POLITICS AS LAW:
JURIDIFIED EXECUTIVE UNILATERALISM IN THE GLOBAL WAR ON TERROR

A DISSERTATION PRESENTED

BY

DORIAN B. KANTOR, M.A.

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS

FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY (PH.D.)

IN THE SUBJECT OF

POLITICAL SCIENCE

DEPARTMENT OF POLITICAL AND SOCIAL SCIENCES

FREIE UNIVERSITÄT BERLIN

BERLIN, GERMANY

MARCH 2019

SUPERVISORS:

PROF. LORA ANNE VIOLA, PH.D. - FIRST SUPERVISOR (FREIE UNIVERSITÄT BERLIN)

PROF. JAMES P. PFIFFNER, PH.D. - SECOND SUPERVISOR (GEORGE MASON UNIVERSITY)

DEFENSE: NOVEMBER 20, 2019

ABSTRACT

In this dissertation, I examine the Bush administration's uniquely legal strategy to monopolize policy-making in the Global War on Terror. First, I situate juridified executive unilateralism (JEU) in the context of juridification. I argue that the Watergate Regime (the hypothesized critical juncture), a legislatively imposed quasi-constitutional corrective, formalized previously informally exercised presidential powers, fundamentally affected institutional power relations, altered the concept of legitimacy, and amplified the policy-making potential of legal actors within the Executive Branch. As a result, Watergate created disincentives for inter-branch politics and incentives for conflict resolution with reference to law. I hypothesize that due to the juridification of inter-branch politics, the Office of Legal Counsel's (OLC) opinions function as a form of quasi-judicial legislation that obviates recourse to inter-branch policy processes. In the empirical chapters, I analyze the Bush OLC's legal memoranda to answer the question whether they qualify as unilateral power tools. Specifically, I examine those legal opinions that laid the foundation of the policy architecture that, in important ways, still governs the conduct of the Global War on Terror. Through a combination of content analysis, process tracing, and legal interpretation, I find that OLC's legal memoranda had far-reaching policy consequences in both the domestic and foreign realms. In addition, I explore the Bush OLC's institutional powers jurisprudence as well as its assertions of independent interpretive authority. I conclude that while such legal arguments do not make policy directly, they serve as the legal basis for unilateral executive action, and in many instances successfully establish quasi-constitutional custom. After concluding that OLC's legal opinions constitute policy-making, I provide a typology of the various manifestations of OLC's quasi-judicial legislation. Also, by examining branch-internal precedent cited in the Bush memos, I find that the Bush OLC's legal interpretive activity is not *sui generis*. Therefore, it is a result of structural developments produced by the critical juncture, which an evaluation of JEU markers in pre-Watergate memoranda confirms. In the conclusion, I observe that the case of the Bush administration's reliance on JEU is alarming proof that the juridification of politics has created an alternative policy-making avenue that, if unchecked, can substitute the rule of law with rule by law.

ABSTRAKT

In dieser Dissertation untersuche ich die einzigartige, rechtliche Strategie der Bush-Administration, die Politik im Globalen Krieg gegen den Terrorismus zu monopolisieren. Zuerst stelle ich den *Juridierten Exekutiven Unilateralismus* (JEU) in den Kontext der Juridifizierung. Ich argumentiere, dass das Watergate Regime (der hypothetische kritische Knotenpunkt), ein vom Gesetzgeber verordnetes quasi verfassungsmäßiges Korrekturmittel, zuvor informell ausgeübte Präsidialbefugnisse formalisierte, institutionelle Machtverhältnisse grundlegend beeinflusste, den Begriff der Legitimität verändert und das politische Entscheidungspotenzial der juristischen Akteure innerhalb der Exekutive erweitert hat. Watergate schuf damit Hemmnisse für die gewaltenübergreifende Interaktion und Anreize für eine rechtskonforme Konfliktlösung. Meine Hypothese ist, dass die Rechtsgutachten des *Office of Legal Counsel* (OLC) aufgrund der Verrechtlichung der gewaltenübergreifenden Politik als eine Form der quasi-juristischen Gesetzgebung fungieren und den regulären Rückgriff auf gewaltenübergreifende Interaktionen unnötig machen. In den empirischen Kapiteln analysiere ich die rechtlichen Memoranden des Bush OLC, um die Frage zu beantworten, ob sie als einseitige Machtinstrumente gelten. Konkret untersuche ich diejenigen Rechtsgutachten, die den Grundstein für die politische Architektur gelegt haben, die in wichtiger Hinsicht immer noch die Durchführung des Globalen Krieges gegen den Terrorismus regeln. Durch eine Kombination aus Inhaltsanalyse, Prozessverfolgung und rechtlicher Interpretation stelle ich fest, dass die Rechtsgutachten des OLC weitreichende politische Konsequenzen sowohl im In- als auch im Ausland hatten. Darüber hinaus untersuche ich die Jurisprudenz mit Bezug auf die institutionellen Machtbefugnisse des Bush OLC sowie seine Behauptungen über die eigene unabhängige Interpretationsautorität. Ich komme zu dem Schluss, dass solche Rechtsargumente keine direkte Politik machen, aber als Rechtsgrundlage für einseitige Exekutivmaßnahmen dienen und in vielen Fällen erfolgreich als quasi-konstitutionelle Regeln fungieren. Nachdem ich zu dem Schluss gekommen bin, dass die Rechtsgutachten von OLC politische Entscheidungen darstellen, stelle ich eine Typologie der verschiedenen Erscheinungsformen der quasi-richterlichen Gesetzgebung von OLC vor. Durch die Untersuchung gewalteninterner Präzedenzien, die in den Bush-Memos zitiert werden, wird deutlich, dass die rechtliche Interpretationstätigkeit des Bush OLC nicht *sui generis* ist. Sie ist daher das Ergebnis struktureller Entwicklungen, die durch den kritischen Zeitpunkt hervorgerufen wurden, was eine Bewertung der JEU-Marker in den Memoranden vor Watergate bestätigt. Abschließend stelle ich fest, dass der Fall der sich auf die JEU verlassenden Bush-Administration ein alarmierender Beweis dafür ist, dass die Verrechtlichung der Politik einen alternativen politischen Weg geschaffen hat, der, wenn er nicht kontrolliert wird, die Rechtsstaatlichkeit unterminiert.

TABLE OF CONTENTS

TABLES

DIAGRAMS

INTRODUCTION

"FIAT JUSTITIA, PEREAT MUNDUS"

On November 8, 2011, Attorney General Eric Holder appeared before the Senate Judiciary Committee to testify on the controversial Fast and Furious gun-running program. Following the Attorney General's prepared statement regarding the firearms scandal, and before the specifics of that program would be addressed, the chairman of the Judiciary Committee, Patrick Leahy, pressed Holder about the legal basis of a counterterrorism operation conducted by the United States in Yemen. In that operation, Anwar al-Awlaki, an American citizen, was killed by a drone strike. "[A]ccording to media outlets," Senator Leahy stated, "the operation was conducted following the issuance of a secret memorandum issued by the Department of Justice which authorized the targeted killing of a U.S. citizen abroad."[1] The Chairman asked Attorney General Holder to provide the Committee, even in the form of a classified session, with the details of the legal rationale that justified the Government's action to carry out a targeted killing of a U.S. citizen. In effect, the Chairman of the Senate Committee on the Judiciary requested that the Executive Branch, the branch that is tasked with the implementation and not the interpretation of the law, share the controlling legal decisions that underlay a crucial element of the Administration's national security strategy in the Global War or Terrorism.

The next year, in a letter to Eric Holder, Senator Ron Wyden called on the Administration to share legal opinions "pertaining to the executive branch's understanding of its authority to kill Americans."[2] While the DOJ consistently refused to declassify its legal opinions on targeted killings, senior intelligence officials, among them the Director of National Intelligence, Dennis Blair, had acknowledged that the "intelligence community takes direct action against terrorists"

---

[1] "Oversight of the U.S. Department of Justice," Pub. L. No. S. Hrg. 112-436, § Committee on the Judiciary (2011), https://www.govinfo.gov/content/pkg/CHRG-112shrg74542/pdf/CHRG-112shrg74542.pdf.

[2] Ron Wyden, "Letter to Honorable Eric Holder," February 8, 2012, http://www.wyden.senate.gov/download/?id=e3a981fa-fe49-44e0-9aa3-49133104e240.

and that "if we think that direct action will involve killing an American, we get *specific permission* to do that."[3] In his letter, Senator Wyden underscored the executive branch's "obligation to explain its interpretations of the law not just to Congress, but to the American public as well."[4] Wyden challenged the DOJ to release the relevant legal memoranda in order to ascertain that they would "withstand public and congressional scrutiny."[5] Not once did he insist, however, on a judicial determination of the President's space to act, or the co-equality of the other branches to weigh in on matters of life and death in the realm of national security. To the contrary, Senator Wyden reaffirmed the broad powers of the Executive in national security matters:

> To be clear, I am not suggesting that the President has no authority to act in this area. If American citizens choose to take up arms against the United States during times of war, there can undoubtedly be some circumstances under which the President has the authority to use lethal force against those Americans.[6]

In a subsequent paragraph, Senator Wyden posed several questions, probing into the Executive Branch's understanding of the power of the President to determine a U.S. citizen's membership in a terrorist organization, the ability of U.S. citizens to surrender before deadly force is used against them, the source of the President's authority to kill U.S. citizens, and the potential use of lethal force inside the United States. In the end, however, what appears to be his paramount concern regarding the Executive Branch's legal interpretations is not so much its ability to render such interpretations, but the secret manner in which those interpretations are rendered:

> Members of Congress need to understand how (or whether) the executive branch has attempted to answer these questions so that they can decide for themselves whether this authority has been properly defined. But it is impossible for elected legislators to understand how the executive branch interprets its own authority if the secret legal opinions that outline the Justice Department's understanding of this authority are withheld from Congress by the Administration.[7]

---

[3] Wyden, 2 emphasis added.
[4] Id. 2.
[5] Id. 2.
[6] Id. 2.
[7] Id. 2.

The institutional struggle delineated above implicates various issues of transparency, widespread secrecy, and the right of Congress to exercise its compulsory power over government agencies. More importantly for my purposes, however, neither Senator Leahy nor Senator Wyden raised concerns with what appears to be an odd exercise of executive power: the power to make authoritative interpretations of the law, both statutory and constitutional, and thereby set the boundaries of legitimate executive action.

This dissertation project is the first systematic study of the Executive Branch's use of Office of Legal Counsel (OLC) memoranda as unilateral power tools, and the structural developments that facilitate the use of such a legal instrument to achieve the President's policy goals in the specific context of national security crises. OLC memos are essentially "advisory opinions" (i.e., pre-decisional advice)[8] produced by the Department of Justice's Office of Legal Counsel. The former national political correspondent for Newsweek and author of *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, Daniel Klaidman, characterized OLC as

> the most important government office you've never heard of. Among its bosses – before they went on the Supreme Court – were William Rehnquist and Antonin Scalia. Within the executive branch, including the Pentagon and CIA, the OLC acts as a kind of mini Supreme Court. Its carefully worded opinions are regarded as binding precedent – final say on what the president and all his agencies can and cannot legally do.[9]

These opinions are far more than dry legal musings about the available juridical precedent that controls contemplated executive action. As James Pfiffner points out in his book *Torture as Public Policy*, OLC memos often amount to policy decisions: they do not only describe how the law operates, they also prescribe its operation.[10] This phenomenon piqued my interest in the

[8] As defined by Assistant Attorney General Virginia Seitz in the Foreword to the Supplemental Opinions of the Office of Legal Counsel.

[9] Daniel Klaidman, "Palace Revolt," *Newsweek*, February 5, 2006, https://www.newsweek.com/palace-revolt-113407.

[10] Professor Pfiffner refers to the memoranda related to enhanced interrogation techniques and the rights of detainees, but as I will argue later, his assessment holds up with respect to other OLC memoranda as well, *see*, James P. Pfiffner, *Torture as Public Policy: Restoring U.S. Credibility on the World Stage* (Boulder, CO: Paradigm Publishers, 2010), 115.

Executive Branch's use of legal memoranda and raised the following questions: Why is the Office of Legal Counsel able to prescribe the operation of the law? How do OLC memos operate?

In the chapters that follow, I will to systematically analyze OLC's legal opinions based on the empirical puzzle that inspired this dissertation project: the Bush administration's unilateralism and the use of OLC memoranda after 9/11. As the introduction above makes it clear, the use of OLC memos did not cease with the expiration of the 43rd President's term in office, and, as I shall demonstrate below, neither did this unilateral power tool originate in the Bush White House. The research question that animates this work addresses the gap that exists between the textbook presidency that puts the Executive Branch "at the peripheries of the lawmaking process" and presidential unilateralism.[11] The specific type of unilateralism that I am interested in is one in which the President renders authoritative legal interpretations that effectively set the boundaries of legitimate government action. So, based on the puzzle and the existing literature that seeks to reconcile the textbook presidency with its post-9/11 institutional behavior, three questions inform the focus of this dissertation: (1) Why do we see the Bush administration engage in a legal strategy activity after 9/11? (2) Were the Bush administration's legal opinions policy decisions? (3) If they were, were they *sui generis*?

THE LITERATURE

In 1960, Richard Neustadt penned the famous phrase: "Presidential power is the power to persuade." Since Neustadt's influential work on the limits of presidential power and the nature of presidential politics, students of the presidency have demonstrated that "*weak* [is not always] the word with which to start" when examining the powers of the Chief Executive.[12] In fact, presidents can flex their institutional muscles and exercise unilateral authority in a wide range of policy areas.[13] In the vein of these fairly recent developments in the institutional literature of

[11] William G. Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton, N.J: Princeton University Press, 2003), 8.
[12] Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*, 1. paperback ed (New York, NY: Free Press, 1991), xix.
[13] Howell, *Power without Persuasion*, 2003.

presidential power, I contend that presidents can rely on a "legal strategy" and draw on legal institutional resources to enhance executive power and/or to effect policy change.[14] In doing so, they can generously interpret, interpret away, and re-interpret existing statutory laws and constitutional strictures in order to avoid the transaction costs associated with the inter-branch institutional process. This study explores a henceforth neglected power tool in the toolbox of unilateral presidential powers, OLC memoranda, complementing a growing literature on executive orders,[15] national security directives,[16] presidential proclamations, and executive agreements. In short, I propose that given the right constellation of institutional circumstances, presidential power is also the power to interpret.

