Court went so far as to dismiss out of hand any idea that the Take Care Clause allows dispensations from statutory requirements. "To contend," the Court wrote, "that the obligation imposed on the President to see the laws faithfully executed[] implies a power to forbid their execution[] is a novel construction of the constitution, and entirely inadmissible."[127]

As I have argued elsewhere, this understanding of the Take Care Clause remains basic to the federal government's structural organization and the subordination of executive officials to law.[128] It explains, at a fundamental level, why agencies must carry out their organic statutes and why legal restraints apply to the President. Here, though, if taken to its logical limit, the antisuspending principle might suggest that executive officials should never claim constitutional authority to disregard statutory restraints, as any such assertion would amount to a suspending power by another name. Indeed, one scholar has challenged the entire notion of departmentalism on this basis.[129] "The claim that a president may refuse to enforce a law on the ground that it is unconstitutional is but a reincarnation of the royal prerogative of suspending the laws," Professor Christopher May has argued.[130] "The Constitution does not give the president a

[122] *Id.* at 1230.

[123] 6 U.S. (2 Cranch) 170 (1804) (per curiam).

[124] *Id.* at 179.

[125] *Id.*

[126] 37 U.S. (12 Pet.) 524 (1838). For scholarly arguments that Presidents hold no authority to defy duly enacted statutes, see, for example, EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 72 (Randall W. Bland et al. eds., 5th ed. 1984) ("[O]nce a statute has been duly enacted . . . [the President] must promote its enforcement by all the powers constitutionally at his disposal unless and until enforcement is prevented by regular judicial process."); Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 382 (1986) ("[O]nce a bill has passed through all the constitutional forms of enactment and has become a law, perhaps even over a presidential veto grounded on constitutional objections, the President has no option under article II but to enforce the measure faithfully.").

[127] *Kendall*, 37 U.S. (12 Pet.) at 613.

[128] Price, *supra* note 118, at 689-93.

[129] CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE, at xiv (1998) ("The claimed authority to defy allegedly invalid laws threatens to further enhance the already 'imperial' trappings of the American presidency.").

[130] *Id.* at 37.

power to suspend the laws, not even when the chief executive may think that a particular law is unconstitutional."[131]

Stated so broadly, May's argument goes too far. Even if departmentalism itself is not inevitably implied by the constitutional separation of powers, the executive practice of disregarding at least some laws on constitutional grounds has deep roots and sound textual and theoretical underpinnings, as we have seen.[132] Departmentalism is accordingly just as much a feature of the legal landscape as is the antisuspending principle itself. After all, Presidents can no more suspend the Constitution than any underlying statutes and therefore must interpret the Constitution as well as those statutes in carrying out their executive functions—or so at least Presidents since Thomas Jefferson have claimed.[133]

Nevertheless, May's analysis does capture the essential nature of the problem. The issue is not simply that executive officials might violate particular laws with impunity; rather, the key danger is that presidents and their lawyers will acquire unilateral power to wipe away statutory restraints through unprincipled constitutional interpretation. To the extent that sound constitutional analysis requires the executive branch to stay within statutory bounds in conducting diplomacy, employing particular interrogation techniques, or taking military action, the executive branch's asserted power to take action based on its own self-serving constitutional conclusions could indeed amount to a de facto executive suspending power.

Standing alone, this risk would support judicial skepticism about executive-branch constitutional views in any litigation directly contesting them. In fact, OLC's track record in recent litigation is not strong: courts have rejected its views on National Labor Relations Board ("NLRB") quorum requirements,[134] recess appointments,[135] and immigration enforcement discretion,[136] among other things.[137] Courts in all these cases have exercised their own departmentalist prerogative to resolve justiciable controversies based on legal conclusions of

[131] *Id.*

[132] *See supra* Section II.B.1.

[133] *See generally* BRUFF, *supra* note 81, at 63-66 (discussing Jefferson's views as President). For a critique of the historical foundations for this claimed authority, see Matthew Steilen, *Judicial Review and Non-enforcement at the Founding*, 17 U. PA. J. CONST. L. 479, 481-82 (2014) (disputing analogy between judicial review and presidential nonenforcement based on founding-era history).

[134] *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 557 (2014) (rejecting purported recess appointments to NLRB).

[135] *See, e.g.*, New Process Steel, LP v. NLRB, 560 U.S. 674, 687 (2010) (holding that NLRB requires quorum of three members as opposed to two).

[136] *See, e.g.*, Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015) (affirming preliminary injunction against proposed immigration relief programs), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

[137] *See* Sonia Mittal, *OLC's Day in Court: Judicial Deference to the Office of Legal Counsel*, 9 HARV. L. & POL'Y REV. 211, 212 (2015) (concluding based on survey of opinions that Supreme Court "rarely cites to OLC opinions" and "has resisted explicitly according them deference under *Chevron* and *Skidmore*").

their own that depart from those of the executive branch. But doing so in the context at issue here—suits seeking sanctions or liability against officials who themselves relied on authoritative executive-branch legal guidance—implicates yet another set of countervailing considerations: fairness and good-government concerns about reneging on past assurances.

3. Fairness and Good Government

The last key consideration implicated by the self-authorization problem is the one that we started with: the risk of unfairness, uncertainty, and demoralization that could result from penalizing actions that the government itself had approved. As a general matter, it may be profoundly unfair to discipline an official after the fact for conduct undertaken in reliance on authoritative constitutional guidance—and yet it is this very sense of unfairness and the resulting impulse to protect official reliance that give rise to the potential antisuspending problem addressed earlier.

Again, for the individual official—whether a CIA officer, diplomat, military officer, or something else—defying superior directives might well place the individual at risk of termination or other sanctions; in the military context, it could even result in criminal prosecution.[138] But if the legal guidance in question proves flawed, then the officials in question could face after-the-fact penalties for actions that their superiors directed and that government lawyers determined were lawful. Even apart from the potential unfairness of such a bait-and-switch, imposing liability in such circumstances could risk corroding government regularity and efficiency and encouraging insubordination: if subordinate officials cannot rely on legal directives and opinions obtained through the proper channels, then they must fall back on their own intuitions or perhaps on some form of outside legal advice. Officials might even stop seeking legal guidance at all, to the detriment of overall legal compliance. Why seek a legal opinion if it won't be worth the paper it's written on?

For all these reasons, punishing government officials for actions approved by authoritative internal legal advice is concerning. And yet, once again, the very instinct to protect the official's reliance and withhold punishment is what creates the antisuspending problem in the first place. Presidents or their lawyers might suspend legal restraints on executive-branch action by adopting dubious constitutional theories and then inviting reliance upon them.

We thus finally confront the problem's full difficulty. While departmentalism provides a theoretical basis for independent executive constitutional interpretation, this tradition creates a risk of abusive, self-authorizing interpretations that improperly suspend statutory restraints on the executive itself. Yet at the same time, failing to protect subordinate officials' reliance on

[138] 10 U.S.C. § 892 (2018) ("Any [member of the armed forces] who . . . (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.").

executive constitutional interpretations risks gross unfairness, uncertainty, and demoralization within the executive branch.

III. A CALIBRATED RELIANCE DEFENSE

Any due process protection for reliance in this context must therefore reconcile the fairness principle that animates existing case law with two other, largely incommensurate principles: a departmentalism principle that supports executive-branch authority to independently interpret the Constitution and an antisuspending principle that precludes any default executive authority to eliminate disfavored statutes.[139] Balancing these competing considerations is ultimately a matter of allocating the burden of interpretive uncertainty. Should the risk of legal error fall on the government officials who are themselves targets of statutory regulation, or should their reliance on flawed constitutional analysis by government lawyers provide immunity from after-the-fact liability? How, furthermore, should courts answer this question in cases where conventional interpretive considerations point in different directions or where the executive branch holds settled views that courts might not embrace in the first instance? Suppose, for example, that the original understanding of war powers is at odds with longstanding executive practice[140] or that longstanding executive views on presidential authority over diplomacy are in tension with the constitutional text and structure.[141] Should presidents and their lawyers get to make the choice, with the consequence that officials carrying out policy may violate statutory restraints with impunity? Or should courts have the last word, as they normally do in constitutional litigation?[142]

In fact, under the best view of the law, formed by aligning relevant case law with background structural and normative considerations, these questions should have different answers in different litigation settings. In this Part, I will address in turn the three main settings in which the question may arise: (A) reliance on a signed OLC or Attorney General opinion in penal litigation; (B) reliance on other executive legal determinations in such litigation; and (C) reliance on either form of executive guidance in other types of litigation, including constitutional tort suits and enforcement actions against private parties.