There is overwhelming evidence that, after September 11, 2001, the Bush administration took sweeping unilateral actions to counter the terrorist threat and to bolster presidential power along the way.[17] This behavior is in stark contrast with the textbook presidency as law executor, and with Neustadt's "Bargainer in Chief" model. The institutional behavior of the post-9/11 Bush administration prompted numerous political scientists, legal scholars, historians, and journalists to argue that the imperial presidency had returned;[18] and, in September 2005, the Presidential Studies Quarterly published an entire issue devoted to the "Unilateral Powers" of the Executive. A particularly interesting aspect of the administration's unilateralism was its use of a "novel" legal strategy to enhance executive power and to devise a response to the terrorist attacks while relegating Congress and the courts to the sidelines. This ostensibly anomalous behavior inspired a boom of scholarly and journalistic interest in the legal tools employed by the President to

---

[14] Richard W. Waterman, "The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory," *Presidential Studies Quarterly* 39, no. 1 (March 2009): 5–9 (The "legal strategy" is closely related to the administrative strategy).

[15] Kenneth R Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton, N.J.: Recording for the Blind & Dyslexic, 2003); Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action*, Second edition, revised and expanded, Studies in Government and Public Policy (Lawrence, Kansas: University Press of Kansas, 2014).

[16] Phillip J. Cooper, "Power Tools for an Effective and Responsible Presidency," *Administration & Society* 29, no. 5 (November 1997): 529–56.

[17] James P. Pfiffner, *Power Play: The Bush Presidency and the Constitution* (Washington, D.C: Brookings Institution Press, 2008); Andrew Rudalevige, *The New Imperial Presidency Renewing Presidential Power After Watergate* (Ann Arbor: University of Michigan Press, 2006), http://site.ebrary.com/id/10268962; Peter Margulies, *Law's Detour: Justice Displaced in the Bush Administration*, Critical America (New York: New York University Press, 2010).

[18] Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (Little, Brown, 2007).

unilaterally change the policy landscape. While scholarly attention predominantly focused on what David Adler calls "an expansive conception of the Commander-in-Chief Clause,"[19] much ink has been spilled over Bush 43's rampant use of signing statements and executive orders[20] as well. The peculiarly *legal* strategy exhibited by the administration sparked off a vibrant discussion about the Unitary Executive Theory,[21] and what Silverstein calls the Bush administration's "prerogative" claims in his book *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (2009).

Some scholars went as far as to argue that the post-liberal order of executive government is best understood in the terms of Carl Schmitt's political philosophy and declared the Madisonian separation of powers obsolete.[22] In their view, liberal legalism has little staying power in the modern administrative state. They claim that the "law does little to constrain the modern executive, contrary to liberal legalism's hope," whereas, "politics and public opinion do constrain the modern executive, contrary to liberal legalism's fears."[23]

For reasons that I will explain in the coming chapters, I disagree with Posner and Vermuele's argument that in the modern administrative state in general and in national security crises in particular the "law recedes… and the state [politics] remains."[24] In fact, I argue that Madisonian liberal legalism is alive and well; not in the sense of legislative government, but rather in terms of the role and the importance of the laws as the cornerstone and preeminent legitimating force of the American constitutional government. Instead of discarding the

---

[19] David Gray Adler, "The Law: George Bush as Commander in Chief: Toward the Nether World of Constitutionalism," *Presidential Studies Quarterly* 36, no. 3 (September 2006): 525–40; see also, Nancy Kassop, "The War Power and Its Limits," *Presidential Studies Quarterly* 33, no. 3 (September 2003): 509–29.

[20] Christopher S. Kelley, "The Unitary Executive and the Presidential Signing Statement" (MIAMI UNIVERSITY, 2003), https://etd.ohiolink.edu/ap/10?0::NO:10:P10_ACCESSION_NUM:miami1057716977.

[21] Amanda Hollis-Brusky, "Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000," *Denver University Law Review* 89, no. 1 (January 2011): 197–244; Ryan J. Barilleaux and Christopher S. Kelley, eds., *The Unitary Executive and the Modern Presidency*, 1st ed, Joseph V. Hughes Jr. and Holly O. Hughes Series on the Presidency and Leadership (College Station: Texas A&M University Press, 2010); Amanda Hollis-Brusky, "The Federalist Society and the 'Structural Constitution:' An Epistemic Community At Work" (PhD Dissertation, University of California, 2010), http://digitalassets.lib.berkeley.edu/etd/ucb/text/HollisBrusky_berkeley_0028E_10385.pdf.

[22] Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2010).

[23] Posner and Vermeule, 15.

[24] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, University of Chicago Press ed (Chicago: University of Chicago Press, 2005), 12.

separation of powers and checks and balances framework altogether, I attempt to tease out what caused the Bush administration's post-9/11 institutional behavior and how OLC's opinions figure into the peculiar type of unilateralism that we see under Bush 43.

To be sure, several scholars have argued on normative grounds for "presidential review"[25] "popular constitutionalism,"[26] or "extrajudicial constitutional interpretation;"[27] however, up to this writing, no one has attempted a historical institutional analysis of the real-world instances (rather than an exercise in abstraction) of executive legal review as a tool to achieve presidential policy goals. In order to be able to answer the research question, it is essential to look at whether the Bush administration's institutional behavior or "legal strategy" was in fact *sui generis.*

The role of structure vs. agency in determining political outcomes has been a subject of great debate in political science research. While this dissertation focuses on structural developments to explain variations and similarities in outcomes over time, agency-based theories have also been used to account for the Bush administration's institutional behavior in the aftermath of 9/11. Hollis-Brusky, for example, argues that it is the result of the political agency of a network of legal actors inside and outside the Executive Branch that can best explain the peculiar type of unilateralism, predicated on the legal theory of the Unitary Executive, that is associated with the Bush administration's post-9/11 behavior.[28] I do not discount agency in this study, instead, I hypothesize that the agency that is ascribed to the Federalist Society in Hollis-Brusky's work is enabled by structural transformations that originated with a critical juncture, and took hold over successive administrations, both Republican and Democratic. As I will explain below, this critical juncture is Watergate. If my hypothesis is correct, then we should see evidence of post-juncture administrations producing critical antecedent conditions for the next critical juncture, which I call the Bush administration's "juridified" executive unilateralism (or JEU, for short). Conversely, pre-juncture evidence (OLC memos) should exhibit clear and marked dissimilarities.

---

[25] Frank H. Easterbrook, "Presidential Review," *Case W. Res. L. Rev.* 40 (1989): 905–29.
[26] Mark Tushnet, "Popular Constitutionalism as Political Law," *Chi.-Kent L. Rev.* 81 (2006): 991–1006.
[27] Keith Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses," *N.C. L. Rev.* 80 (2002 2001): 773–852.
[28] Hollis-Brusky, "The Federalist Society and the 'Structural Constitution:' An Epistemic Community At Work."

In this dissertation project, I will answer the research question by (i) surveying structural/institutional developments that gave rise to Bush 43's legal strategy, by (ii) analyzing the Bush OLC's legal opinions to evaluate whether they were unilateral power tools, and (iii) by examining OLC memoranda from administrations pre-dating Bush 43 in order to shed light on the provenance of the Bush "revolution in the law." My hypothesis is that post-9/11 executive action is rooted in the institutional behavior of previous administrations that, in turn, can be seen as a response to the constraints imposed by the Watergate regime. To state my hypothesis differently: while the Bush administration clearly moved beyond precedent, its institutional behavior was not an aberration but rather a continuation of the practice of previous post-Watergate presidencies, including Democratic ones.

In this study, I use and substantially extend the theory of juridification into the area of executive politics. Juridification denotes a set of transformative processes that "comprise both legal regulation of new areas, with conflicts and problems increasingly being framed as legal claims, and penetration of judicial ways of thinking and acting into new fields."[29] Juridification of politics occurs with the transfer of decisionmaking authority and competence to legal institutions and the displacement of political conflict into the legal arena. Until very recently, research into the phenomenon of juridification was predominantly done in Europe; North and South American social scientists have focused almost entirely on a subset of juridification called judicialization, which I will discuss below. In 2009, in his book *Law's Allure*, Gordon Silverstein made a bold attempt at taking the epistemological leap from judicialization to juridification, only to stop short of actually transcending the North American state of the research. Nevertheless, in a chapter discussing the institutional dialog between the Executive Branch and the Judiciary over the war powers, Silverstein points out an important phenomenon that helps substantiate my hypothesis regarding the existence of a critical juncture: "thanks to the steady juridification of American politics in the years since World War II and especially in what Assistant Attorney General Jack Goldsmith refers to as the 'post-Watergate hyper-legalization of warfare, and the attendant proliferation of criminal investigation,' the Bush administration did not even consider the need

[29] Anne-Mette Magnussen and Anna Banasiak, "Juridification: Disrupting the Relationship between Law and Politics?," *European Law Journal* 19, no. 3 (2013): 325–339.

to make a political case for its actions."[30]

In short, my hypothesis regarding the juridification of executive politics is that the Watergate congressional resurgence formalized previously informally exercised powers, affected institutional power relations, the institutional behavior of all three branches, the concept of political legitimacy, and effectively re-calibrated the policy-making potential of legal actors within the Executive Branch. This structural transformation enabled a peculiar type of agency, "juridified executive unilateralism" (JEU), which, in turn, resulted in a feedback loop that nudged onward the structural transformation, creating a self-reinforcing cycle.

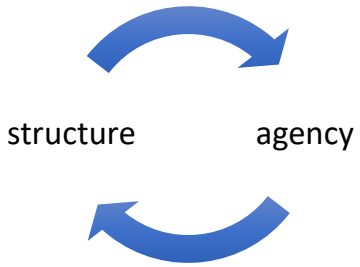


Diagram 1: Structure and Agency

THE JURIDIFICATION OF POLITICS – THE INSTRUMENTALIZATION OF THE LAW

The motto of Ferdinand I quoted at the beginning of this chapter aptly encapsulates the problem that this study sets out to investigate. At the highest level of generality, the Latin phrase "let justice be done though the world may perish" represents the dilemma that lies at the core of this dissertation project: politics as law, meaning, the juridification of executive politics and the instrumentalization of the law in the service of greater executive latitude in the setting of policy and the disposition of inter-branch conflict. The juridification of presidential politics, i.e., the dominion or pre-eminence of legal rationales, legal rules, and legal tools over "the political"[31] is the central theme of this dissertation project.

The importance of authoritative legal opinions to undergird political action cannot be

[30] Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge [UK] ; New York: Cambridge University Press, 2009), 229.
[31] Carl Schmitt's *das Politische*.

overstated in the context of U.S. politics. In fact, as Gordon Silverstein states, "law and politics cannot be disentangled in the United States."[32] While this may be true overall, in the next chapter I will argue that the relationship between politics and law is more complicated than Silverstein's characterization suggests. Based on systems theoretical considerations and the Blichner-Molander framework of juridification, I will demonstrate that politics and law are, in fact, separate autopoietic[33] systems; however, their interaction or structural coupling can and does produce unintended or distorted consequences for the political system as a whole. This is not to discount Silverstein's assessment of the structural relationship between politics and law, and, as a matter of fact, I will use his findings below as stepping stones in my investigation of the relationship between executive policy-making and juridification. However, I take issue with the normative statement that law and politics are necessarily or inevitably intertwined. I will argue, instead, that a series of institutional developments since Watergate have led to the structural coupling of law and politics in the sphere of executive politics, and that the Bush administration's handling of the GWOT is a direct consequence of the layering of those developments.

The relationship between legal interpretation by the Executive Branch and political action based on such interpretive activity is also examined in Christopher Kelley's doctoral dissertation, *The Unitary Executive and Presidential Signing Statements.* According to Kelley, "[t]he signing statement has been the black sheep of all the power tools, mostly overshadowed by the more high profile executive order, pocket veto, line-item veto, and presidential directive and memoranda. Nonetheless, what it shares with this literature is the rising reliance by presidents in the last thirty years, a reason I explain is connected to the rise of the Unitary Executive."[34] Similarly to executive branch constitutional and/or statutory judgments (i.e., Office of Legal Counsel memoranda), signing statements (in essence, line-item vetoes) also represent a shift in the constitutional order toward greater latitude for the Executive to define the boundaries of

---

[32] Id. *Law's Allure*, 2.

[33] David Seidl, "Luhmann's Theory of Autopoietic Social Systems," *Munich Business Research* 2 (2004): 2–3 ("Central to the concept of autopoiesis is the idea that the different elements of the system interact in such a way as to produce and re-produce the elements of the system… A living cell, for example, reproduces its own elements, like proteins, lipids, etc., they are not just imported from outside. […] A system's *operative closure*, however, does not imply a closed system model. […] Autopoietic systems are, nevertheless, also open systems: all autopoietic systems have contact with their environment (interactional openness).").

[34] Kelley, "The Unitary Executive and the Presidential Signing Statement," 183.

legitimate action[35] and to hamstring the effect of legislative enactments inimical to executive policy goals. While their application is patently different, both OLC's legal opinions and signing statements are essentially auto-interpretations of the President's own powers and Executive Branch determinations regarding the proper (legal binding) allocation of institutional authorities. According to Clement Fatovic, "in a liberal democratic society it is difficult – if not impossible – to justify any policy, program, or measure that lacks a solid basis in law. Whether sincere or not, everyone appears to accept that law is the only legitimate basis for government action."[36] Thus, since law in the liberal legal state is a self-legitimating system,[37] legal interpretations generate legitimacy for executive action.

A fundamental difference between Christopher Kelley's and my investigation is that he identifies the Unitary Executive Theory as a driving force of growing executive unilateralism, while I treat it as a symptom of an underlying structural transformation. As I will discussion below, I acknowledge the importance of the UET, however, I attempt to diagnose deeper structural mechanisms at work in what I call "juridified executive unilateralism," the Executive Branch's unilateral actions based on independent legal interpretive authority.