A. *Reliance on OLC or Attorney General Opinions in Penal Litigation*

A first possible litigation context is a public enforcement suit seeking civil or criminal penalties for past legal violations undertaken by public officials in

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[139] *See supra* Section II.B.

[140] *See, e.g.*, Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1543-44 (2002) (arguing that Constitution gives Congress alone the power to initiate offensive warfare).

[141] *See, e.g.*, Ryan M. Scoville, *Ad Hoc Diplomats*, 68 DUKE L.J. 907, 920-21 (2019) (questioning executive practice of employing ad hoc envoys for diplomatic purposes).

[142] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803) ("An act of congress repugnant to the constitution cannot become a law. The courts of the United States are bound to take notice of the constitution.").

reliance on a legal opinion from OLC or the Attorney General. Although I am aware of no recent prosecution fitting this description, this scenario is precisely what some hoped for—and indeed advocated as a necessary vindication of the rule of law—following the repudiation of the Torture Memos.[143] Certain electronic surveillance authorized by an unsigned Bush Administration opinion could also have been criminal if the opinion's constitutional conclusions were wrong,[144] and other examples addressed earlier, such as drone strikes and disregard for statutory spending limitations, could implicate the same problem.[145]

Should due process bar prosecution in such cases? Except when the advice in question was not only wrong but unreasonable, the answer should be yes. This result not only best accommodates the key structural considerations but also draws strength from analogous administrative law cases and anti-entrapment precedent, as I will show.

1. Structural Analysis

In this context, fairness and departmentalism should generally outweigh antisuspending concerns, thus yielding a rule of deference to executive conclusions in after-the-fact litigation.

Fairness concerns are at their apex in penal suits reneging on prior authoritative guidance. That is so not only because of the penal character of the remedies at issue but also because reliance on a formal legal opinion obtained from an office dedicated to this purpose presents the most compelling case for individual good faith. Indeed, assuming at least a modicum of professionalism within the federal bureaucracy, protecting reliance on such formal legal guidance should generally advance the good-government objective of legal compliance. After all, if seeking advice provides greater legal security, government officials will have greater incentive to seek it—even when doing so means receiving advice that particular planned initiatives are unlawful.

To be sure, even if a legal green light did not provide such immunity, officials might still seek guidance on close questions in order to accurately gauge their own legal exposure or ensure legal compliance for its own sake. Some might thus argue that, much as with private legal advice, an official legal opinion should provide security against future punishment only insofar as it accurately predicts courts' eventual view of the law. This view, however, could place government personnel in an untenable position. For one thing, such officials will typically lack adequate legal understanding to judge the quality of official legal opinions on abstruse constitutional or statutory topics. Unlike many private parties, moreover, they cannot readily obtain accurate external advice. Even if some private lawyer could be found who possesses the relevant expertise, government secrecy requirements could preclude consulting external counsel. In

[143] *See supra* Section I.A.

[144] For critical analysis of these legal determinations, see PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 88-89 (2009).

[145] *See supra* Section I.A.

addition, once again, insofar as official guidance is binding on the executive branch, defying such guidance (whether by acting or refusing to act) could mean risking removal or other sanctions for insubordination.[146]

On top of these fairness and good-government concerns, the departmentalism principle further weighs in favor of protecting reliance in this context. The executive branch's authority to interpret the Constitution for itself in the first instance would be a dead letter if criminal prosecution were possible based on subsequent judicial disagreement with executive-branch attorneys' conclusions. Executive-branch lawyering would then be reduced to a matter of accurately predicting future judicial conclusions rather than interpreting the Constitution for itself in keeping with its own traditions and past decisions.

That said, judicial-executive disagreement could arise in the first place only if the executive branch chose, at a later point in time, to pursue criminal or civil enforcement notwithstanding its own prior advice. The executive branch thus could protect the departmentalism principle for itself by declining to initiate any court proceedings. A pure theory of departmentalism might thus suggest that courts should never take executive-branch opinions into account because courts have an independent responsibility to decide cases presented to them based on their own best view of the law.[147] Yet relying on a later executive branch to protect an earlier one ultimately provides inadequate protection for the functional and practical values that departmentalism advances. Government personnel must decide in the moment whether to act prospectively on the basis of current advice. Accordingly, even apart from fairness and good-government concerns, failing to protect government officials' past reliance would only erode the executive branch's long-term autonomy in performing functions other than prosecution, such as conducting foreign policy, protecting national security, or administering laws.

On the other side of the balance, antisuspending concerns are acute in this context. To the extent formal legal guidance will support a later reliance defense against enforcement, senior officials may have an incentive to orchestrate sham opinions that approve planned initiatives on specious grounds or at least to appoint lawyers known in advance to hold an ideology or disposition that makes such approval likely. Recent controversies over the Torture Memos and other opinions suggest this risk is real and not hypothetical.

Nevertheless—and this point is crucial to distinctions I draw later[148]—the standard process of producing a signed OLC or Attorney General opinion carries institutional safeguards that may at least mitigate these risks. Much as is true of public opinion writing by courts, an obligation to articulate how conclusions follow from generally accepted legal premises necessarily rules out some results that might otherwise be rubber-stamped. Some conclusions, as they say, just

[146] *Cf.* 10 U.S.C. § 892 (2018) (criminalizing disobedience of lawful orders by military personnel).

[147] *See Marbury*, 5. U.S. (1 Cranch) at 138 ("The courts of the United States are bound to take notice of the constitution.")

[148] *See infra* Section III.B.

won't write, at least not in a way that external observers would accept as professionally valid. Indeed, in the Torture Memos example, the lead lawyers only narrowly escaped professional discipline for their flawed advice and the Justice Department's internal critique of their work centered on their failure to account for obvious contrary authorities and counterarguments.[149]

The institutional attributes highlighted earlier reinforce this discipline. Again, OLC's value within the government bureaucracy is its institutional self-understanding as an office devoted to providing professionally competent, objective legal advice.[150] While that self-understanding surely does not inoculate OLC and its politically appointed leadership against all pressures to approve politically sensitive initiatives, it does support an ethos in which adhering to past positions and rejecting proposed initiatives comports with OLC's own sense of its mission.[151]

Accordingly, at least so long as OLC's core institutional attributes—delegated statutory authority over executive interpretation combined with a reputational interest in preserving objectivity and credibility—remain in place, background structural considerations should generally support shielding officials from penal sanctions when they relied in good faith on formal OLC advice. Doing so may carry costs to the rule of law insofar as OLC guidance is sometimes mistaken and indeed, in the long run, may systematically skew toward permissive conclusions. But institutional constraints provide some assurance of professional reasonableness, the fairness and demoralization costs of throwing government officials under the bus are high, and allowing later punishment by an administration with different leanings would disrupt departmentalist practices on which all executive-branch legal interpretation ultimately depends. For all these reasons, the overall balance of relevant considerations generally favors protecting reliance.

Nonetheless, a rule of absolute reliance protection would go too far. Such absolute protection could enhance the very risks it aims to avoid: if reliance protection were guaranteed, no matter how flawed the opinion in question, political actors' incentive to capture and corrupt OLC's decision-making could become overwhelming. To provide an ultimate backstop against this risk, the reliance defense here must give out at some point, and that point may best be defined in terms of whether the legal conclusions in question were reasonable,

[149] Margolis Memo, *supra* note 14, at 64-69 (discussing flaws in Torture Memos but nonetheless declining to refer their authors for bar discipline).

[150] *See supra* Section II.B.1.b (explaining how OLC employees typically understand OLC's function).

[151] *See, e.g.*, Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1722 (2011) ("Put simply, if OLC says yes too readily to its clients, it will no longer be useful to them. OLC maintains its position as the most important centralized source of legal advice within the executive branch not because any provision of positive law makes it so, but because its legal advice is uniquely valuable to its clients.").

even if ultimately incorrect in a court's later judgment.[152] I will return momentarily to the Torture Memos and other examples that may usefully illustrate where this line falls. But first, to provide stronger grounding for this principle and bring existing precedent back into the picture, it remains to consider how well this structural account accords with existing reliance case law.

2. Precedent from Administrative Law and Criminal Law

Analogous cases from both administrative law and criminal law reinforce a rule protecting reliance on reasonable OLC or Attorney General opinions. Again, cases in neither area are squarely on point. But even recognizing their limitations, these authorities offer indirect support for elaborating reliance defenses along the lines I have proposed.

To begin with, in administrative law, the Supreme Court has recognized that executive statutory interpretations often warrant greater deference when issued through more formal deliberative processes. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[153] courts generally defer to reasonable agency constructions of ambiguous statutes,[154] and in *City of Arlington v. FCC*,[155] the Court extended this principle even to self-authorizing agency interpretations of the agency's own jurisdiction.[156] Under *United States v. Mead Corp.*,[157] however, the formality of the agency's decision-making process factors importantly in whether the agency's interpretation receives such deference under *Chevron*.[158]

[152] Robert Bauer has argued that executive-branch lawyers dealing with national security crises should generally eschew any search for the "best view" of the law and instead employ a more open-ended analysis in which "strong, reasonable, or even plausible legal theories [are] good enough." Bauer, *supra* note 11, at 250. Whatever the merits of Bauer's proposal for national security lawyers in general, my argument is not that OLC itself should abandon a search for the best view of the law but rather that courts considering reliance defenses after the fact should protect officials' reliance insofar as OLC's conclusions were reasonable. On my account, such judicial deference is appropriate precisely because OLC holds an institutional culture and other attributes that encourage objective legal analysis. My approach would give less immunizing power to lawyers whose positions are less focused on legal objectivity. *See infra* Section III.B.

[153] 467 U.S. 837 (1984).

[154] *Id.* at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[155] 569 U.S. 290 (2013).

[156] *Id.* at 303 ("[W]e have applied *Chevron* where concerns about agency self-aggrandizement are at their apogee . . . .").

[157] 533 U.S. 218 (2001).

[158] *Id.* at 230-33 ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."); *see also* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (identifying "the careful consideration the Agency has given the question over a long period of time" as a key factor in determining whether to recognize *Chevron* deference); Christensen v. Harris County, 529 U.S. 576, 587

In particular, although "the fact that [an agency] previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due,"[159] the Court has cited an agency's "careful consideration" of a question as a key reason to accord *Chevron* deference.[160] Moreover, in *Mead* itself, the Court indicated: "It is fair to assume generally that Congress contemplates administrative action with the effect of law [and thus warranting judicial deference] when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[161] In sum, despite generally allowing agencies to resolve ambiguities in the statutes they administer, the Supreme Court has formulated deference doctrines in a manner that may often encourage greater agency care and deliberation.[162]

A rough analogy supports recognizing a reliance defense here, though again only if executive constitutional views are reasonable and carry hallmarks of procedural "fairness and deliberation." In this context, to be sure, the considerations of relative institutional competence that generally underlie *Chevron* doctrine are absent. Courts, not executive agencies, are generally thought to hold paramount competence over constitutional questions.[163] Furthermore, while *Chevron* gives priority to agency views in part to protect policy-driven legal judgments by agencies with presumed competence over policy,[164] policy-driven resolution of constitutional questions is generally the antithesis of principled interpretation.[165]

(2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

[159] *Barnhart*, 535 U.S. at 221 (internal citation omitted).

[160] *Id.* at 222.

[161] *Mead Corp.*, 533 U.S. at 230.

[162] Admittedly, by declining to limit *Chevron* deference to legislative rules and formal adjudications, *Mead* leaves the ultimate scope of *Chevron* deference notoriously unclear. *See, e.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1467 (2005). For present purposes, however, the only relevant point is *Mead*'s suggestion that greater procedural rigor generally supports greater judicial deference.

[163] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179-80 (1803) (claiming judicial authority to interpret Constitution).

[164] *See, e.g.*, ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 29-30 (2016) (characterizing *Chevron*'s ostensible delegation rationale as legal fiction that in fact "promotes expertise and accountability").

[165] *But cf.* Renan, *supra* note 11, at 812 ("Moral and policy dimensions of legal advice regularly converge with the deeply technocratic minutiae of complex legal frameworks."). Relatedly, some argue that the executive branch tends naturally to accrue power, particularly with respect to national security questions, due to its superior accountability and institutional competence in resolving legal questions. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 4-6 (2007). While that view may be a reason to construe executive authority broadly as a matter of first principles, it does

Even recognizing all these distinctions, however, the federal government's departmentalist operation does presume at least some executive competence over constitutional questions, even those affecting the executive branch's own authority. In addition, justiciability doctrines make it inevitable that the executive branch will sometimes resolve important constitutional questions on its own in advance of judicial consideration. Given these realities, *Mead*'s inference that legal validity is often correlated with procedural rigor seems equally applicable.[166] Indeed, when it comes to executive constitutional interpretation, the same considerations that generally suggest superior judicial competence over constitutional questions support granting primacy to the Justice Department over other executive actors. In some sense, OLC, if not the Justice Department as a whole, is the judicial body of the executive branch: it is the bureaucratic entity committed institutionally and by reputation to providing credible legal analysis of constitutional questions.[167] Within reasonable bounds, reliance doctrines should therefore encourage seeking OLC guidance over less deliberative forms of decision-making, much as *Mead*'s refinement of *Chevron* may reward greater deliberation in the administrative context.

As for criminal law, perhaps surprisingly, case law addressing the anti-entrapment defense has converged on roughly analogous principles. As we have seen, despite recognizing a due process defense when private parties rely on mistaken government assurances of legality, courts have effectively limited this defense to circumstances in which those assurances appeared reasonable under the circumstances.[168] The Tenth Circuit, for example, recently explained that "consistent enforcement of the law requires a reasonableness limitation" on any reliance defense.[169] In the Tenth Circuit's formulation, reliance must therefore be "reasonable in light of the identity of the agent [providing legal guidance], the point of law misrepresented, and the substance of the misrepresentation."[170] In another common formulation, reliance must be "reasonable—in the sense that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries."[171]

Meanwhile, in cases involving a so-called "public authority" defense—a claim that the defendant reasonably believed conduct was lawful because he or

not justify allowing executive officials to violate statutory restraints based on unreasonable constitutional views.

[166] *See Mead Corp.*, 533 U.S. at 230 (indicating that more stringent administrative procedure generally supports greater deference).

[167] *See supra* Section II.B.1.b.

[168] *See supra* Section II.A.

[169] United States v. Rampton, 762 F.3d 1152, 1157 (10th Cir. 2014) (reviewing method of most consistent law enforcement with respect to entrapment-by-estoppel exception).

[170] United States v. Bader, 678 F.3d 858, 886 (10th Cir. 2012) (quoting United States v. Apperson, 441 F.3d 1162, 1204-05 (10th Cir. 2006)).

[171] United States v. Lansing, 424 F.2d 225, 227 (9th Cir. 1970).

she was aiding law-enforcement efforts[172]—courts have generally collapsed the reasonableness inquiry into a straightforward judgment of legality. What matters in that context is not whether the hapless defendant, having aided, say, an undercover investigation or counterintelligence operation, reasonably believed the government had authorized his or her conduct nor even whether government officials reasonably appeared to hold such authorizing power. What matters is instead only whether the officials in question had "actual authority" to license the legal violations.[173]

As with administrative holdings, these formulations do not cleanly map onto the particular problem of self-authorizing constitutional interpretation.[174] On some level, any reliance on an OLC opinion is "reasonable in light of the identity of the agent" (here the office designated to provide constitutional guidance) and "the point of law misrepresented" (here a point of constitutional interpretation).[175] OLC, moreover, typically only answers the questions it is asked, so officials desirous of following the law have made the "further inquiries" available to them by requesting and obtaining an OLC opinion in uncertain areas.[176]

Nevertheless, the third consideration in the Tenth Circuit's formulation—the "substance of the misrepresentation"—remains an essential limitation.[177] A legal claim that is simply too outlandish or dangerous to be given immunizing force is unreasonable, not in the sense that the legally untutored would not give it credence but rather in the more absolute sense that protecting such reliance would come at too great a cost to the antisuspending principle. It is at least plausible, furthermore, that limiting legally protected reliance in this way will induce a desirable sense of caution on the part of those receiving legal guidance. Again, government officials generally cannot be expected to conduct abstruse

[172] *See, e.g.*, United States v. Sariles, 645 F.3d 315, 317 (5th Cir. 2011) (indicating that "this defense 'is available when the defendant is engaged by a government official to participate or assist in covert activity'" (quoting United States v. Spires, 79 F.3d 464, 466 n.2 (5th Cir. 1996))); United States v. Fulcher, 250 F.3d 244, 254 (4th Cir. 2001) ("The public authority defense allows 'the defendant [to] seek[] exoneration based on the fact that he reasonably relied on the authority of a government official to engage him in a covert activity.'" (alterations in original) (quoting United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994))).