Why the use of legal interpretation? To start, as I noted above, law in the liberal legal state is a self-legitimating system, therefore, it creates legitimacy for government action. Given the contextual conditions provided by the juridification of politics, I will argue below, certain political issues become removed from the political arena and, thereby, legal rules, rationales, and resolutions come to supplant real-world political conflict.[38] If such juridified executive action (in essence, legal interpretation) is unchallenged by the coordinate branches, then the President's legal determinations, along with all practical political implications, effectively become controlling

---

[35] Jack Goldsmith calls this "executive auto-interpretation," *see*, Jack Goldsmith, "The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation," in *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*, ed. Clement Fatovic and Benjamin A. Kleinerman (New York: Oxford University Press, 2013).

[36] Clement Fatovic, "Settled Law in Unsettling Times: A Lockean View of the War on Terror," *The Good Society* 18, no. 2 (2009): 14.

[37] Id. ("These divergent appeals to the law exemplify to the seemingly incontestable equation of legality with legitimacy in liberal democratic societies.").

[38] Gunther Teubner, *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law* (Berlin; New York: De Gruyter, 1987), 8.

precedent. This is not to say, as some scholars have argued, that the "popular branch" of the executive renders the most appropriate interpretations of difficult or controversial legal questions.[39] To the contrary, in Justice Robert Jackson's aphorism, judicially or quasi-judicially reached legal conclusions are not "final because [they] are infallible, but [they] are infallible only because [they] are final."[40]

If we conceive of different types of legal interpretation as points on a spectrum, then "juridified executive unilateralism" and "judicial supremacy" would be at opposite extremes. Judicial supremacy inherently implies that the denizens of the federal bench are better suited to deliver impartial interpretations of the law than other actors in the constitutional system. Conversely, legal interpretation by politically motivated actors (such as those in the Executive Branch) cannot be said to be in search of an ideal or impartial "ultimate legal truth;" rather, it is in search of the "best understanding of the law," which often amounts to the expedient truth.[41] Despite the normative appeal of such a characterization, numerous scholars have pointed out that legal interpretation is inherently subjective, even if it claims to be based on originalist or textualist principles and spoken from a judge's bench.[42] In fact, legal realists claim that the *bouche-de-la-loi*, non-political interpretation of the law is an idealistic illusion.[43] Thus, judicial actors such as the Justices of the Supreme Court are also motivated by their political preferences when rendering legal decisions. Nonetheless, due to the imperatives that drive the Executive

[39] Tushnet, "Popular Constitutionalism as Political Law," 999–1000. ("What is distinctive about popular constitutionalism is that the courts have no normative priority in the conversation. For popular constitutionalists, it simply does not matter whether, or when, or how, the courts come to accept the constitutional interpretation offered by the people themselves. Sometimes the conversations will end with the legislature and executive, and the people, accepting the judges' decisions. But sometimes the conversations will end with the legislature or the executive going their own way, ignoring the imprecations hurled at them by the courts and supporters of judicial supremacy.")

[40] *Brown v. Allen*, 344 U.S., 443, 540.

[41] Bob Bauer, "Power Wars Symposium: The Powers Wars Debate and the Question of the Role of the Lawyer in Crisis," *Just Security*, November 18, 2015, https://www.justsecurity.org/27712/powers-wars-debate-question-role-lawyer-crisis/.

[42] See, e.g.: Jeffrey Allan Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, UK ; New York: Cambridge University Press, 2002).

[43] Terri Jennings Peretti, *In Defense of a Political Court* (Princeton, N.J.: Princeton University Press, 1999).

Branch, legal interpretations issued by the Office of Legal Counsel are, admittedly, far more susceptible to politically expedient standards.[44]

By extension of this logic, legal interpretation to achieve politically desirable real-world outcomes implies not only the juridification of the political, but, equally importantly, the instrumentalization of the law. While political action based on such legal determinations carries an air of legitimacy, juridified executive unilateralism, if unchallenged by the coordinate branches, inevitably alters the separation of powers and checks and balances, removes certain political decisions from the political arena, attenuates the connection between constituents and political actors, and narrows the space for collective action – taken to an extreme, "rule by law" supplants the "rule of law."[45] Also, it bears repeating, the exercise of such interpretive authority, when unchallenged by coordinate institutional actors, establishes the Executive Branch's ability and legitimacy to make such determinations.

CHAPTER OUTLINE

In the methodology chapter, I lay out the general methodological approach of this dissertation. In Chapter Three, I present the theory that undergirds my inquiry. My aim in the theory chapter is to create an analytical framework based on the juridification of politics within which OLC's legal interpretive activity can be analyzed and properly understood as an alternative form of policy-making. In operationalizing the analytical framework, I substantially rely on William Howell's observations regarding presidential direct action, Gordon Silverstein's study of the judicialization of politics in *Law's Allure*, as well as James Pfiffner's finding in *Torture as Public Policy* that OLC's interrogation-related memoranda are functional equivalents of policy decisions. In Chapter Four, I present the raw data as it emerges from the content analysis and provide some initial insights into the Bush OLC's legal opinions. Chapter Four, is the first of four empirical

[44] Although this has direct implications for the curb appeal of popular constitutionalism, executive review, and extrajudicial constitutional interpretation, my focus here is not to arbitrate the merits of those prescriptions of multi-institutional constitutional interpretation.

[45] David Dyzenhaus, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?," *Cardozo Law Review* 27 (August 21, 2008): 2029.

chapters. It analyzes four legal-policy areas (OLC's imposition of the war paradigm, domestic deployment of military force, capture and detention of enemy combatants, and the use of military commissions) in order to determine whether OLC's legal opinions can be said to have made policy in areas other than torture (which is the subject of James Pfiffner's study in *Torture as Public Policy*). Chapter Four does not address the area of foreign intelligence surveillance because Chapter Six deals with OLC's relevant legal arguments. Chapter Five continues, by means of deep contextual analysis, to inquire into the Bush OLC's use of legal arguments and authorities to effect policy change in in the realm of international law. It also explores the ways in which the Bush OLC uses international authorities to bolster presidential unilateralism. Chapter Six is a detailed examination of the Bush OLC's institutional powers jurisprudence. It explores those elements of the "Bush corpus" that address the President's institutional powers and competencies vis-à-vis the coordinate branches. Chapter Seven analyzes the Bush OLC's assertions of independent authority to interpret the laws and the extent of its recognition of judicial supremacy. Furthermore, it provides a typology of OLC's power tools, the various manifestations of OLC's quasi-judicial legislation. Finally, it answers the question whether the Bush OLC's institutional behavior is an aberration or a continuation of that of previous OLCs. Finally, Chapter Eight compares the "JEU markers" found in pre-Watergate memoranda to ascertain whether the critical juncture considerably affected the substance of OLC's memoranda. In the Conclusion, I address the troubling prospect of a governing arrangement in which rule by law effectively subverts the rule of law.

CHAPTER ONE

METHODOLOGY

Office of Legal Counsel memoranda are the principal source of data in this dissertation. I rely primarily on OLC's legal opinions related to national security and foreign policy from the George W. Bush administration. The Bush 43 memos examined in detail in Chapters Four to Six comprise all declassified OLC opinions related to the Global War on Terror. Post-Watergate OLC opinions of precedential value, i.e., cited in the Bush corpus, will be considered in Chapter 6 as examples of branch-internal *stare decisis*. They will be compared to the GWOT memos in order to determine the extent to which post-9/11 OLC practice was a continuation of that of previous administrations. Pre-Watergate memoranda will be analyzed in Chapter Eight. These are, in essence, my three case studies of the juridification of executive politics.

I have the benefit of hindsight in that the vast majority of Bush 43 memoranda were declassified by the Obama administration in 2009. This means that I can work with complete (or minimally redacted) OLC opinions and I have access to most of the legal reasoning produced after 9/11 that, I will argue, effectively determined the Bush administration's terrorism policies. Moreover, the Bush administration's uniquely *legal* strategy in the GWOT makes for a fecund case study.

Due to the dearth of systematically complied OLC memoranda from before 1977, when the Office began to publish its opinions, and given that only a limited number of pre-Watergate legal opinions have been declassified, the first volume of the Supplemental Opinions of the Office of Legal Counsel is the only window into pre-Carter era Executive Branch legal reasoning:[46]

> [This] volume allows us to fill [] gaps and make available to other government agencies and to the general public a significant number of legal opinions from a period when opportunities for publication were limited. It also allows us to make available opinions that for prudential reasons could not be published at or near the time of issuance. The vast majority of OLC writings are pre-decisional advice — they

[46] The first and only *Supplemental Opinions of the Office of Legal Counsel* was published in 2003.

> address the legality of contemplated action — and thus are covered by both the attorney-client and deliberative process privileges. Over time, the need for confidentiality may recede, and it may become possible to publish opinions that would not have been appropriate to include in the primary series of Attorney General and OLC opinions because of the proximity in time to the circumstances giving rise to the opinion requests.

Thus, given the limitations of available data, the pre-Watergate case study is based on fewer OLC opinions, and they are less systematically selected than the Bush memos.

This dissertation relies heavily on the case study method. George and Bennett define a case study as "the detailed examination of an aspect of a historical episode to develop or test [] explanations that may be generalizable to other events."[47] The purpose of Chapter 8 is the testing of the antecedent condition (large-scale juridification) to determine whether the effect of the critical juncture (Watergate) is demonstrable in OLC's legal opinions.[48] The purpose of my main case study (Bush 43) as well as of Chapter Seven, is hypothesis testing:[49] *Hypothesis 1*: the Bush administration's legal opinions are functional equivalents of policy decisions; *Hypothesis 2*: the Bush OLC's legal opinions are not an anomaly (they are an extension of the practice of previous administrations), although they do go beyond precedent.

While I postulate that the juridification of executive politics affects policy areas outside of national security and foreign policy, I have limited the scope of this project in order to ensure fairly uniform case conditions: (a) an event external to the political system sets off the crisis; (b) it is not unreasonable to assume that agency is present in all the case studies, i.e., the Executive Branch is a rational utility maximizer, especially given the role of the OLC and the scheme of government in which "[a]mbition [is] made to counteract ambition;"[50] lastly, (c) I have case

---

[47] Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences*, BCSIA Studies in International Security (Cambridge, Mass: MIT Press, 2005), 17.

[48] *Hypothesis 1*: the Bush administration's legal opinions are functional equivalents of policy decisions; *Hypothesis 2*: the Bush OLC's institutional behavior is not entirely anomalous, although it did go beyond precedent. See more on this in Stephen Van Evera, *Guide to Methods for Students of Political Science* (Ithaca: Cornell University Press, 1997), 73.

[49] Jack S. Levy, "Case Studies: Types, Designs, and Logics of Inference," *Conflict Management and Peace Science* 25, no. 1 (February 2008): 6.

[50] Alexander Hamilton et al., eds., *The Federalist Papers*, Oxford World's Classics (Oxford; New York: Oxford University Press, 2008), 257; William P. Marshall, "Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters," *BUL Rev.* 88 (2008): 505.

studies (pre-Watergate vs. Bush 43) with "extreme (high or low) values on the study variable. This lowers the number of third factors with the strength to produce the result that the test theory predicts, which lowers the possibility that omitted variables account for passed tests."[51] According to Van Evera, uniform case conditions provide solid controls for third-variable influence: "The uniform background conditions of the case create a semi-controlled environment that limits the effects of third variables by holding them constant."[52] Consequently, I have a rather strong test "whose outcome is unlikely to result from any factor other than the operation or failure of the theory," namely: the juridification of executive politics.[53]

I used MAXQDA to break down the data (OLC memos) into smaller but still meaningful units that can be used to flesh out the case studies.[54] The Codebook is included in the Appendix together with the corresponding commentary. The codes emerged as a result of the three-stage process of open, axial, and selective coding of the Bush memos. I apply the Bush codes (as much as possible) to the pre-Watergate case study in order to maintain cross-case consistency. The initial reading of the Bush 43 legal memoranda produced the following conceptual categories:

1. Use of authorities and arguments
    - Unilateralizing the response to the crisis
    - Interpreting international obligations
    - Distribution of institutional powers and obligations
2. Asserting Independent interpretive authority
    - Executive precedent as *stare decisis*
    - Interpretive equivalency/superiority
    - Incomplete court mimicry (original interpretations of the law)
    - Appraising options/Risk Assessment
    - OLC policy making (functional equivalent of "judge-made law")

In the empirical chapters below, I will report the results of my analysis in the form of "thick description," grounding my findings in "copious quotations from the principals" in order to "allow

[51] Van Evera, *Guide to Methods for Students of Political Science*, 53.
[52] Id. 52.
[53] Id.
[54] The complete codebook can be found in the Appendix.

the reader to evaluate the evidence without relying entirely on the author's own authority. It also provides a depth otherwise lacking in abstract concepts and content-analysis statistics."[55]

A few methodological issues concerning the limitations of textual analysis need to be addressed here. While content analysis is a useful quantitative method to analyze large volumes of data, its inferences are limited to the text only. Nevertheless, legal realists assert that judicial opinions can be used to make "empirical claims about the actual thinking and behavior of judges in deciding cases."[56] Yet, purely quantitative content analysis can miss the point. As Justice Holmes famously said, the law "is the painting of a picture – not the doing of a sum."[57] Thus, it is important to conduct conventional interpretive analysis as well, which I will do throughout this dissertation. For reasons that I will explain in the Theory chapter, the most straightforward way to analyze OLC memoranda is to regard them as activist judicial opinions – rulings with far-reaching policy consequences. Therefore, I will use the methods of traditional (interpretive) legal analysis: the close reading of opinions to see whether OLC engages in the equivalent of "judicial policy-making." Traditional case analysis is a three-step process: it examines the facts of the case, the law of the case (the legal principles the judge uses to decide the case and reach a particular outcome), and, lastly, the disposition (i.e., the decision). In the interpretive reading of the Bush opinions, I will focus on the intent of the government (facts), OLC's interpretive method (the law of the case), and the effect or policy outcome of the decisions (disposition in its broadest sense). Nevertheless, quantizing, forms an integral part of my investigation, in order to point out trends that emerge in single case studies as well as across case studies. As Hall and Write point out, "scholars have found that it is especially useful to code and count cases in studies that *debunk* conventional legal wisdom."[58]

An oft-cited critique of the textual analysis of judicial opinions is the "circularity of facts."[59] Simply put, the facts and reasons textually present in a judicial actor's decision might

---

[55] John Gerring, *Party Ideologies in America, 1828 - 1996* (Cambridge: Cambridge Univ. Press, 2001), 298.
[56] Mark A. Hall and Ronald F. Wright, "Systematic Content Analysis of Judicial Opinions," *California Law Review* 96, no. 1 (2008): 77.
[57] Susan-Mary Grant, *Oliver Wendell Holmes, Jr.: Civil War Soldier, Supreme Court Justice* (New York: Routledge, 2016), 149.
[58] Hall and Wright, "Systematic Content Analysis of Judicial Opinions," 2008, 84. (emphasis added)
[59] Id. 95.

deviate from real world facts and the actor's actual decisionmaking process.[60] Thus, while "the cynical legal realist might say that the facts the judge chooses to relate are inherently selective and a biased subset of the actual facts of the case," it is indisputable that "a judicial opinion is the judge's story justifying the judgment."[61] Indeed, OLC's choice of reasons and rationales is exactly what this study proposes to examine. "After all," as Hall and Wright point out, "the facts and reasons that a judge selects are the substance of the opinion that creates law and binding precedent."[62] Therefore, content analysis is especially useful in studying judicial method, or the way in which results are justified:

> [P]recision [is crucial in] setting the goals of study. Instead of predicting outcomes, content analysis is better suited to studying judicial reasoning itself, retrospectively. Scholars can use the method to learn more, for instance, about how results are justified. This study… is more relevant to legal scholars seeking a measurable understanding of substantive law or the legal process.[63]

Questions other researchers have pursued, and, indeed, ones this study also examines, "include the types of authorities judges cite in their opinions; [and] the argumentative, interpretive, or expressive techniques judges use in different circumstances."[64]

EXPLANATORY FACTORS AND STUDY VARIABLES

I will examine several explanatory factors that facilitate the reliance on a legal strategy to achieve desired policy goals and cause the accretion of constitutional and statutory interpretive authority in the Executive at the expense of the coordinate branches:

- The polarization of Congress
- Judicial under-enforcement
- The Constitutional Structure
- The presence of a critical juncture

---

[60] Id.
[61] Id. "Systematic Content Analysis of Judicial Opinions," 2008, 95. (quoting: Ann Juliano & Stewart J. Schwab, The Sweep of Sexual Harassment Cases, 86 Cornell L. Rev. 548, 558-559 (2001))
[62] Hall and Wright, 98.
[63] Id. 98.
[64] Id. 93.

- Agency (OLC's assertion of independent interpretive authority) leading up to Bush 43

I will also undertake the textual analysis of OLC memoranda to find evidence of OLC memos being authoritative legal interpretations and/or policy directives. I call the categories below "JEU markers;" they help show variance and/or covariance of the independent variable (juridification) and the dependent variable (JEU):

- Kind of question asked
- Complexity of decisions
- Constitutional vs. Statutory law interpretation
- International law/treaty interpretation
- Negative interpretation vs. positive interpretation
- Reinterpretation of authorities?
- Reference to previous "executive precedent"?
- OLC policy-making? (equivalent of judicial policy making)
- Complete vs. incomplete court mimicry
- Full recognition of judicial supremacy?
- Defining institutional power relations?
- One interpretation of the law vs. alternative avenues?
- Non-legal arguments?

Under condition of the juridification of politics, I expect OLC opinions to be more complex[65] and address quite specific legal questions about constitutional and/or statutory authority to act. In other words, I expect that multiple memos will deal with "lateral" issues within the same national security context. I expect to see more statutory law-related memos post- than pre-Watergate due to the legalization of institutional turf battles, and as a result of the broad framework statutes enacted by the Watergate Congress. I also expect mostly interpreting-away

[65] Admittedly, this a somewhat subjective measure. I will determine complexity based on the number and distribution of *Authority* coded segments and the number and distribution of *Legal Arguments* coded segments.

of statutory restrictions on the President, coupled with insistence on unilateral institutional powers. If OLC is an authoritative court-like law interpreter post-Watergate, then those legal memos should show evidence of the Office citing "executive precedent" as dispositive. In other words, I expect see to self-referential *stare decisis*-like reasoning, similar to a ruling by an Article III court. If OLC asserts coordinate interpretive authority, rather than sub-ordinate interpretive authority like a lower court, then I should see jurisprudential areas where OLC exercises original interpretation (not based on SCOTUS or other judicial precedent) and engages in incomplete court mimicry (departing from court precedent or relying on lateral precedent). If OLC asserts independent interpretive authority, then I expect to see "reinterpretation" of authorities, OLC policy-making, and adjudication of institutional power relations. Finally, since under the juridification of politics, OLC is not expected to operate under a fully actualized version of judicial supremacy, I expect to see multiple (alternative) avenues of legal reasoning, acknowledging the possibility that a court might overturn OLC's legal analysis.[66]

If JEU is absent, then OLC memos should essentially be advisory opinions. In other words, they do not adjudicate a "case" in the same vein as an activist court would legislate from the bench, rather they simply advise on the constitutionality/legality of contemplated action. Consequently, I do not expect to see "executive precedent" being dispositive; I expect predominantly constitutional law interpretation (pre-framework statutes); the decisions should be shorter (and, therefore, less complex); and they should not include assessments of risks posed by coordinate law interpreters. While I expect to see non-legal arguments, they are unlikely to be instances of OLC policy-making. Lastly, prior to the Watergate Regime-derived "turf battles," I expect no adjudication of institutional power relations when JEU is absent.

Complementing the content analysis, I will also perform in-depth interpretive analyses of the GWOT memos in order to test my hypothesis that the Bush OLC's legal opinions are functional equivalents of policy decisions. I expect that the explanatory factors and the parsing of OLC's opinions will answer my research questions and make an important contribution to the study of

[66] Regardless of departmentalist claims to the contrary, under a system of separated powers, the judiciary's interpretation of the law, if it exercises its review authority, has, traditionally, been respected by the Executive Branch. For more on this, see: Matt Ford, "When the President Defies the Supreme Court," *The New Republic*, April 24, 2018, https://newrepublic.com/article/148108/president-defies-supreme-court.

juridification in the heretofore untapped area of executive politics as well as to the study of presidential power of unilateral action.

CHAPTER TWO

THE THEORY OF JURIDIFIED EXECUTIVE UNILATERALISM

"Congress has ample authority to oversee Executive Branch programs and activities, and can inquire through the committee and Government Accountability Office oversight processes about the legal basis for Executive Branch decisions in the course of overseeing those programs and activities."

- "Constitutionality of OLC Reporting Act of 2008," Attorney General Michael B. Mukasey

"*The bill's requirements could deter the President and Executive Branch officials responsible for executing government programs, including especially highly sensitive programs, from soliciting the Department's legal advice for fear that the advice would trigger reporting obligations that could compromise a program and/or subject its legal assessment to unnecessary and damaging uncertainty or publicity… [it] would inevitably degrade the quality of the resulting legal advice and, thus, the integrity of the government decisionmaking to which it pertains. The bill would thus undermine, rather than advance, the public's interest in having Executive Branch officials, just like private parties, receive full, candid and confidential legal advice to ensure that they conduct the government's business effectively and in accordance with law*."

- "Constitutionality of OLC Reporting Act of 2008," Attorney General Michael B. Mukasey

The purpose of this chapter is to (i) consolidate the available literature on the juridification of politics in order to tease out the ways in which juridification has impacted the exercise of executive power in the post-Watergate era; (ii) to build a preliminary theory of how the executive can engage, benefit from, as well as cause the juridification of politics; and (iii) to flesh out the previously hypothesized importance of the critical juncture, Watergate. The ultimate goal of this chapter is to create an analytical framework within which certain juridico-political phenomena can be examined, namely: the legal interpretive authority of the executive branch and the use of

legal opinions as a unilateral executive power tool. I shall perform the following steps in this chapter: At the outset, I will review four conceptual categories of juridification as defined by Blichner and Molander. Then, I will discuss the systems theoretical relationship between the legal and political spheres and draw conclusions about their interactions. That will lead me to a brief discussion about the structure of the constitutional system that facilitates juridification. Next, I will delve into the questions of structure and agency. And finally, I will deduce from the available literature on juridification those aspects that are relevant to the study of what I call "juridified executive unilateralism" (JEU), and I will examine JEU in operation. In this chapter, I will set the stage for my later analyses of case studies that investigate the development and exercise of JEU.

This study relies on the pertinent European social science literature to add depth and breadth to a theory of juridified executive unilateralism as well as the instrumentalization of the law in the context of executive politics. It also complements the relevant literature in the United States by disentangling juridification from "judicialization," a term that is ubiquitously used in studies of courts and legal/constitutional development.[67] While judicialization is a useful concept to understand the role of courts in the policy-making process, it is a sub-category of juridification and cannot account for the phenomena that this study sets out to analyze. The proposition undergirding this study is that juridification affects not only social spheres,[68] and that it is not simply a driver or the consequence of judicial policy-making, but that it also has profound and potentially grave consequences for the growth of executive power, and concomitantly, inter-branch politics, legal interpretive authority, and ultimately, the rule of law.

I am going to use the available literature on judicialization and the juridification of inter-branch interaction in order to validate my proposition that executive politics has been affected

---

[67] See, e.g.: Ran Hirschl, "'Juristocracy' -- Political, Not Juridical," *The Good Society* 13, no. 3 (2004): 6–11, https://doi.org/10.1353/gso.2005.0020; Ran Hirschl, "New Constitutionalism and the Judicialization of Pure Politics Worldwide, The," *Fordham L. Rev.* 75 (2006): 721; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, First Harvard University Press paperback edition (Cambridge London: Harvard University Press, 2007); Tamir Moustafa, "Law Versus the State: The Judicialization of Politics in Egypt," *Law & Social Inquiry* 28, no. 4 (2003): 883–930; T. Vallinder, "The Judicialization of Politics--A World-Wide Phenomenon: Introduction," *International Political Science Review* 15, no. 2 (January 1, 1994): 91–99, https://doi.org/10.1177/019251219401500201.

[68] See, e.g.: Teubner, *Juridification of Social Spheres*, 1987; Jürgen Habermas, *The Theory of Communicative Action* (Boston: Beacon Press, 1984); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT Press, 1998).

by juridification. Or, to put differently, that executive politics has become juridified. I will then tease out the reasons for this juridification. I maintain throughout my analysis, however, that political actions, though they may become juridified, never lose their political character, but, rather, rationales, rules, and processes that are associated with the legal system are transposed to or superimposed on the political process. In effect, this superimposition, confers upon political decisions an air of legitimacy, while at the same time removing certain kinds of political conflict from the political arena, which represents a form of "arena-shifting."[69] I also acknowledge the importance of political agency in the study of juridification, thus, I point out the political motivation behind stimulating this transformative process to change the context within which (executive) politics is exercised.

In this chapter, I ask two questions that are intimately related to the overall goal of this study: What is juridification? And, secondly, how does juridification affect executive politics?

WHAT IS JURIDIFICATION?

Blichner and Molander have produced the most comprehensive exegesis of the descriptive content of the concept of juridification to date.[70] According to their compendium of five strands of juridification, "judicialization" is only one facet of the aggregate concept. Scholars of constitutional courts have demonstrated that, due to the widespread emergence of constitutional supremacy and the vesting in constitutional courts of the ability to review legislative and executive actions, tribunals all over the world have gained powerful competencies to arbitrate, and essentially decide "core moral predicaments, public policy questions, and political controversies."[71] The study of courts and judicial means to address such issues is an

[69] Matthew Flinders and Jim Buller, "Depoliticisation: Principles, Tactics and Tools," *British Politics* 1, no. 3 (November 2006): 293–318.

[70] Lars Chr. Blichner and Anders Molander, "Mapping Juridification," *European Law Journal* 14, no. 1 (December 19, 2007): 36–54.

[71] Hirschl, "New Constitutionalism and the Judicialization of Pure Politics Worldwide, The," 721; See also: (worldwide) Martin M. Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford ; New York: Oxford University Press, 2002); (Australia) Reginald S. Sheehan, *Judicialization of Politics: The Interplay of Institutional Structure, Legal Doctrine, and Politics on the High Court of Australia* (Durham, N.C: Carolina Academic Press, 2012); (Latin America)

important endeavor, however, it represents but one area of the larger reality of the juridification of politics. In order to tease out those aspects of juridification that are most relevant to the executive branch, I will first use the Blichner-Molander (BM) framework to extract four categories of juridification that will then be further developed in this chapter.

Blichner and Molander identify legal-political transformative processes, some of them quantitative others qualitative changes, that individually or in combination produce the phenomenon of juridification. The table below sums up four of the five categories identified in the BM framework. I will omit the fifth category because it is immaterial for the current discussion. The four categories are individually labeled A, B, C, and D – these labels will be used throughout this discussion.

Qualitative change	**Quantitative change**
Expropriation of conflict (C)	Accretion of power in the Judiciary (D)
Constitutive juridification (A)	Legal proliferation (B)

Table 1: The BM Categories

Using the categories from the table above, we can model various forms of juridification specific to the United States:

- The enactment of the constitution is the archetype of juridification A, i.e., "constitutive juridification." The constitution establishes procedural rules (policy-making process), content rules (or perimeters of political power and individual liberties), and institutional rules (that vest competencies in various parts of the political system). Prerogative power, the claim of executive authority to act outside the bounds of established legal rules, due to its nature, falls outside of the scope of juridification A.
- The fundamental means of administrating the affairs of the polity, according to classical political theory, is the legislative output of Congress. "Democratic political activity depends

Alan Angell, Rachel Sieder, and Line Schjolden, *The Judicialization of Politics in Latin America* (Basingstoke: Palgrave Macmillan, 2009).

on the representative legislature being able to make formally binding decisions that are… *de facto* implemented."[72] Juridification B (legal proliferation) entails an increase in formal rules and individual rights. This political juridification may strengthen democratic participation by "equip[ping] individuals with the necessary recourses to act politically, and well-defined rights might strengthen the autonomy of citizens.[73] Formal rights result in better predictability, they inform citizens about the claims they can make and the results they can expect.[74] Regulations issued by executive agencies are also frequently cited examples of "legal explosion."[75] Lastly, an example that also implicates juridification D is judicial policy-making. While it is conceptually distinct from classical lawmaking or rule making, judicial policy-making also represents a form of legal proliferation. Although it is Congress that traditionally makes laws, the courts likewise set public policy, resulting, in the aggregate, in the enormous quantitative growth of the body of laws that regulates the social, political, and economic life of the polity.