[173] *See, e.g.*, United States v. Alvarado, 808 F.3d 474, 484 (11th Cir. 2015) (requiring government official to actually have authority to issue order to commit crime for which defendant faces prosecution); *Sariles*, 645 F.3d at 319 (requiring same); *Fulcher*, 250 F.3d at 254 (requiring actual authority of government official to engage defendant in covert activity). One early concurring opinion suggested otherwise, *see* United States v. Barker, 546 F.2d 940, 955 (D.C. Cir. 1976) (Merhige, J., concurring), but other courts have rejected this view.

[174] *Cf.* Note, *The Immunity-Conferring Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2091 (2008) (noting that applying these defenses to immunize officials from criminal prosecution "raises self-dealing concerns absent from private-party suits").

[175] *See Bader*, 678 F.3d at 886 (quoting *Apperson*, 441 F.3d at 1204-05).

[176] *See Lansing*, 424 F.2d at 227.

[177] *See Bader*, 678 F.3d at 886.

legal analysis for themselves, and it is unfair to expect them to do so.[178] But at least with respect to conduct that any citizen of a democracy should appreciate raises serious civil-liberties questions, such as torture or wiretapping, a reasonableness limitation on protected reliance could help stimulate demands for extra assurance that a legal opinion allowing the conduct is credible.[179] Such demands may at least ensure that lawyers' reputations, rather than just the officials' reputations, will be on the line if the opinion proves mistaken.

In sum, cases from two disparate areas, administrative law and criminal law, reinforce the view that when government officials rely on a reasonable, signed OLC or Attorney General opinion to violate an otherwise applicable statute, their good-faith reliance should afford a defense against later penal sanctions.

3. Illustrative Applications

The key boundary, then, is reasonableness. What might reasonableness mean when it comes to constitutional analysis? Without attempting any definitive answer to the many difficult questions to which this standard might apply, I offer both some general rules of thumb and a few concrete illustrations.

As to general guidance, a constitutional reasonableness inquiry might properly focus on the degree of conflict between generally accepted types or "modalities" of constitutional argument in any given instance. Ongoing debates over interpretive theory notwithstanding, as a matter of practice American constitutional analysis is generally a holistic inquiry centered on five basic modalities of argument—text, structure, history, precedent, and policy—with a heavy emphasis in most instances on maintaining fidelity to existing judicial precedents and government practices.[180] Many heated theoretical debates may be reducible to fights over the correct general ordering of interpretive modalities (e.g., whether text or original understanding should ever, always, or sometimes override precedent). By the same token, many hard constitutional questions involve conflicts between these modalities. Just as a conflict between apparent legislative purpose and enacted text may present a hard question of statutory

[178] *See supra* Section II.B.3.

[179] *Cf.* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1214 (2010) (arguing that imprecise legal standards may sometimes have "salutary impact . . . on citizens' moral deliberation and on robust democratic engagement with law"). Some argue that this sense of caution has in fact taken hold within the intelligence community following the torture controversy. *See, e.g.*, GOLDSMITH, *supra* note 8, at 238-40 (discussing indications of CIA "skittishness" following repudiation of Torture Memos).

[180] For a useful account of this "mainstream" approach to constitutional interpretation, see H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 191-93 (2016). For the canonical account of the basic interpretive modalities of constitutional law and their relevance, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-22 (1991).

interpretation, so, too, may a conflict between apparent historical understanding and dictionary meaning present a hard constitutional question.[181]

From this point of view, a reasonableness standard might compel courts to defer to an executive opinion's resolution of such a conflict between accepted modalities, even if the court itself would have resolved the same conflict differently. In other words, an originalist OLC opinion might be reasonable and thus support reliance by government officials, even if a court or judge would have given greater weight to subsequent precedent and practice when considering the issue de novo. By the same token—and perhaps most importantly—executive-branch lawyers may act reasonably in resolving disputed questions based on past executive practice and precedent, even if courts writing on a blank slate would give greater weight to other considerations. This last point, indeed, is perhaps departmentalism's central implication: at least within the limits of textual plausibility and judicial precedent, the executive branch may develop and adhere to its own principled views on constitutional meaning.[182]

Turning to concrete examples, officials who relied on recent OLC opinions authorizing them to disregard funding restrictions on participating in certain United Nations bodies[183] or conducting certain diplomatic activities with China

[181] Admittedly, courts applying *Chevron* deference do not always describe ambiguity as arising from this sort of conflict. Instead, courts often assert that "[a]t th[e] first step of the *Chevron* analysis 'we employ[] traditional tools of statutory construction' to determine whether Congress has 'unambiguously foreclosed the agency's statutory interpretation.'" Village of Barrington v. Surface Transp. Bd., 636 F.3d 650, 659 (D.C. Cir. 2011) (third alteration in original) (citation omitted) (first quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); then quoting Catawba County v. EPA, 571 F.3d 20, 35 (D.C. Cir. 2009)). I have elsewhere argued, however, that courts applying the rule of lenity in the criminal context should focus on whether accepted interpretive criteria render competing interpretations plausible. *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 889 (2004).

[182] Accounts of how OLC may conduct constitutional interpretation in a principled but nonetheless distinctive fashion frequently emphasize this feature of executive-branch constitutionalism. *See, e.g.*, OLC Best Practices Memo, *supra* note 94, at 2 ("The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question, but as with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes."); *see also* BRUFF, *supra* note 13, at 81 (discussing OLC's reliance on prior executive-branch opinions); GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 93, at 32-39 (discussing OLC's institutional role and "cultural norms"); SHANE, *supra* note 144, at 103 ("However predisposed it may be to upholding plausible assertions of executive power, OLC is traditionally mindful of its quasi-adjudicative role."). Professor David Luban has identified the boundary between "legal plausibility" and "frivolity" as key to assessing the ethics of government legal opinions. *See* LUBAN, *supra* note 5, at 229-30. Though similar to the standard proposed here, the reasonableness standard that I advocate for reliance defenses should be more constraining than a test of mere plausibility and nonfrivolity.

[183] OLC 2009 Appropriations Memo, *supra* note 24, at *1.

through the White House Office of Science and Technology Policy[184] should be immune from any penal sanctions for violating the ADA.[185] By the same token, in an earlier day, officials who relied on Attorney General opinions to disregard one-house or committee veto provisions in appropriations statutes should have been immune from such penalties.[186] All these positions, though perhaps contestable as a matter of first principles, were nonetheless so firmly rooted in traditional executive-branch understandings that, in all likelihood, no reasonable executive-branch lawyer could realistically have advised otherwise.[187]

Though these questions are closer, officials who administered the Obama Administration's controversial deferred-action immigration programs or participated in military action against Libya should be equally safe from any after-the-fact punishment that would otherwise be possible.[188] In these cases, too, however controversial OLC's legal conclusions, OLC provided reasoned opinions rooted in past views that took account of key legal authorities and articulated cogent limiting principles (in the immigration opinion, even disapproving one proposal), even as the opinions approved some proposed actions. Courts reviewing these actions de novo might well reach different conclusions—indeed, one circuit court did with respect to the immigration programs.[189] But when considering a reliance defense to penal sanctions, courts should view the same question through a different lens.

By contrast, enhanced interrogation in reliance on the Torture Memos offers an example in which even a formal OLC opinion should not provide blanket immunity. Insofar as OLC's legal conclusions were deeply flawed—a view

[184] Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C., 2011 WL 4503236, at *1 (Sept. 19, 2011).

[185] 31 U.S.C. §§ 1341-1342, 1350 (2018).

[186] *See, e.g.*, Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 61 (1933). For the argument that executive-branch constitutional objections were justified, see SHANE, *supra* note 144, at 133-35.