- Juridification C, conflict resolution with reference to law, is the topic of much of Ran Hirschl's scholarship. A not-so-classic and somewhat controversial example of juridification C is the judicial resolution of the 2000 presidential election culminating in the Court's decision in *Bush v. Gore*. This represents, in Teubner's words, the expropriation of political conflict by the legal system.[76] I will consider this point in more detail below.
- The Supreme Court's 1803 decision *Marbury v. Madison* is an example of juridification D, meaning increased judicial power. In that landmark case, the judiciary asserted its implied mandate to review legislative and executive acts for their constitutionality. Alternatively, this might also be considered juridification A, as it effectively changed institutional arrangements and shifted the balance of institutional powers. Ran Hirschl's article "The New Constitutionalism and the Judicialization of Pure Politics Worldwide" presents examples of constitutional courts flexing their judicial muscles to settle political conflicts and decide

[72] Magnussen and Banasiak, "Juridification," 330.
[73] Id. 330. "legal explosion" is a synonym for juridification B.
[74] Id. 331.
[75] Teubner, *Juridification of Social Spheres*, 1987.
[76] Id.

questions that, in a non-juridified, purely political sense, properly belong to the purview of national lawmaking majorities. The latest strand of court research has argued that governing coalitions in power seek to "transform or fortify the policy-making bias of the federal judiciary so that it is in a position to represent the goals of that coalition even if they lose control of Congress or the presidency."[77] Thus, juridification D can be the result of the conscious effort of governing coalitions to effect partisan entrenchment.

The above categories are far from airtight. They do bleed into one another creating parallel or intermingled processes. In order to demonstrate the descriptive utility of the foregoing categories and the concept of juridification in general, let us model the growth of the administrative state – a state-internal transformative process that is tightly bound up with juridification. Using the BM framework, the accretion of policy-making power in the judiciary due to the growth of the administrative state can be modeled as such:

$(-J_A; +J_B) \rightarrow +J_C \rightarrow +J_D$

A broad-brush explication of the formula is as follows: negative juridification A represents the weakening of institutional arrangements prescribed by the Constitution. This is due to the introduction of new governing structures largely based on Congress's delegation of its lawmaking authority to administrative agencies, resulting in the gradual flight of lawmaking authority from the legislative branch and the growth of rulemaking by the expert bureaucracy. The delegation of congressional power to the bureaucracy is coupled with the legal explosion ($+J_B$) that characterizes the growth of the administrative state and the period of modern state building in the United States that lasted from roughly 1955 to 1977.[78] The proliferation of regulatory laws went hand in hand with the referral of conflicts arising under the newly enacted framework statutes to the judiciary ($+J_C$) and administrative courts ($+_aJ_C$ or alternative juridification C) for

[77] Ronald Kahn and Kenneth Ira Kersch, eds., *The Supreme Court and American Political Development* (Lawrence, Kan: University Press of Kansas, 2006), 139.
[78] Paul Pierson and Theda Skocpol, *The Transformation of American Politics Activist Government and the Rise of Conservatism* (Princeton: Princeton University Press, 2007).

arbitration and resolution. This increased adjudicatory function, in turn, resulted in the overall growth of judicial power or the power of court-like conflict-dispositive bodies ($+J_D$).

Like I noted above, the BM model is a purely descriptive characterization of the multifarious process of juridification. Although it is useful in that it provides reliable analytical categories to study juridification, it does not readily lend itself to the construction of a theory that can critically examine transformative juridico-political processes anchored in juridification. What is clear from the examples offered above, however, is that juridification implicates legal *and* political developments in the specific context of the United States. In order to analyze these changes, I will build on the BM classification scheme by extending the above-discussed categories, and complement them with systems theoretical perspectives.

Operationalizing the BM Framework: Source and Consequence

At the outset of this chapter, I proposed to investigate two aspects of juridification, namely: what it *is* and what it *does*. In order to answer the latter inquiry, it is essential to look at why and how juridification happens. Blichner and Molander's categories give a broad overview of juridification but they cannot account for specific issues examined in this dissertation: juridification engendered by the Watergate congressional resurgence, the ensuing structurally determined path dependency, and further juridification motivated by Executive Branch actors in the surveyed case studies. Therefore, I am going to operationalize the BM framework by adding the analytical categories "source" and "consequence." When applied to the specific context of the United States and to the specific juridico-political puzzle that animates this dissertation, each BM category can, by extrapolation, be used to account for observable knock-on effects between the political and legal spheres. I will proceed in alphabetical order of the labels attached to each of the BM categories.

Constitutive juridification (J_A), according to BM, is the process whereby the norms and procedures of the constitutional system are established. It is, however, by no means a one-off occurrence that fizzles out as the constitutionalization process is "accomplished." In fact, as I expound below, the constitutional system of the Unites States is characterized by weak

institutional checks that make power-redistribution in the state possible and probable without necessitating a formal amendment of the Constitution. Thus, power-redistributive currents within the state effectively recalibrate governing arrangements, resulting in either positive or negative juridification A, i.e., the formalization or the de-formalization (meaning: weakening) of institutional powers. An example that I will pick up later for a more detailed analysis is the post-Watergate congressional resurgence that formalized previously informally exercised presidential powers by constructing a quasi-constitutional regime to control institutional interaction and alter the institutional balance of powers. This episode of modern large-scale constitutive juridification was initiated by the Congress (*source*) and it was based on fortified Congress-centric checks and balances. It proceeded through the enactment of framework statutes that were intended to hamstring the imperial presidency that was seen as upending the Madisonian constitutional equilibrium. I argue that constitutive juridification, i.e., legal (or constitutional) regulation establishing procedural rules, content rules, and institutional rules, was activated by the Legislature, and, in turn, it affected the way inter-branch politics plays out (*consequence*). Later in this chapter I will discuss the consequences of this constitutional corrective and the repercussions of the juridification of executive politics it precipitated.

The law's expansion and differentiation, or juridification B, describes the growth of the density and complexity of laws. It stands to reason, however, that the proliferation of laws, and the social, economic, and political activities governed by legal regulation are a result of social and political demand for more laws (*source*).[79] Thus, the mushrooming of the legal sphere and its invasion of the contiguous political, social, and economic spheres, are motivated by political actors. It is important to point out that the source of juridification B is not exclusively the legislative body. Alternative sources of juridification B in the U.S. political system such as the courts (judicial policy-making) and the executive (executive orders, national security directives, etc.) create a variegated and overlapping fabric of intermeshed statutory, regulatory, and constitutional policies. It is also important to note, and this theme will return later in this chapter, that the implication of extensive legal regulation and formalization is that political decisions

[79] Silverstein, *Law's Allure*; Teubner, *Juridification of Social Spheres*, 1987.

become stabilized (or fixed). This stabilization creates rights-claims and, consequently, increases the space in which legal claims can be made (*consequence*). This represents a feedback loop to juridification C.

It is tempting to see J_C, conflict resolution with reference to law, or the expropriation of political conflict by judicial actors, as a process that involves only, or primarily, the judicial branch. However, as this study seeks to demonstrate, the Executive Branch actively participates in the juridical resolution of political conflict by branch-internal means, without involving the Judicial Branch in the process. On the "consequence" side of J_C, we find the phenomenon of depoliticization. Depoliticization will be discussed together with the instrumentalization of the law below. For now, suffice it to say that depoliticization is a consequence of the expropriation of political conflict as it becomes regulated by legal norms and procedures. In other words, previously political conflicts are absorbed into the legal sphere (or the legal system but not in the sense of the judicial branch), removing from the political arena certain types of political conflict: an example of arena-shifting. Potential sources of J_C are J_B and J_A (the legal sphere), and the temporal extension of partisan representation (or partisan entrenchment) on the federal bench (political sphere).

Juridification D, the accretion of power in the judiciary, is also narrowly defined in the BM framework. My contention is that it is not only the judiciary but also legal decisionmaking bodies in the Executive Branch that monopolize important legal interpretive powers in the setting of constitutional and statutory policy. This means, in effect, the accretion of interpretive authority outside the judiciary. One important source of this, I will argue below, is judicial "underenforcement" of constitutional principles[80] and the ability of the executive branch to "litigate" legal conflict endogenously. The consequence of J_D is that such legal actors can make decisions about an increasingly wide range of political issues, thus enervating the political process in favor of legal resolutions that require little to no citizen participation.

In this section, I demonstrated that the BM categories describe transformative processes that do not happen in a vacuum, but rather as a result of the interaction of the separate spheres

[80] Cornelia Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands," *Michigan Law Review* 103, no. 4 (2005): 692.

of law and politics. According to Magnussen and Banasiak, "changes in the relationship between law and politics are important indicators of changes in a society's normative foundation and division of powers."[81] There are certain "transformative points in history," or critical junctures, in which the institutions of law and politics "can come into direct competition."[82] It is during these times, as I will show below, that the *modus operandi* or values associated with one system are transposed to another:

> The relationship between law and democracy can, thus, be perceived as a struggle over institutional identities and institutional balances [institutions referring to "law" and "politics"]. Reallocation of power… has influence on political decisionmaking on the societal level, and on individuals' possibilities for and motivation to participate in both individual and collective action. If the law is strengthened to a degree that little space is left for politics, or if politics is strengthened to a degree that little space is left for the law, democracy will be undermined. This means that in certain situations, either politics or law can be strengthened in such a way that the criteria for what is good or bad come solely from one sphere of society. On the other hand, changes in the relationship between law and politics might be necessary in the search for innovative solutions to contemporary challenges.[83]

***

Although this study is not conducted at the high level of abstraction that characterizes systems theory, it is, nonetheless, illustrative to draw on systems theory here to showcase the necessity of extending the BM categories to include the dimensions "source" and "consequence." These analytical categories presume that juridification is a phenomenon that involves the separate spheres of politics and law and that their interaction shapes the participating spheres in significant ways. Indeed, systems theory is derived from observations regarding living self-sufficient organisms that interact with each other and their environment and adapt their behavior as a result of such interaction. Systems theory, as applied to the social sciences, holds that the political and the legal systems in the liberal legal state are "autonomous self-referential

[81] Magnussen and Banasiak, "Juridification," 329.
[82] Id. 329.
[83] Id. 329.

social systems" that can influence each other by way of perturbation, i.e., they "reciprocally trigger self-regulating [or compensating] processes."[84]

This study is concerned with changes in the legal system to the extent that they can be said to engender, by way of a knock-on effect or sphere-interaction, changes in the contiguous political system and *vice versa*. For example, as I noted above, while the concept of "legal explosion" refers to a measurable change in the expansion and differentiation of the law, I am interested in this form of juridification only insofar as it is the result of co-evolutionary changes in the contiguous political and legal spheres. For this reason, my definition of juridification is necessarily limited to those developmental processes that have an observable impact on legal *and* political institutions and the actors that populate those institutions.

This study presumes that the legal system has affected the political system through mutual influence. The iterated interaction between the legal sphere and the political sphere that produces behavioral changes in both affected systems is referred to as "structural coupling." By definition, structural coupling refers to structure-determined as well as structure-determining engagement of a given unity with another unity. Systems theory holds that systems that participate in structural coupling engage in reciprocal perturbation. The plastic systems of law and politics, while exogenous to one another, mutually impact each other by being, conterminously, both the source and target of perturbation. According to Varela, structurally coupled systems "will have an interlocked history of structural transformations, selecting each other's trajectories."[85] In the context of this study, the structural coupling of the political and legal systems is due to a "history or recurrent interactions leading to the structural congruence between two… systems."[86] I argue that the intertwined nature of law and politics in the United States and the specific puzzle that animates this inquiry is a result of such co-evolution.

Structural coupling engenders behavioral adaptation as the participating systems reciprocally serve as sources of compensable perturbations for each other. "Compensable"

---

[84] Teubner, *Juridification of Social Spheres*, 1987, 21.

[85] Bob Mugerauer, "Maturana and Varela: From Autopoiesis to Systems Applications," in *Traditions of Systems Theory: Major Figures and Contemporary Developments* (New York: Routledge, 2014), 160.

[86] Humberto R. Maturana and Francisco J. Varela, *The Tree of Knowledge: The Biological Roots of Human Understanding*, 1st ed (Boston: New Science Library, 1987), 75; John Mingers, "The Cognitive Theories of Maturana and Varela," *Systems Practice* 4, no. 4 (August 1991): 319–38.

means that neither coupled system is perturbed beyond a point where the system ceases to be a functional whole. This is the reason why I reject Posner's "Schmittian" postulation that in the modern administrative state the law falls by the wayside and the only source of legitimacy is that associated with plebiscitary democracy. Although the political and the legal spheres remain functional wholes, this does not rule out that certain elements of one system will be transferred to the other, or that certain characteristics of the *modus operandi* of one system will be transposed to the other.[87] This, in turn, results in the structural congruence of both systems or the transference of behavioral characteristics from one coupled system to the other. Thus, structural coupling engenders changes that result in the transposition of logics, rationales, legitimacy, etc., from one sphere to another. Put differently, the otherwise autopoietic and self-referential legal sphere impacts the contiguously located but likewise self-reproducing political sphere and *vice versa* in a way that altered/alternative legal and political processes and governing structures emerge.

In the context of US politics, this means that the political and legal spheres interact in a way that legal arguments, processes, and rationales come to serve a legitimating function in the political arena of inter-branch conflict. This arena-shifting, expressed in the language of the BM framework means that the mutual perturbation of the legal and political systems triggers juridification A in the sense that alternative institutional, procedural, and content rules emerge that favor juridified forms of conflict resolution. Furthermore, juridification C is activated as political conflict resolution shifts to judicial or quasi-judicial actors with legal processes and rationales of conflict-resolution trumping or obviating conflict-management in the real political world. Juridification B is the result of the layering of institutional expressions of legitimate juridico-political action from different constitutional and statutory expositors and decision-makers. And lastly, juridification D manifests itself in the accretion of interpretive authority in conflict-dispositive bodies of a judicial or quasi-judicial character.

This theoretical digression was necessary to introduce my hypothesis regarding the juridification of the political, namely, that juridification creates a self-reinforcing spiral of

[87] Seidl, "Luhmann's Theory of Autopoietic Social Systems" ("interactional openness").

dependency on legal resolutions to political problems. In other words: solutions to political problems of institutional interaction and institutional boundary-management are not sought in the "real social [or political] world" but rather in the "illusory world of legal concepts and procedures."[88] I will argue later that this is so due to the institutional architecture that was enacted by the Watergate Congress, the critical juncture, as well as the utility-maximizing political agency of the actors inhabiting the Executive Branch.