[187] Though it is hard to see how it could result in penal sanctions, a recent opinion concluding that the temporary position of Acting Attorney General was an inferior rather than principal office under the Appointments Clause appears reasonable given executive-branch precedent, even if a court might reach a different conclusion de novo. *See* Designating an Acting Attorney General, 42 Op. O.L.C., 2018 WL 6131923, at *5 (Nov. 14, 2018) ("[The Acting Attorney General] was appointed in a manner that satisfies the requirements for an inferior officer.").

[188] OLC Immigration Memo, *supra* note 26, at *1 (authorizing Department of Homeland Security to implement deferred-action immigration programs); OLC Libya Memo, *supra* note 25, at *1 ("[W]e concluded that the President had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest.").

[189] *See* Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015) (enjoining implementation of deferred action programs for certain immigrants), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

shared by nearly all commentators[190]—these opinions were simply too unreasonable to support an after-the-fact reliance defense. To the extent that is true, the reason is not that officials who relied on the opinions could fairly anticipate being liable; having obtained legal assurances through the proper channels, they would likely have been in no position to question the lawyers' conclusions. Nor, on the other hand, is the reason simply that courts on their own would have reached a different view; any such theory would run roughshod over departmentalism. The opinions' unreliability instead derives from their sheer implausibility—from their dependence on a theory of Article II authority extending beyond even the generally permissive view of executive power reflected in past executive-branch opinions.[191] Indeed, the extraordinary breadth of the opinions' reasoning might be a reason to reject reliance upon them even if a narrower opinion could have justified some practices it covered.[192] To the extent that reliance doctrine aims in part to encourage sound executive practices, the quality of an opinion's reasoning rather than the mere fact that it exists may properly affect the degree of immunity it provides.[193]

By the same token, given limits recognized in the executive branch's own past opinions and practice, executive-branch lawyers might well exceed the bounds

[190] *See, e.g.*, BRUFF, *supra* note 13, at 239-47 (discussing problems with OLC's legal analysis); H. JEFFERSON POWELL, THE PRESIDENT AS COMMANDER IN CHIEF: AN ESSAY IN CONSTITUTIONAL VISION 38-47 (2014) (same); Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 690 (2004) (noting that critics characterize Torture Memos as "legally and morally unsupportable, likely to endanger our own military personnel, and damaging to our country's reputation and national interest"); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 468-69 (2005) (arguing that authors of Torture Memos violated ethical obligations of candor and accuracy). *But cf.* GOLDSMITH, *supra* note 8, at 236 ("The legality of the original CIA interrogation techniques under the purposefully loophole-ridden torture law was always a closer question than critics have publicly acknowledged (though some admit it in private)."). For further discussions of legal issues presented by the torture controversy, see, for example, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 107-08 (2010) (detailing criticisms of arguments in Torture Memos as "incomplete and one-sided" and without legal basis); Morrison, *supra* note 151, at 1728 (recounting "widespread condemnation" of Torture Memos by legal academics and commentators); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 68 (2005) ("The overwhelming response by experts in criminal, international, constitutional, and military law was that the legal analysis in the government memos was so faulty that the lawyers' advice was incompetent.").

[191] *See, e.g.*, John C. Dehn, *Why a President Cannot Authorize the Military to Violate (Most of) the Law of War*, 59 WM. & MARY L. REV. 813, 820-21 (2018) (explaining that law-of-war statutes bind President); Shane, *supra* note 13, at 514 ("A competent legal memorandum on this particular point would consider the implications of constitutional text pointing conspicuously in the other direction . . . .").

[192] *See* GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 93, at 144, 148-49 (discussing Torture Memos' unnecessary breadth).

[193] *Cf.* SEC v. Chenery Corp., 318 U.S. 80, 92 (1943) (holding that administrative action must be upheld on grounds relied on by Agency).

of reasonableness by approving a full-scale war without advance congressional approval[194] or authorizing law-enforcement expenditures in defiance of specific appropriations limitations, like those currently barring federal prosecution of state-authorized medical marijuana businesses.[195] In addition to departing sharply from existing practice and precedent, such views would likely lack any adequate foundation in sound textual and historical analysis, thus placing them beyond the range of reasonable executive interpretation.[196]

In sum, applicable due process case law, read in light of the competing fairness, antisuspending, and departmentalism considerations in this context, supports recognizing a general reliance defense for government officials facing penal sanctions for engaging in conduct that OLC or the Attorney General assured them was lawful in a signed opinion. To maintain an appropriate sense of caution and restraint on all sides, this defense necessarily must give way when the constitutional determinations in question are not only wrong but also unreasonable. Otherwise, in this context considerations of fairness and bureaucratic regularity should win out over concerns about unprincipled self-authorization. As we shall see next, however, other contexts implicate a different balance of concerns and thus require lesser degrees of reliance protection.

B. *Reliance on Other Executive Directives in Penal Litigation*

If the balance of relevant considerations, as informed by applicable case law, generally supports protecting reliance on signed OLC or Attorney General opinions in subsequent penal litigation, a different calculus should apply to reliance on less formal legal determinations. Here, too, the reliance calculus must balance multiple conflicting and largely incommensurate concerns, yet the overall balance supports weaker reliance protection than in the case of more

[194] For my own argument to this effect with respect to the use of force in Korea, see Zachary Price, *Attacking North Korea Would Be Illegal*, TAKE CARE BLOG (Aug. 10, 2017), https://takecareblog.com/blog/attacking-north-korea-would-be-illegal# [https://perma.cc/SY48-LXDF].

[195] For my analysis of this point, see Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 437-49 (2018) (arguing that congressional appropriations limits may restrict President's authority to enforce laws).

[196] As noted earlier, Professor Keith Whittington's theory of the political foundations of judicial review suggests that presidential challenges to received constitutional understandings are a hallmark of "reconstructive" presidencies that fundamentally reorient politics going forward. *See* WHITTINGTON, *supra* note 77, at 23. From that point of view, reconstructive administrations might be prone to adopt positions that appear unreasonable under governing constitutional understandings. This feature of reconstructive presidencies nevertheless provides no reason to recognize a legal reliance defense based on such an administration's assertions. A presidency is reconstructive, on the terms of this theory, only insofar as it succeeds in reorienting the political and constitutional order. A presidency that tries to do so and fails should not derive any particular benefit from the attempt. *See* STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 44-45 (1993) (arguing that Presidents who try to reconstruct constitutional order and fail are "considered personally deranged and brought down on charges of gross violations of constitutional stricture").

formal opinions. For such legal determinations, except insofar as they merely implement a reasonable prior OLC or Attorney General opinion, reliance should be protected only to the extent that the executive branch's conclusions were objectively correct in the reviewing court's view.

The set of legal determinations in this category should include all internal executive legal conclusions short of authoritative Justice Department guidance, up to and including presidential signing statements, White House counsel opinions, and other outputs of the "porous" legal process that some accounts suggest is growing more common.[197] While such determinations are subject to the same incentives for overreaching that infect all self-authorizing executive opinions, they lack the procedural and institutional guarantees that help assure principled constitutional analysis in a signed OLC or Attorney General opinion.[198] Simply put, there is less reason to trust them and therefore less reason to protect those who rely on them without making further inquiries. Indeed, on some level the whole point of a more porous, policy-inflected legal process is to yield conclusions that give greater relative weight to policy in the legal calculus.[199] Whatever the merits of that recalibration on other types of legal questions, there is little reason to let motivated constitutional reasoning of this sort eliminate statutory restraints on the executive branch itself. In fact, as we have seen, even in conventional administrative contexts where policy may more appropriately influence legal analysis, the degree of procedural formality factors importantly in the degree of judicial deference.[200]

On the other hand, departmentalist values may also be at their apex in this context. In personally issuing a signing statement or selecting some view from among competing options generated through interagency deliberation, individual Presidents, as heads of the executive branch, may assert a particular constitutional view for which they are then politically accountable. From an accountability perspective, therefore, deference might be more rather than less warranted in this context.[201]

There are nonetheless two fatal problems with giving heightened reliance protection to such presidential assertions: First, the President, though head of the

[197] Renan, *supra* note 11, at 835-42.

[198] Although any significant constitutional assertion in a presidential signing statement is likely to be vetted internally by the Justice Department, such statements may be formulated on a rushed timetable and rarely supported by any substantial legal reasoning. In that context, risks of political manipulation are heightened, as are the incentives to preserve an executive position by laying down a marker, even if the position is dubious and on closer examination would provide no sound basis for departing from statutory requirements.

[199] *See* Renan, *supra* note 11, at 872 ("Within a 'zone' of reasonable legal answers is a policy-drenched process of giving law meaning."); *see also* Bauer, *supra* note 11, at 250 (advocating approach to national security crises that allows for "full exploration of the legal grounds for action while allowing for all the relevant policy, moral, and other reasons, for or against the policy, to be identified and integrated into the legal deliberative process").

[200] *See supra* Section III.A.2.

[201] *Cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2310-11 (2001) (advocating judicial deference based on presidential accountability).

executive branch, is not personally vested with the relevant legal authorities. As noted earlier, the Attorney General instead holds statutory authority, now delegated by regulation to the Assistant Attorney General for OLC, to provide legal guidance to the executive branch; the Justice Department also holds exclusive statutory authority to enforce most criminal laws.[202] For all but the most ardent proponents of a unitary executive branch, Congress properly holds power under the Appointments Clause and the Necessary and Proper Clause to assign particular responsibilities to particular executive officers in this way, subject of course to appropriate presidential supervision.[203] From that point of view, statutory assignment of responsibility for legal interpretation should support giving greater weight to these officers' opinions.

Second, and relatedly, giving primacy to OLC (or at least the Justice Department as a whole) strikes a better balance among the relevant competing considerations. Insofar as the core value departmentalism protects is not presidential judgment for its own sake but rather principled executive judgment on constitutional issues, departmentalism values are better advanced by encouraging a legal process that gives greater force to legal values than to political ones. As for fairness considerations, punishing an individual for conduct undertaken in reliance on the President's own assurances or directives certainly risks significant unfairness. Nevertheless, the absence of any formal legal opinion cuts against treating the risks of entrapment here as equivalent to reliance on an OLC or Attorney General opinion.[204] Again, some anti-entrapment case law treats whether "a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries"[205] as a prerequisite to recognizing a reliance defense. Here, the same consideration should foreclose protecting reliance if those at the top of an agency could have done more to protect themselves and their staff.

Here, then, the balance of relevant considerations should support weaker reliance protection. Even so, the institutional setting, and in particular the unfairness of punishing officials for relying on presidential directives, should once again inform how courts evaluate the legal determination in question on the merits. In particular, insofar as the doctrine should aim to encourage

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[202] *See supra* Section II.B.1.b.

[203] *See* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 705 (2007) ("If differing views of presidential authority were occasionally expressed, both important events and implicit understandings of our first two centuries appeared to settle on a construction of President as overseer and not decider in relation to ordinary administration."). *See generally* Michael W. McConnell, The President Who Would Not Be King (Jan. 21, 2019) (unpublished manuscript) (on file with author) (arguing that Congress may vest law enforcement authorities in subordinate officers subject to presidential removal).

[204] *Cf.* United States v. Lansing, 424 F.2d 225, 227 (9th Cir. 1970) (indicating that reliance defense depends on whether "further inquiries" would reasonably have been pursued).

[205] *See id.*; *see also* United States v. Batterjee, 361 F.3d 1210, 1216-17 (9th Cir. 2004) (quoting *Lansing*'s definition of reasonable reliance).

obtaining a credible executive-branch opinion, courts should not necessarily reject a reliance defense simply because they would have reached a different legal conclusion de novo. Instead, the relevant tradeoffs may best cash out in a rule that (a) protects reliance on executive directives insofar as they follow inevitably from reasonable prior OLC or Attorney General opinions but (b) otherwise gives the executive view no particular deference.

Under this approach, directives and assertions based on longstanding executive-branch understandings, such as the view that conduct of diplomacy is an exclusive executive prerogative, could immunize officials who rely on such directives from subsequent penal sanctions. To establish such protection, the executive branch would not need to reinvent the wheel by restating in new formal opinions a view already established by a prior line of reasoned executive precedent—even if courts might not share the asserted view as a matter of first principles. At the same time, however, more novel assertions in a signing statement or other informal directive could not have such immunizing effect. Thus, for example, even were this position capable of some reasonable defense in an OLC opinion, President Trump's recent signing statement questioning the validity of funding restrictions on federal marijuana enforcement could not properly be subject to reliance by subordinate officials.[206] By the same token, while use of military force within the parameters of prior executive-branch legal opinions may be immune from sanctions under the ADA or other applicable statutes, use of military force outside those parameters should not carry the same protection absent a credible new opinion.

By thus calibrating the level of deference in accordance with the level of seriousness reflected in executive-branch reasoning, courts could encourage formulation of novel positions in the institutional setting most likely to result in a principled rather than strategic interpretation. In the administrative context, once again, *Mead* and related cases effectively encourage more deliberative agency processes by making judicial deference more likely when the agency proceeds based on "careful consideration."[207] By the same token, here, calibrating the level of reliance protection could encourage officials to seek more complete legal guidance in the first place, an outcome likely to benefit overall legal compliance within the executive branch. This result, moreover, gives appropriate force to departmentalist values, at least insofar as departmentalism is understood to support principled presidential constitutionalism rather than unprincipled self-licensing. Under the view advocated here, presidents may effectively shield subordinates from penal sanction but only insofar as their constitutional assertions accord with the broader tradition of American constitutionalism reflected in past executive-branch opinions. Advice from executive-branch lawyers—lawyers who are themselves accountable to the

[206] *See* Price, *supra* note 195, at 448 (arguing that President Trump's signing statement denying Congress's authority to restrict marijuana enforcement was "mistaken").

[207] Barnhart v. Walton, 535 U.S. 212, 222 (2002) (holding that "careful consideration the Agency has given the question over a long period of time" supported concluding that "*Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue"); *see also supra* Section III.A.2.

President but depended upon for sound professional judgment—may push past existing precedent to a somewhat greater degree, but they may only do so because lawyers formulate advice in an institutional setting in which professional norms and internal practices may be more conducive to principled legal reasoning.

This understanding still risks significant unfairness to subordinate government officials. But it calibrates the level of deference to the heightened risks of unprincipled self-authorization in this institutional setting, and it responds to those risks by maintaining incentives to seek more formal legal guidance from the governmental agency with particular legal competence when the position the President advances appears novel and uncertain. In short, this understanding adapts existing due process case law to the background structural and normative concerns that apply in this particular institutional setting.

C. *An Aside on Statutory Construction*

Before turning to a last litigation setting—other types of lawsuits such as civil damages suits—statutory interpretation, as opposed to constitutional interpretation, warrants a brief detour. Although I focus here on executive constitutional interpretation, OLC, the Attorney General, and other executive officials routinely engage in statutory construction too. Indeed, key opinions, including those addressing such controversial matters as enhanced interrogation and drone strikes, often address both statutory questions and constitutional questions. In some instances, they may also reach statutory conclusions informed by constitutional understandings or even calculated to avoid constitutional questions. A clean separation between constitutional and statutory interpretation is thus impossible, and in any event, opinions interpreting governing statutes may present many of the same fairness concerns that result from executive opinions deeming statutes unconstitutional.

Should reliance on an executive statutory interpretation, then, immunize executive officials from subsequent penal sanctions? Although this question raises some unique concerns, many of the same considerations sketched so far could support recognizing a parallel set of reliance defenses. For one thing, the Justice Department's statutory authorities with respect to legal interpretation and criminal enforcement provide equivalent reasons to give primacy to OLC's or the Attorney General's views over those of other executive actors, including the President, when it comes to the effective scope of penal prohibitions.[208] Here, too, by the same token, there are equivalent benefits to rewarding agencies that seek guidance with greater legal protection, and fairness concerns once again support protecting those who seek legal assurances from the bait-and-switch of prosecuting them after the fact.

Of course, this framework implicates the same paradoxical relationship between reliance and immunity that runs through this Article—that recognizing immunizing power encourages agencies to seek advice while simultaneously heightening the incentives to corrupt the advice given. Here, however, no less

[208] *See supra* Section II.B.1.b.

than with respect to constitutional interpretation, the best balance available may be to protect reliance only insofar as the advice is objectively reasonable, thus preserving a backstop against gravely flawed advice. By the same token, withdrawing all deference if OLC loses the institutional attributes that give its opinions particular credibility may provide a further and still more important backstop.