JURIDIFICATION OF THE POLITICAL

Having extended the BM categories, let us now turn to the effects of the juridification of politics as a general matter. In the language of systems theory, juridification of the political means that through perturbation of the political system by the legal system, the former acquires characteristics of the latter. Simply put, politics weakens, and the law strengthens. Juridification of the political is defined by Magnussen and Banasiak as "the reallocation of more power, for example to judicial institutions, or the penetration of juridical ways of thinking and acting to new areas in the society."[89] This entails, at a minimum, the following:

(1) The depoliticization of certain issues that normatively belong to what classical political theory associates with representative democracy such as legislatures and elected politicians. Depoliticization, according to Flinders and Buller is a "range of tools, mechanisms and institutions through which politicians can attempt to move to an indirect governing relationship and/or seek to persuade the demos that they can no longer be reasonably held responsible for a certain issue, policy field or specific decision;"[90]
(2) Political decisions become fixed and not easily changed. As noted earlier under juridification B, the expansion of legal rights and regulations creates *de jure* norms and expectations that limit the space of future decisionmaking;

[88] Teubner, *Juridification of Social Spheres*, 1987, 8.
[89] Magnussen and Banasiak, "Juridification," 332.
[90] Flinders and Buller, "Depoliticisation," 295–96.

(3) Thus, the space for collective action is narrowed;
(4) Political decisions and/or the review of political decisions are transferred to autonomous or quasi-autonomous, unelected institutions. According to Magnussen and Banasiak, "democratic politics are weakened if this transfer implies that decisions cannot be altered, or that the chain of governance and responsibility between the citizens and their representatives becomes too long or too weak;"[91]
(5) Independent or quasi-independent unelected institutions become responsible for the content and quality of large areas of decisionmaking that previously belonged to democratic politics;
(6) Since legislative formulations tend to be rather vague and abstract, legal interpretive bodies have broad discretion to construe legislative acts.

In sum, juridification of the political changes the quality and locus of decisionmaking, transferring important public debates to unelected decision-makers, making collective action less effective and thus less probable, and thus renders decisions permanent and difficult to renegotiate. I will now turn to how all this pertains to executive politics.

WHY DOES THE JURIDIFICATION OF EXECUTIVE POLITICS HAPPEN?

In this section, I will set forth some hypotheses as to why the structural coupling of law and politics is a result of (i) the constitutional setup, (ii) the perception of politics and legitimate government action, and lastly (iii) political agency. I will argue that due to the highly permeable separation of powers in the United States, the legal and political spheres are likely to become structurally coupled and to impact each other in their separate spheres. This provides the necessary condition of juridification of politics that enables JEU. Subsequently, I will also contend that while the agency of political actors has greatly contributed to the juridification of presidential politics after Watergate, agency alone cannot account for the rise of JEU.

[91] Magnussen and Banasiak, "Juridification," 332.

Silverstein's remark in *Law's Allure* that in the United States law and politics are inextricably intertwined is evocative of Alexis de Tocqueville's famous observation that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[92] While this statement is largely true, the segue from "political" to "judicial" denotes not only juridification D in its narrow sense of increased judicial power. Instead, it must be viewed in the broader sense of the juridification of political conflict (J_C) as well as in the sense of my definition of juridification D, i.e., the accretion of conflict-dispositive quasi-judicial authority in any branch of government that can make an authoritative claim to constitutional and statutory interpretive authority ($_aJ_D$). The Office of Legal Counsel within the Department of Justice is such a locus of accretion of legal interpretive authority.

Structural Explanation of the Multi-Causal Process of the Juridification of Executive Politics

I will now attempt to provide a more or less exhaustive list of the structural reasons for the juridification of politics, especially as it regards presidential politics. I will refer to constitutional vagueness, the dispersion of governmental powers by the constitution, the multiplicity of access points to the political process, the permeability of the separation-of-powers system, and the inadequacy of institutional checking.

Constitutional vagueness is a major driver of power-redistribution within the state. Edward Corwin's classic on presidential power, *The President: Office And Powers, 1787–1957*, opens with the following *obiter dictum*: unlike the legislative and judicial powers, the executive power "is still indefinite as to function and retains, particularly when exercised by a single individual, much of its original plasticity as to method."[93] In his functionalist approach to separation-of-powers issues, Justice Jackson also recognized that government power is fluid and

[92] Alexis de Tocqueville, *Democracy in America*, ed. Phillips Bradley, trans. Henry Reeve and Francis Bowen, Vintage Classics (New York: Vintage Books, 1990), 280.
[93] Edward S. Corwin et al., *The President: Office and Powers, 1787-1984: History and Analysis of Practice and Opinion*, 5th rev. ed (New York: New York Uni. Press, 1984), 3.

that the separate branches negotiate constitutional space dynamically. Thus, fluctuations in the power of the branches are permissible as long as each branch "retains its truly core functions" and the ability to "check and balance power grabs by other branches." In unclear cases, Jackson wrote, "practical considerations matter in what the Constitution allows and prohibits."[94] At the outset of his concurring opinion in *Youngstown v. Sawyer*, Justice Jackson clearly stated that functionalism rather than formalism is the most tenable approach to separation of powers issues:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[95]

In common law terms, functionalism recognizes "adverse possession" of powers. Adverse possession is the process whereby one branch can gain "constitutional real estate" by use rather than by design. In other words, the trespasser becomes the property owner: if a branch takes over and retains for an extended period of time a certain power unchallenged by the coordinate branches, then it can be fairly assumed that the usurpation is condoned and, therefore, functionally legitimate. Hence, according to functionalism, we look at how the branches have been functioning and what works practically, as opposed to what the Constitution explicitly states. Functionalism, in Justice Frankfurter's words, recognizes that "it is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[96] Accordingly, executive unilateralism is "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress [or the Judiciary] and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government… a gloss on 'executive Power' vested in the President by § 1 of Art. II."[97] In the language of juridification, the vaguely drawn U.S. Constitution allows for conditions in which the

---

[94] Richard H. Fallon, *The Dynamic Constitution: An Introduction to American Constitutional Law* (New York: Cambridge University Press, 2004), 176.
[95] *Youngstown v. Sawyer*, 343 US 579, 635 (1952) (Jackson, J. concurring).
[96] Id. 610 (Frankfurter, J. concurring).
[97] Id.

absolute value of J_A (constitutive juridification) rarely approaches zero, i.e., it is an on-going process and state-internal power continuously reallocates without formal constitutional amendments. This makes for fluid institutional power-relations.

Unlike many other scholars of the Constitution, I do not contend that the founding document created sovereign inviolable spheres for each branch. Thus, strict separation can only be said to be consistent with the constitutional design to the extent that a strict separationist claim by one branch is unopposed by the co-ordinate branches due to unwillingness or inability to do so; this being an instance not so much of strict constitutional separation as the inadequacy of institutional checking. This is consistent with Madison's famous observation that the dispersion of powers, guarded by the separation-of-powers system and the attendant checks and balances, or "parchment barriers," does not guarantee that one branch will not attempt to dominate the other two. "Ambition" set against "ambition" is Madison's prescription to ensure that no one branch of government can dominate the others. "The interest of the man must be connected with the constitutional rights of the place" (Madison, Federalist 51): this is a common-sense formulation of the rational utility maximization of one branch counteracting the (potential) incursions of another and maximizing its ability to see desired policy goals implemented. As I will discuss below, the Executive Branch is best equipped institutionally to engage in unilateral action and to relegate the rest of the institutional system to a reactive position.

The Constitution establishes a political system in which most governmental powers are divided and shared.[98] Due to the separation of powers and checks and balances design of the constitution, not only the legislative and executive, but also the judicial power is dispersed: a degree of legal interpretive function is tacitly assigned to each branch.[99] Dispersed interpretive

---

[98] *See*, Federalist no. 47; Richard M. Pious, "Inherent War and Executive Powers and Prerogative Politics," *Presidential Studies Quarterly* 37, no. 1 (March 2007): 75 (Madison observed that 'if a *complete* separation of power were achieved (so that Congress exercised all legislative power and only legislative power, and the president exercised all executive power and only executive power, and the Supreme Court and the lower courts exercised judicial powers and only judicial powers), the institution assigned all legislative power would be so powerful it would suck the other institutions into the 'legislative vortex.' […] How to prevent the erosion of separation powers? … [F]irst, provide the politicians in the three departments the motivation to protect their prerogatives; second, provide 'interior contrivances' such as the council of state for the executive (never adopted) and bicameralism in the Congress; and third, replace *complete* with *partial* separation of powers.").

[99] For more on this, see: Harold H Bruff, *Untrodden Ground: How Presidents Interpret the Constitution* (Chicago: University of Chicago Press, 2016).

power gives rise to a multiplicity of constitutional and statutory law interpreters with various degrees of interpretive legitimacy. Although many scholars of the courts argue that the Supreme Court and the federal judiciary enjoy interpretive supremacy,[100] this does not mean that the other branches are devoid of legal interpretive competence or that they do not actively engage in constitutional or statutory interpretation. As a matter of fact, Whittington and others have pointed out that judicial supremacy is politically constructed as an attempt at the temporal extension of partisan representation. Thus, the institutional deference to the Judiciary is not directly prescribed by constitutional precepts.[101] The question arises then, how can the coordinate branches represent extra-judicial legal positions?

The notion that the Executive has a mandate to interpret the laws (whether constitutional or statutory) is neither new nor all-too controversial. Akhil Reed Amar, among others, argues that the president as "Chief Magistrate" has the power under the presidential Oath Clause and the Take Care Clause as well as the Article VI Oath Clause, to interpret proposed legislation (and proposed executive action) for its constitutionality.[102] The "absolute negative," the presidential veto, is another case in point. Consequently, the President actively engages in the interpretation of proposed statutes on policy grounds as well as on constitutional grounds. Thus, in the original design of the constitutional system, the President, in the discharge of the executive function, has at least a narrow space in which to act as much as an interpreter as an agent of the constitution. I argue that the juridification of politics creates a conducive environment for the executive to absorb interpretive capacity (essentially juridification D) and to rely on endogenously rendered interpretations of constitutional and statutory law (juridification C) for unilateral executive action, and thus avoid the transaction costs associated with inter-branch politics.

Besides the division and sharing of institutional powers, Peretti argues that the Constitution also created an institutional order that is characterized by multiple access points to the political process. "The existence of many institutions," according to Peretti, "increases the number of arenas in which groups can articulate their interests and contest policies with which

---

[100] Keith E Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, N.J.; Woodstock: Princeton University Press, 2009).
[101] Kahn and Kersch, *The Supreme Court and American Political Development*, 140.
[102] Akhil Reed Amar, *America's Constitution: A Biography* (New York, NY: Random House, 2006).

they disagree […] [This] increase[s] the likelihood that a group will succeed in one of those arenas. And ordering those numerous and diverse institutions in a nonhierarchical manner (via a system of check and balances) can help to insure that a victory in one arena is of real consequence for policy-making outcomes."[103] Although she makes this claim in the context of judicial protection of minority rights, it is a useful illustration of my current subject as well. If we situate legal interpretive authority in the flat structure of co-ordinate branches, then the legitimacy of legal interpretation would stand or fall based upon the ability or willingness of other branches to oppose a legal position taken, say, by the Executive Branch.

Perhaps somewhat counter-intuitively, the co-equal branches lack effective means to counteract "presidential review" or presidential legal interpretations due to their institutional characteristics. Let us now turn to those institutional characteristics of the coordinate branches that make them ineffective checkers.

THE JUDICIARY'S LIMITATIONS

The judicialization of politics literature suggests that judicial power has grown in the setting of public policy, indicating a trend of juridification D in its narrow sense. This is a well-documented trend across political systems.[104] The expropriation of political conflict by the judiciary is a phenomenon that has also enjoyed considerable scholarly attention.[105] Judicialization notwithstanding, the judiciary is in no position to effectively countermand Executive Branch legal interpretations. In other words, in the context of U.S. institutional power relations, the judiciary cannot effectively check presidential interpretations of statutory and

[103] Peretti, *In Defense of a Political Court*, 215.

[104] Lars Tragardh and Michael X. Delli Carpini, eds., "The Juridification of Politics in the United States and Europe: Historical Roots, Contemporary Debates and Future Prospects," in *After National Democracy: Rights, Law and Power in America and the New Europe* (Portland: Hart Publishing, 2004), 41; Enrique Peruzzotti, "Modernization and Juridification in Latin America: A Reassessment of the Latin American Developmental Path," *Thesis Eleven* 58, no. 1 (August 1, 1999): 59–82.

[105] Hirschl, "'Juristocracy' -- Political, Not Juridical"; Hirschl, "New Constitutionalism and the Judicialization of Pure Politics Worldwide, The."

constitutional law, especially in the field of foreign relations and national security. There are several reasons for the courts' inability to arrest juridified executive unilateralism:[106]

The courts do not control the content of their dockets: While appellate courts can exercise discretionary docket control in deciding which cases to hear and which ones to dismiss, they cannot actively invite cases to be brought before them.[107] Furthermore, under the limitations of the Constitution's Case or Controversy Clause, federal courts can only adjudicate questions that arise out of a real dispute brought by an injured party. Courts can neither resolve abstract legal question (advisory opinion below), nor can they hear cases where the plaintiff has not suffered "injury in fact," i.e., cases in which the plaintiff lacks standing.

Justiciability limitations: This doctrine of deference to the political branches is rooted in the judiciary's preference to avoid encroaching on the prerogatives of the popular branches. The Court has recognized that there are some questions that are best resolved by way of the political process. The Supreme Court made it clear in *Oetjen v. Central Leather Co*. that decisions regarding the conduct of foreign affairs and national security are most deserving of deference to the elected branches. This is, in essence, the political question doctrine (PQD):

> The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – "the political" – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.[108]

Implementation or compliance is not guaranteed: While the judiciary depends on the coordinate branches for their cooperation to be able to effectuate its legal interpretations, the executive is not constrained in the same way.

Rational utility maximization: the courts gain utility when their judgments are upheld and implemented by the other branches. Conversely, the courts would run the risk of being marginalized if they inserted themselves too aggressively into matters of national security or

---

[106] Based, in part, on Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, Inalienable Rights Series (New York: Oxford University Press, 2006).
[107] David Fontana, "Docket Control and the Success of Constitutional Courts," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Edward Elgar Publishing, 2011).
[108] *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918)

foreign policy where the courts have significant epistemic limitations and, thus, dubious legitimacy. As Green and Shapiro tell us, rational action "involves utility maximization." Meaning, when judges are "confronted with an array of options… [they] pick the one [they] believe best serves [their] [institutional] objective[s];"[109] i.e., their institutional prestige and legitimacy. Legitimacy is of the essence because, as Hamilton noted in Federalist No.78, the Court has "no influence over the sword or the purse ... and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacy of its judgments."[110]

Epistemic limitations of generalist judges: as Richard Posner wrote in *Not a Suicide Pact*, "our judges… are generalists. Cases involving national security are only a tiny part of their docket."[111] Moreover, unlike the Legislature and (especially) the Executive Branche that have the requisite human and other resources to specialize, the federal courts lack the resources to engage in systematic study of national security cases. Thus, the courts[112] lack institutional competence, confidence, and resources.

Lastly, and most importantly for the purposes of this dissertation, the federal courts will issue *no advisory opinions*: this is another self-imposed limitation, much like the PQD. Let us briefly survey the historical circumstances of the Court's refusal to issue advisory opinions. In the fledgling days of the Republic, Secretary of State Thomas Jefferson wrote a letter to Chief Justice John Jay, asking the Court to advise the President on the proper interpretation of treaties between the United States and warring European powers:

> The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances which do not give a cognisance of them to the tribunals of the country. *Yet their decision is so little analogous to the ordinary functions of the*

[109] Donald P. Green and Ian Shapiro, *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* (New Haven, Conn.: Yale Univ. Press, 1994), 12.
[110] Alexander Hamilton, James Madison, and John Jay, *Federalist Papers (Amazon Classics Edition)* (S.l.: Lake Union Publishing, 2017), 570.
[111] Posner, *Not a Suicide Pact*, 39.
[112] Other than specialized courts such as the Foreign Intelligence Surveillance Courts.

> *executive, as to occasion much embarrassment and difficulty to them. The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties.*[113]

In its response to Jefferson, the Supreme Court plainly declined the invitation to issue an advisory opinion, citing limits of the federal judicial power, separation of powers concerns, and the Court's appellate jurisdiction ("a court in last Resort.") Instead, the Jay Court advised, the president should call on "Heads of Departments" for opinions:

> The lines of Separation drawn by the Constitution between the three Departments of Government, their being in certain Respects checks on each other, and our being judges of a court in the last Resort, are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been purposely as well as expressly limited to executive Departments.[114]

In *Muskrat v. United State*, the Supreme Court issued a formal opinion which confirms that the federal courts will not "give opinions in the nature of advice concerning legislative [or executive] action."[115] This self-imposed limitation, according to the Supreme Court, is based on the Case or Controversy Clause of Article III of the U.S. Constitution, which "precludes [federal] courts from deciding 'abstract, hypothetical or contingent questions.'"[116] Thus, it is due to the Court's refusal to render advisory opinions that the President turns to Department Heads for advice, and, more specifically, to the Attorney General; who, since 1951, has delegated her legal advisory function to the Office of Legal Counsel.

---

[113] Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay*, vol. 4, The Founders' Constitution (University of Chicago Press), accessed August 25, 2018, http://press-pubs.uchicago.edu/founders/print_documents/a3_2_1s32.html. (emphasis added)

[114] "Letter on Advisory Opinions," Documents in Early American History, 1793, http://courses.missouristate.edu/ftmiller/letteradvisoryopin.htm.

[115] Quoted in, R. Persaud, *The Role of Judicial Advisory Opinions in Canadian Constitutionalism and Federalism: The Senate, Patriation and Québec Veto Reference Cases Considered* (Queen's University, 1998), 10, http://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/tape15/PQDD_0012/NQ31948.pdf.

[116] Id. 10.

Taken together, these limitations give rise to the problem of what Cornelia Pillard calls judicial "underenforcement:"[117]

> Even where courts do not wholly refrain from judgments on the merits, they often defer in part to the political branches in a range of ways - whether by using rationality review, accepting discretionary executive decisions as subsidiary parts of ultimate constitutional questions, or assuming governmental good faith. By using rational basis review, for instance, which, for reasons of relative institutional competence, judicially underenforces constitutional norms, the courts leave it to the political branches to fill the enforcement gap. In cases involving foreign policy, national security, military, or immigration judgments, the courts systematically apply doctrines of overt deference that cause them to refrain from full enforcement of constitutional norms, leaving that task to the political branches. The commander-in-chief power, even if narrowly understood, involves executive judgments that could be tainted by unconstitutional considerations that the Court, nonetheless, would decline to review.

In sum, Pillard's observations lend support to my argument that the Executive has broad interpretive authority in the areas where the courts do not exercise their legal policing and boundary-maintenance functions.

A Fragmented and Polarized Congress

Due to its institutional characteristics, Congress lacks the will and incentive structure to develop a coherent and potent constitutional vision or to counter that of the Executive Branch.[118] While the institutional interests of the presidency and the individual interests of the incumbent

---

[117] Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands," 2005, 692.

[118] By contrast, the Regan Justice Department's Office of Legal Policy issued *Guidelines on Constitutional Litigation*. Based on the "jurisprudence of original intent" the Reagan DOJ claimed fidelity to the text of the Constitution by advocating the protection of rights claims based on express constitutional provisions and categorically renouncing non-textual ones. The *Guidelines* explicitly stated that the federal government, including the courts, could not expand or limit the scope of textually enumerated rights such as the Second Amendment's right to bear arms or the First Amendment's guarantee of religious liberty. The *Guidelines* emphatically rejected judicially created rights such as the "right to privacy." Because judges are "bound by the text… and cannot rely on their own notions of desirable public policy" and "the Constitution does not specify the value to be preferred," what values are to be accorded protection is a matter "reserved by the Constitution to the democratic majorities in the states and the political branches of the federal government."

are largely identical,[119] the 535 members of Congress lack shared overriding institutional interests. The parochial interests of individual members create a collective action problem; lawmakers are "trapped in a prisoner's dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride in favor of the local constituency."[120] In fact, Congress is in a better position that the Judiciary to assert itself against unilateral presidential power (such as JEU); nevertheless, the lack of a unified power center, the constituency-rooted rather than national interests of individual legislators, short terms in office coupled with the pressures of reelection, as well as the structural advantages of the Executive relegate the First Branch of government to a reactive position.

Political polarization has also played a significant role in the debilitation of Congress's ability and willingness to check and balance executive unilateralism. Based on Median Ideological Scores calculated by Voteview, today's Congress is the most polarized it has ever been.[121] In the 1970s the median ideological score of Democrats was further from the center than that of their Republican counterparts, yet the ideological distance between members of the two parties was negligible. Starting in the mid-1980s, Republicans drifted quickly and far from the ideological center, while the Democrats' ideological drift to the left has been gradual and spans a significantly shorter distance. The ever-widening ideological gap between the two parties makes it less likely for Republicans and Democrats to work toward bipartisan goals, such as a unified institutional vision or the strengthening of congressional powers vis-à-vis those of the Executive. Instead, legislators increasingly play "message politics," and use the legislative process "as a way to [advance] a unified party message" and "distinguish their party from the other."[122]

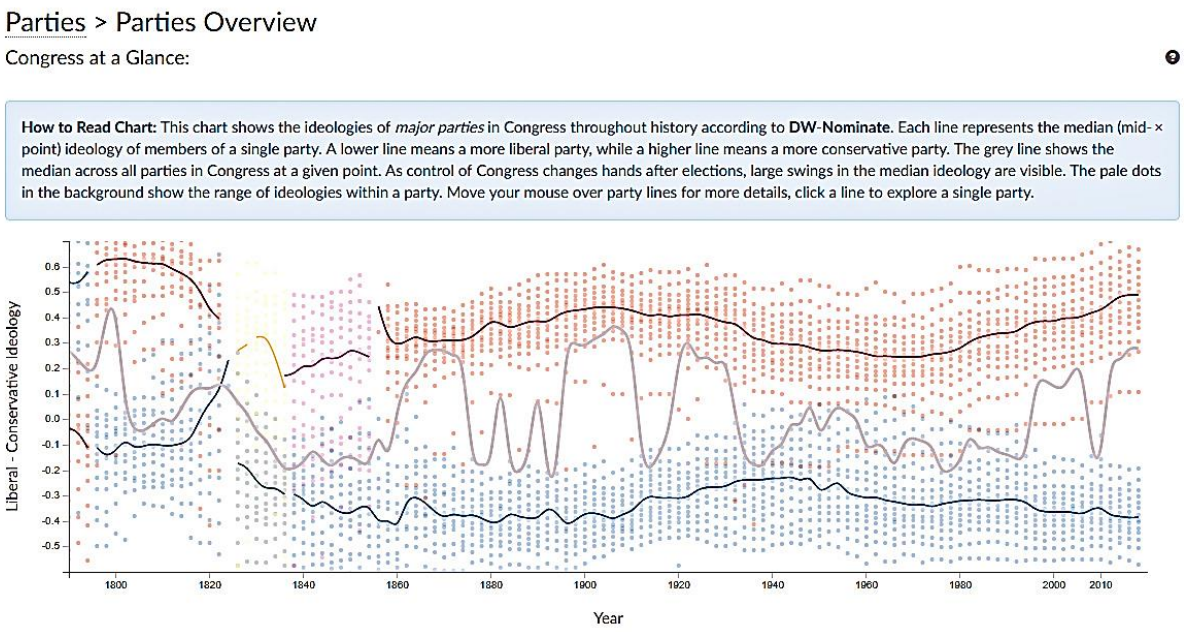
---

[119] "the king's two bodies," *see*: Ernst Kantorowicz, Conrad Leyser, and William C Jordan, *The King's Two Bodies: A Study in Mediaeval Political Theology*, 2016.

[120] Terry M. Moe and William G. Howell, "Unilateral Action and Presidential Power: A Theory: Unilateral Action and Presidential Power," *Presidential Studies Quarterly* 29, no. 4 (December 1999): 861.

[121] This is based on the most recent data available at http://voteview.com/parties/all

[122] Neal Devins, "Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives," *Willamette L. Rev.* 45 (2008): 409.



(source: https://voteview.com/parties/all)

Diagram 2: Median Ideology Scores over time

Lastly, as Mann and Ornstein point out, congressional partisans have increasingly seen themselves as "foot soldiers of the President," effectively abdicating their role as an independent co-equal branch of government.[123] This phenomenon, coupled with the ever-deepening ideological polarization described above, ensures that the Madisonian "ambition" to counteract Executive unilateralism falls victim to party-line politics. As Justice Ginsburg wrote as Circuit Judge in 1985, "Congress has formidable weapons at its disposal – the power of the purse and investigative resources far beyond those available in the Third Branch. But no gauntlet has been thrown down… by a majority of the Members of Congress… 'If the Congress chooses not to confront the President, it is not our task to do so.'"[124]

In summary, Congress has the potential to be an effective check on JEU, however, given the fragmented nature of the institution and the polarization of the parties, it is incapable of effectuating that potential.

---

[123] Thomas E Mann and Norman J Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (Oxford; New York: Oxford University Press, 2008).
[124] *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (DC Cir., 1985).

THE WATERGATE REGIME: A TALE OF UNINTENDED CONSEQUENCES

As I stated above, Watergate is the critical juncture that marks the emergence of momentous changes in the operation of institutional relations and political processes. At first glance, the Watergate Congress stands out as an anomaly in 20th century Executive-Legislative relations: in short it sought to meaningfully restrain what came to be known as the "imperial presidency"[125] of Richard Nixon, despite the institutional deficits of Congress outlined above. According to Devins, Congress's willingness to check presidential power in response to Vietnam and Watergate was prompted by two phenomena: (1) a bipartisan consensus emerged in Congress, lowering otherwise debilitating transaction costs and collective action problems; and (2) Congress was willing to take action because "presidential unilateralism was so unpopular with voters and other constituents that lawmakers achieved political advantage by curbing presidential power."[126] The former was possible because there was not yet a deep ideological divide between Democrats and Republicans.[127] The latter was the result of the ability of "members of Congress [to] gain[] personal advantage by standing up for legislative prerogative," as both voters and interest groups demanded greater checks on the president.[128] Overall, we can say that the Watergate investigations and the impeachment of President Nixon were based on some sort of bipartisan institutional loyalty. As Gillis Long, Democrat from Louisiana put it:

> Congress will not stand by idly as the President reaches for more and more power... Our message to the President is that he is risking retaliation from the Congress for his power grabs, that support for the counter-offensive is found in the whole range of Congressional membership – old Members and new, liberal and conservative, Democratic and Republican.[129]

---

[125] Arthur M. Schlesinger, *The Imperial Presidency* (Boston: Houghton Mifflin, 2004).
[126] Devins, "Presidential Unilateralism and Political Polarization," 401.
[127] By Obama's second term, the median ideological score of congressional Republicans nearly doubled (+0.49) vis-à-vis the Watergate Era (+0.25), meaning that they represented increasingly polarized conservative political positions. The Democrats, on the other hand, were much more static, moving from -0.34 during Watergate to -0.38 by Obama's second term. This represents a considerable ideological drift apart by the two parties: from 0.59 to 0.87, or 0.28 points.
[128] Devins, "Presidential Unilateralism and Political Polarization," 404.
[129] Quoted in Devins, 395.