On the other hand, OLC does not have any particular policy competence of the sort that justifies administrative deference on expertise and accountability grounds; OLC's special competence, such as it is, relates to court-like legalistic interpretation.[209] But this distinction goes more to the nature of OLC reasonableness in statutory construction than to the appropriate standard for a reliance defense. Although OLC might well lack competence to render an immunizing opinion deeming particular conduct lawful based on a policy-inflected statutory interpretation, OLC can competently analyze the statutory text and history in ways a court would. Once OLC or the Attorney General has done so credibly and reasonably, much the same balance of concerns addressed earlier with respect to constitutional interpretation may justify privileging the offending official's reliance over a court's preference for a different interpretation.[210]

It is also worth noting that any OLC interpretation implicating these principles is likely to involve a narrow rather than broad construction of the applicable statute. Under the so-called rule of lenity, for reasons I have addressed elsewhere, courts should generally favor narrow, defendant-friendly interpretations of criminal statutes.[211] Doing so helps ensure democratic accountability for criminal prohibitions and counteracts political incentives for overcriminalization.[212] To be sure, laws limiting executive authority might be expected to encounter greater political resistance than ordinary criminal laws given the executive branch's interest in avoiding such restraints. By the same token, however, Congress may have some incentive to score political points by criminalizing conduct that it expects the executive branch will not in fact punish.[213] To the extent that applying the usual rule of lenity is justified in this setting—a question I do not attempt to resolve here—the resulting preference

[209] *See, e.g.*, VERMEULE, *supra* note 164, at 30 (associating judicial deference to agency interpretations with rationales of superior expertise and accountability over policy).

[210] *See supra* Section III.A.

[211] Price, *supra* note 181, at 925.

[212] *Id.* ("[T]he rule of lenity is important because it at least facilitates democratic accountability in circumstances where political constraints would otherwise be weak."); *see also* Kiel Brennan-Marquez, Essay, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 658 (2019) (describing political incentives for legislatures to enact broad criminal laws).

[213] Price, *supra* note 181, at 911 (explaining "tough on crime" electorate pressures legislators to expand reach of criminal law and rely on prosecutors to exercise discretion with minor offenses); *cf.* POSNER & VERMEULE, *supra* note 165, at 3 (observing that legislatures often impose restrictions on executive conduct after the fact despite approving of executive responses during emergencies).

for narrow interpretations may shorten any gap between de novo executive and judicial readings of criminal statutes.

Although it predated the modern reliance case law and employed a different analytic framework, one key historic case in fact drew more or less this same limit on reliance. In *United States v. Dietrich*,[214] a federal circuit court held in 1904 that a U.S. senator's contract with the federal government violated an applicable statute despite an earlier Attorney General opinion approving a similar contract.[215] "The construction of a doubtful or ambiguous statute by the Attorney General in the discharge of his duty to render opinions upon questions of law arising in the administration of any of the executive departments," the court held, "is always entitled to respectful consideration, and where that construction is acted upon for a long time by those charged with the duty of executing the statute it ought not to be overruled without cogent reasons."[216] Nevertheless, the court found the opinion in question patently unpersuasive. "We cannot follow or approve the opinion cited," the judges explained,[217] because

> [i]t does not refer to the terms of the statute; the reasons assigned for the conclusion stated are brief and unsatisfactory; it is not shown that this opinion has been followed in any of the executive departments for any length of time, or at all; and we think the statute is . . . plain and unambiguous.[218]

By requiring "cogent reasons" to disregard a prior Attorney General opinion, *Dietrich* suggests, at least obliquely, that an executive-branch legal opinion may sometimes be subject to reliance even if a court addressing the question in the first instance would have given less weight to past executive practice and precedent and thus reached some different conclusion. Nevertheless, *Dietrich*'s ultimate rejection of the Attorney General's view suggests that if an executive-branch opinion is unreasonable even by such deferential standards, it cannot exempt those who rely on it from subsequent penal remedies. *Dietrich* thus indirectly supports the framework advocated here for both constitutional and statutory executive-branch opinions.

D. *Civil Damages Suits and Other Litigation*

Some reliance protection, then, is warranted in after-the-fact punitive enforcement suits, although the scope and character of such protection should vary according to the nature of the legal assurances at issue. It remains to consider other potential forms of litigation, particularly civil damages suits against government officers and enforcement actions against private parties. In these types of suits, the balance of relevant considerations should tip the other way, so as to support de novo judicial consideration of pertinent constitutional

[214] 126 F. 671 (C.C.D. Neb. 1904).

[215] *Id.* at 676.

[216] *Id.*

[217] *Id.*

[218] *Id.*

questions. In such litigation, in other words, prior executive-branch legal determinations, whether embodied in formal legal opinions or not, should not establish any special reliance defense.

A distinguishing feature of both of these forms of litigation is that the rights of private parties may depend on the court rejecting executive legal interpretations on which government officials relied. To start with the easiest case, when the government enforces the law against a private party in reliance on an executive opinion or statement deeming unconstitutional any restrictions on such enforcement (such as, say, an appropriations limitation), upholding reliance on the government's own prior constitutional conclusions would obviously mean shortchanging the current defendant's interest in a different view prevailing.[219] Much the same is true in a tort damages action seeking retrospective liability against the government or an individual officer based on unlawful official action. In such suits, the claim's viability might well depend on the claimant's view of the underlying constitutional law prevailing over the view on which the government relied.

Accordingly, in either type of suit, officials' reliance on past internal executive-branch guidance provides no compelling reason to depart from conclusions the court would have reached on its own. Precisely because private interests apart from the government's relationship with its own personnel are at issue, departmentalism requires giving independent force to judicial judgments about the proper redress of private harms. Likewise, antisuspending concerns strongly support an independent judicial role here: leaving affected private parties without redress (or without an otherwise-available defense) would eliminate even indirect restraints on the executive branch's self-dealing determination of its own powers.

To be sure, damages claims against individual officers (if not also other types of litigation) may raise significant fairness concerns—concerns that have shaped the doctrine of qualified immunity. But such concerns are nowhere near as acute as in enforcement suits seeking criminal liability or other punitive action. In all likelihood, the government will indemnify individual officers for any personal liability,[220] and while such potential indemnity may not spare officials the burdens and reputational costs of a lawsuit or adverse judgment,[221] it may at least mitigate fairness concerns about holding them to account.

[219] *Cf.* United States v. McIntosh, 833 F.3d 1163, 1178-79 (9th Cir. 2016) (applying appropriations restriction on federal marijuana enforcement to bar prosecutions).

[220] *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (concluding from empirical survey that "[p]olice officers are virtually always indemnified").

[221] *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9 (2017) (noting that Supreme Court cases on qualified immunity have increasingly focused on "the need to protect government officials from nonfinancial burdens associated with discovery and trial").

Furthermore, although some case law suggests that qualified immunity's purpose is to ensure fair warning to the individual officer,[222] the doctrine seems better understood, along the lines of administrative law deference doctrines, as protecting officials' freedom of action within objectively reasonable bounds.[223] Reflecting this tension in qualified immunity's rationale, lower courts are split over whether and to what degree reliance on an internal legal opinion should guarantee immunity to frontline officers.[224] Whatever the merits of the pro-immunity position in other contexts, here the cost to competing departmentalist and antisuspending values is simply too great to provide blanket immunity for reliance on self-authorizing executive legal judgments.

It is true that civil damages suits against federal officers may become less common even without any broad reliance defense. Historically, as Professor James Pfander has demonstrated, damages litigation was a primary vehicle for elaborating and enforcing legal restraints on the executive branch,[225] and in its

[222] *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) ("[T]he focus [in assessing a qualified immunity claim] is on whether the officer had fair notice that her conduct was unlawful . . . ." (quoting Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam))); Pierson v. Ray, 386 U.S. 547, 557 (1967) (recognizing "defense of good faith and probable cause" in § 1983 suit).

[223] *See* Baude, *supra* note 41, at 60-61 ("[I]nstead of the subjective inquiry into intent or motive that marked the good-faith inquiry, qualified immunity has become an objective standard based on case law. This means that even the official who acts in *bad faith* is entitled to the defense if a different official could have reasonably made the mistake." (footnote omitted)).

[224] *Compare In re* County of Erie, 546 F.3d 222, 229 (2d Cir. 2008) (refusing to consider "reliance upon advice of counsel" in immunity defense), *with* Kelly v. Borough of Carlisle, 622 F.3d 248, 255-56 (3d Cir. 2010) (holding that "a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause"), *and* Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004) (deeming advice of counsel relevant to immunity calculus unless "an objectively reasonable officer would have [had] cause to believe that the prosecutor's advice was flawed, off point, or otherwise untrustworthy"). The Supreme Court suggested in dicta that reliance on advice of counsel may be relevant to qualified immunity in some circumstances. *See* Messerschmidt v. Millender, 565 U.S. 535, 553 (2012) ("[T]he fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the Magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause."). For a general survey of courts' varied approaches, see Dawson, *supra* note 40, at 528-29, 543-53.

[225] *See* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 6 (2017) ("After independence, the courts of the United States regularly relied on common-law suits against responsible officials as the cornerstone of government accountability."); *see also* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 6 (2012) (observing that, in the early decades of the American Republic, "[c]ommon law actions had the capacity to provide substantial relief with respect to the activities of the most numerous federal agents:

landmark 1971 decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[226] the Supreme Court recognized a tort cause of action for certain constitutional violations.[227] In subsequent decisions culminating in *Ziglar v. Abbasi*,[228] however, the Court has all but disclaimed any such cause of action, concluding that, in general, "the Legislature is in [a] better position [than courts] to consider if 'the public interest would be served' by imposing a 'new substantive legal liability.'"[229] To the extent *Ziglar* precludes liability for constitutional tort damages apart from unlawful searches, the analysis offered here might provide yet another reason to reconsider the Court's holding. The Court in *Ziglar*, after all, based its holding in part on concerns that "high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis."[230] Giving such overwhelming primacy to reliance concerns in this context, however, would require shortchanging other competing principles identified earlier as central to the analysis.

In any event, to the extent liability otherwise remains possible, the balance of relevant principles militates against recognizing an automatic qualified-immunity defense based on executive legal assurances. Though some have argued to the contrary,[231] any such absolute defense would go beyond what sound analysis justifies even in the penal enforcement context, let alone with respect to civil liability. Here, moreover, because offsetting departmentalist and antisuspending considerations are so powerful, fairness cannot provide the exclusive basis for analysis, particularly when fairness considerations do support recognizing a reliance defense with respect to penal litigation.[232] To the extent reliance defenses sometimes preclude penal prosecution (as I argued earlier they should), some alternative mechanism of after-the-fact legal accountability may be important to disciplining executive constitutional analysis. As Pfander (among others) has argued, the "imperfection" of internal constraints on lawless government action, as evidenced most notably in the torture controversy,

tax collectors and postal officials" and that "[o]fficial immunity was nonexistent; the officers' only defense was that they were carrying out their statutory responsibilities").

[226] 403 U.S. 388 (1971).

[227] *Id.* at 397 ("[W]e hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment.").

[228] 137 S. Ct. 1843 (2017).

[229] *Id.* at 1857 (quoting Schweiker v. Chilicky, 487 U.S. 412, 426-27 (1988)).

[230] *See id.* at 1863.

[231] *See* Dawson, *supra* note 40, at 528 (positing that "legal advice should support an officer's qualified immunity defense when the officer can show that an objectively reasonable officer would have relied on the lawyer's advice to conclude that her intended conduct would not violate clearly established constitutional law"); Pines, *supra* note 7, at 98 (arguing that "it is appropriate, as well as beneficial to American society, for government employees to be shielded from civil liability and criminal prosecution for actions undertaken in reliance on an Attorney General opinion").

[232] *See supra* Section III.A.

"suggests a continuing need for some form of external judicial test of the legality of government action."[233]

As for government enforcement actions against private parties, courts have had little trouble disregarding OLC or Attorney General opinions in that context. In the 1939 case *Perkins v. Elg*,[234] the Supreme Court upheld a decree blocking a deportation the Court considered unlawful, even though doing so meant disagreeing with an Attorney General opinion on which the labor secretary relied.[235] Noting that the Attorney General had disregarded past practice and failed to consider key features of birthright citizenship under the Fourteenth Amendment, the Court held that, although it was "reluctant to disagree with the opinion of the Attorney General," in this case "the conclusions of that opinion [were] not adequately supported and [were] opposed to the established principles which should govern the disposition of the case."[236] Likewise, more recently, in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*,[237] the D.C. Circuit vacated an order issued by just two members of the NLRB, notwithstanding a prior OLC opinion concluding that two members were sufficient for a quorum.[238]

By the same logic, to consider a current example, President Trump's signing statement should have no bearing on whether courts enforce appropriations limits on federal marijuana enforcement. During the Obama Administration, the federal government pursued penal remedies against certain marijuana offenders despite claims that their conduct complied with state law and thus fell within the applicable appropriations restriction.[239] Although the government argued that this appropriations ban applied only in narrower circumstances, the Ninth Circuit rejected that reading and barred continued litigation against the defendants.[240] In the meantime, President Trump issued his signing statement,

[233] PFANDER, *supra* note 225, at 97.

[234] 307 U.S. 325 (1939).

[235] *See id.* at 347.

[236] *Id.* at 348-49.

[237] 564 F.3d 469 (D.C. Cir. 2009).

[238] *Id.* at 476 (disagreeing with OLC opinion that two members constituted quorum despite concluding that question was "close" and that OLC opinion was not "entirely indefensible"); *see also* NLRB v. Noel Canning, 573 U.S. 513, 550 (2014) (disagreeing with OLC opinion regarding recess appointment).

[239] *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015) (barring use of Justice Department funds "to prevent [certain listed states] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana"); *see also* Continuing Appropriations Act, 2016, Pub. L. No. 114-53, § 103, 129 Stat. 502, 506 (2015) (extending force of § 538 with respect to continuing appropriations); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) (including restriction similar to § 542).

[240] United States v. McIntosh, 833 F.3d 1163, 1178-79 (9th Cir. 2016) ("DOJ is currently prohibited from spending funds from specific appropriations acts for prosecutions of those who complied with state [medical marijuana] law.").

raising doubts about whether Congress holds authority to deny funds for executive enforcement of substantive federal laws.[241] Had prosecutors relied on any such presidential view, its existence—or even its formulation in a formal executive legal opinion—would have provided no reason for the court to reach a different result. The primacy of antisuspending concerns over any valid reliance consideration in this context justifies disregarding the executive branch's views and considering the question de novo, just as courts have regularly done.[242]

In sum, recognizing a limited reliance defense in penal litigation against government officials highlights the value in maintaining external de novo consideration of constitutional questions in other litigation contexts, particularly suits seeking private damages from individual government officials. Congress may adjust such liabilities or provide indemnities as appropriate, but such suits may provide an important mechanism for external judicial consideration of potentially self-serving interpretations of Article II developed within the executive branch itself.

CONCLUSION

As public opinion grows increasingly divided, executive-branch lawyers' capacity for objective legal analysis is coming under increasing stress. One consequence may be that a question we have largely avoided answering to date—the degree to which official legal opinions may immunize those who rely on them—will now require judicial resolution. To guide any such future decisions, I have attempted in this Article to identify the set of reliance doctrines best supported by governing authorities and background constitutional considerations. Reliance on authoritative OLC or Attorney General legal opinions, I have argued, should generally afford a defense to penal prosecution; reliance on less formal legal directives should provide such a defense only insofar as the directive followed ineluctably from reasonable past executive opinions; and reliance should provide no particular defense in other litigation settings such as third-party prosecutions and civil damages suits.

Elaborating these principles carries some risk of inviting bad-faith invocation of reliance. Yet my goal is the opposite. Throughout this Article, I have aimed to highlight how reliance doctrines may help reinforce other mechanisms of legal restraint, such as formulation of principled legal guidance within the federal executive branch. The judiciary is the most important rule-of-law institution in our society, but it is hardly the only one, and political division may strain courts' capacity to resolve legal questions in a manner perceived by all as legitimate. In crafting reliance doctrines, courts should therefore consider not only their own best view of the law but also whether deferring to others' views

[241] *See* Trump 2017 Appropriations Act Signing Statement, *supra* note 31, at 1-2 ("[S]ection 537 provides that the Department of Justice may not use any funds to prevent implementation of medical marijuana laws by various States and territories. I will treat this provision consistently with my constitutional responsibility to take care that the laws be faithfully executed.").

[242] *See, e.g.*, *Noel Canning*, 573 U.S. at 550; Perkins v. Elg, 307 U.S. 325, 348-49 (1939).

may sometimes better preserve an ethic of legal compliance within the executive branch, the branch of government where the rule of law most matters and yet may be most imperiled.