In a series of attempts to hem in the out-of-control executive, Congress passed legislation in four broad policy areas to restore what it saw as the constitutionally prescribed balance of powers: (a) foreign and defense policy and intelligence gathering, (b) domestic affairs such as determining spending priorities, (c) presidential accountability and the concomitant ethics regulations, and (d) strengthening Congress's oversight authority.[130] The theme of checks and balances dominated the emerging post-Watergate legal regime. Congress was determined to ensure parity in foreign and defense policy-making by requiring the Executive Branch to keep lawmakers apprized about its activities.[131] It also sought to impose a more balanced distribution of powers between the President and Congress by limiting the President's exercise of unilateral powers. The Watergate Congress enacted a series of framework statutes such as the National Emergencies Act (50 USC §1601-1651), the War Powers Resolution (50 USC §1541-1548), the Ethics in Government Act, the International Emergency Economic Powers Act (IEEPA) (50 USC Ch. 35), the Case-Zablocki Act on Executive Agreements (1 USC §112b), and the Foreign Intelligence Surveillance Act (FISA) (50 USC Ch. 36), to mention just a few.[132]

These "constitutional 'framework' [statutes]," wrote Gerhard Casper, "interpret[ed] the Constitution by providing a legal framework for the governmental decision making process."[133] In essence, framework legislation was an attempt at bringing about juridification A – a legislative corrective that imposes procedural requirements that seek to redistribute constitutional power in favor of Congress:

> Framework legislation is different from ordinary legislation in that it does not formulate specific policies for the resolution of specific problems, but rather attempts to implement constitutional policies. Both declaratory and regulatory in

[130] Harvey G. Zeidenstein, "The Reassertion of Congressional Power: New Curbs on the President," *Political Science Quarterly* 93, no. 3 (1978): 393–409.

[131] To keep itself in the loop, Congress also created Intelligence Committees in each House of Congress for better oversight as well as to "provid[e] a mechanism for public disclosure of classified information" (Zeidenstein, 400).

[132] An important element of these framework statutes was the legislative veto. The National Emergencies Act, for example, provided for a check on the President's power to declare national emergencies "in the form of the power Congress retained, through a concurrent resolution of the House and the Senate, to terminate any presidential declaration of emergency;" *see*, Richard Pildes, "The Supreme Court's Contribution to the Confrontation Over Emergency Powers," Lawfare, February 19, 2019, https://www.lawfareblog.com/supreme-courts-contribution-confrontation-over-emergency-powers.

[133] Gerhard Casper, "Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model," *The University of Chicago Law Review*, 1976, 482. (emphasis added)

> nature, it describes the constitutional distribution of powers and regulates the decision making of the President and the Congress. Framework legislation thus forces both Congress and the President to focus on constitutional considerations, which are ordinarily submerged in disputes concerning specific policies. *By providing institutionalized forms for consultation and the resolution of disagreements, it also gives greater specificity to the notion of legal constraints and attempts to stabilize to a greater extent expectations about the ways in which governmental power is exercised. Finally, by providing procedures for the evaluation and control of exercises of presidential power, it strives for constitutional legitimacy.*[134]

Casper's observation regarding the "legal constraints" and stability in the way "governmental power is exercised" is in line with my argument regarding the formalization of power and the attendant juridification of politics:

$(+J_A; +J_B) \rightarrow +J_C \text{ AND } J_D/_A J_D$

The Watergate Regime is a textbook example of juridification B, legal proliferation. Congress's solution to what was essentially a legal (constitutional) problem of checks and balances was more law, much of which created discontent on the part of the President who felt too "hemmed in" as a result. David Gergen's description of the post-Watergate presidency is an apt characterization of the legal sphere's perturbation of the political sphere:

> [F]rom the [Ford] White House point of view, those laws – you felt like you were Gulliver in Lilliput. You had all these strings that were tying you down, and you really couldn't act… especially the War Powers Act, which really was a questionable assertion of congressional power. So in effect we moved from the imperial presidency of Richard Nixon very quickly into what many of us thought was an imperiled presidency under Gerald Ford. OK, some terrible mistakes were made [in the Nixon period], and there were abuses of power. Then along come the legislators and pass all sorts of laws and regulation to make sure that will never happen again. But they also make sure nothing else will ever happen, either. [135]

Jack Goldsmith, former Assistant Attorney General for the Office of Legal Counsel, describes post-Watergate institutional relations and political decision making as "hyper-legaliz[ed];" meaning

---

[134] Casper, 482 (emphasis added).

[135] David Gergen, PBS Frontline: Cheney's Law, accessed January 30, 2019, https://www.pbs.org/wgbh/pages/frontline/cheney/interviews/gergen.html.

that the legal sphere had an outsized impact on the political sphere (J_A or the juridification of the political) and the newly enacted framework statutes caused the value of J_C (conflict resolution with reference to law) to rise exponentially.

In this climate of hyper-legalization, the Executive adapted its institutional behavior. Since the Watergate Regime put a premium on J_C, the Executive marshalled its vast institutional resources and tasked OLC within the Department of Justice to defend the authority of the President from incursions. Nelson Lund, former OLC Attorney-Advisor in the Reagan administration, wrote in his article "Lawyers and the Defense of the Presidency" that,

> [a]n emboldened congresses and a more belligerent press has sought to subject subsequent presidents to tighter and tighter controls, those presidents have also invoked the Constitution to protect themselves from encroachments on their freedom of action. Some of these disputes have arisen from the post-Watergate ethics laws, but they have not by any means been limited to this context. Because recent turf fights between presidents and their adversaries have often been waged in legal and constitutional terms, lawyers who specialize in the separation of powers have become much more prominent than they once were. *The function of articulating a principled defense of presidents and the presidency – mostly from congressional incursions – is carried out primarily by those who serve in the Office of the Council to the President of the White House and in the Department of Justice's Office of Legal Counsel, to which the Attorney General's legal advisory function has largely been delegated. The rise of this species of presidential lawyer is worthy of considerable attention, both for its intrinsic intellectual interest and because it can be expected to have continuing effects on the political life of our nation*.[136]

This leads to a view of juridified executive unilateralism as establishing a principal-agent relationship in which the former, the appointed lawyer, the legal expert making decisions based on legal interpretation, sets policy parameters; and the latter, the elected politician is justified in acting on the best, and often the only, understanding of the relevant law. Thus, besides being a proactive policy-setting strategy, JEU can also be seen as a defensive risk-management tactic, especially in what Goldsmith refers to as the post-Watergate "hyper-legalization of warfare, and the attendant proliferation of criminal investigation."[137]

---

[136] Nelson Lund, "Lawyers and the Defense of the Presidency," *BYU Law Review*, no. 1 (1995): 20.

[137] Jack L. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: Norton, 2009), 81.

Cornelia Pillard, former Deputy Assistant Attorney General at OLC, also acknowledges the importance that the office has played in legitimating presidential action. In her article titled "The Unfulfilled Promise of the Constitution in Executive Hands," Pillard calls the Office the "principal constitutional interpreter[] for the executive branch."[138] Indeed, the Department of Justice affords the Executive a robust pool of legal experts, giving the President a distinct advantage over Congress, which lacks similar resources. In fact, the vast array of legal advice that the Department of Justice can provide to the President and the resulting imbalance of resources was one of the reasons why several scholars and policy-makers called for an independent DOJ after the Watergate scandal.[139]

The reconstructive Watergate Regime was no silver bullet against the "imperial presidency." Although Congress attempted to restrain the over-broad use of presidential power, the Watergate resurgence amounted to little in the way of actual political constraints on the President. The effectiveness of the Watergate regime in restraining the power of the President was questioned by expert commentators as early as 1974. In a discussion on American political institutions after Watergate, nine leading experts on the Presidency agreed that Congress's resolve to counterbalance the Presidency would be short-lived. Moreover, Arthur Schlesinger raised the possibility that the framework statutes might in fact have empowered the President rather than restrained him:

> PRESSMAN: I would like to pick up on that. So far, our assessment of the imbalance among institutions seems to have been reflected in our discussion, in which Congress has probably received a minute and a half of attention. I wonder if we could turn to that now. Arthur Schlesinger had mentioned the necessity of "consciousness raising" for Congress to live up to what its role ought to be, and I was wondering what ideas people had about the effect of the Watergate experience on Congress and on its future role definition. Is this a brief moment of glory and courage for the Judiciary Committee, to be dissipated in a return to business as usual? Or is Congress going to go through some sort of resurgence?
>
> SCHLESINGER: Nelson, you're the expert on Congress.

[138] Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands," 2005, 682.
[139] "Removing Politics from the Administration of Justice," § Subcommittee on Separation of Powers of the Senate Judiciary Committee (1974), https://archive.org/details/removingpolitics00unit/page/n3.

> POLSBY: I will say I don't know. No, I assume not. I assume that there are very powerful organizational constraints that operate on congressmen which will in fact keep them from fulfilling Arthur's hopes.
>
> PRESSMAN: Could you say what your hopes might be?
>
> SCHLESINGER: I do not think that Congress has necessarily taken the right way to rejuvenate itself. I am skeptical, for example, about all assumptions of a congressional role based on a notion of a unitary congressional policy, such as the new Budget Act. *Congress in exceptional situations may act as an institutional unit against an aggressive or unpopular executive but the notion that this is going to be the normal or appropriate role of Congress seems to me wrong. I do not think the Budget Act is going to work miracles nor do I think the War Powers Act will do much to restrain the presidency; quite the opposite, perhaps.* Congress is not terribly inhibited in domestic affairs. In fact, it may have in some respects too much power to block the executive. The real place where the presidency has got its momentum is foreign affairs. There Congress has deferred - and wished to defer. It's hard to solve that. Providing better information to Congress isn't the answer. Lack of information is an alibi for the congressmen. Congress can get all the information it needs, one way or another - if it really wants to get that information.[140]

Schlesinger's clairvoyant observation has been borne out by history. His prediction that the War Powers Resolution, and the Watergate framework statutes in general, would have "quite the opposite" effect than their intended purpose is at the core of my argument regarding JEU.

As for the political momentum, the bipartisan sense of institutional loyalty that characterized the Watergate Congress, which was predicted by Madison and formed the basis of the separation of powers at the Constitutional Convention, has dissipated. The most lasting and consequential unintended consequences of Watergate, as far as my inquiry is concerned, are: the formalization of informal presidential powers and the legalization of turf battles. Despite Congress's intention to restrain the power of the President, the Watergate Regime caused a new form of unilateral executive action to emerge. As a result of J_A and J_B, alternative political processes arose ($_aJ_D$) based on legal rather than political rules, rationales, and legitimacy (J_C). To counteract its institutional weaknesses, Congress sought to "de-politicize" and institutionalize constraints on executive power and inserted automated control mechanisms into the law. Thus, it wrote into law "inherent" presidential authority that had previous been informally exercised.

[140] Demetrios Caraley, "American Political Institutions after Watergate: A Discussion," *Political Science Quarterly* 89 (1974): 713–49.

By acknowledging in the law that such powers exist, Congress gave ammunition to future presidents to assert a legal basis for broad executive action in foreign affairs. This unintended effect of Watergate has manifested itself in the juridification of executive politics and resulted in the weakening of inter-branch politics: as long as the President can make a strong legal argument based on textual, inherent, and statutorily authorized powers, executive action must be legal.

***

In conclusion, the separation-of-powers system is not watertight, and the checks-and-balances mechanism is not self-executing. Rather, institutional checking depends on the institutional will and capacity of the coordinate branches; and the separation of powers allows state-internal power to be redistributed within the system. This does not mean that power redistribution is a zero-sum game; the institutional power of one branch can grow beyond strict constitutional limits, as it has been demonstrated with regard to all branches of the U.S. government.[141] Furthermore, different institutional incentive structures, epistemic limitations, and other barriers to action make the co-equal branches ineffective checkers of executive unilateralism, including unilateral legal interpretive activity. Conversely, the vast institutional resources and structural advantage of the Executive allow it to adapt to new circumstances and to act in ways that relegate the co-ordinate branches to a reactive position. As I argued above, the critical juncture amplified the unilateral interpretive activity of the Executive Branch and resulted in the juridification of executive power. The structural transformations due to rules-based depoliticization by the Watergate Congress resulted in juridification C (conflict resolution with reference to law), as well as juridification D in its broad sense (accretion of power in legal conflict-dispositive bodies, ${}_{a}J_{D}$). Thus, juridification is, to a significant degree, structurally determined. My structural analysis suggests that several elements and characteristics of the constitutional system create a conducive environment for the juridification of executive politics,

[141] Marshall, "Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters"; Paul Pierson and Theda Skocpol, eds., *The Transformation of American Politics: Activist Government and the Rise of Conservatism*, Princeton Studies in American Politics (Princeton: Princeton Uni. Press, 2007); Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (New York: Basic Books, 2005).

and for the intermingling of politics and law in the exercise of presidential power.

STRUCTURE VS. AGENCY (WITH A NOTE ON CARL SCHMITT)

As I argued above, the structure of the political system allows for the legal interpretive function to be exercised, and, in certain areas, to be monopolized by the Executive Branch. This facilitates the President's engagement of the processes of J_D (in its broad sense, meaning accretion of interpretive power in non-Article III legal interpretive bodies) as well as J_C (conflict resolution with reference to law) to effect legal change unilaterally. For structural reasons, moreover, the coordinate branches are at a disadvantage when trying to hamstring executive legal interpretation. If we assume that the juridification of politics has substantially affected the political system, and that legal rules, rationales, and resolutions have come to dominate certain political processes, then the agency of Executive Branch actors is required to exploit those conditions. Thus, political actors (in a judicial or quasi-judicial capacity) can harness juridification by instrumentalizing the law to achieve desired policy goals. In other words, the Executive has a stake in the juridification of politics. Agency, therefore, will be assumed throughout the analyses that comprise the empirical section of this dissertation.

Several recent studies stand out that highlight the role of agency (individual and collective) in bringing about and exploiting juridification as it relates to the President. Amanda Hollis-Brusky, for example, has examined the role of the Federalist Society in devising, legitimating, and injecting the Unitary Executive Theory into the legal mainstream, and more importantly, into Executive Branch legal interpretation. Her findings exhibit the principled commitment to juridification of actors inside and outside of government who cultivate legal theories that feed into JEU.[142]

[142] Hollis-Brusky, "Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000"; Amanda Hollis-Brusky, "Unpacking the 'Reagan Revolution': The Reagan Administration, the Fledgling Federalist Society, and the New Federalism," 2008; Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*, Studies in Postwar American Political Development (Oxford : New York, NY: Oxford University Press, 2015); Hollis-Brusky, "The Federalist Society and the 'Structural Constitution:' An Epistemic Community At Work."

A relatively new line of court research ("new institutionalism") pursued by Howard Gillman and others, has proposed that political actors (either individual Presidents or governing coalitions) empower constitutional courts and appoint judges as temporal extensions of partisan representation.[143] Those judges, in turn, become life-tenured representatives of bygone political alliances – assuming no ideological drift in judges' decisional behavior.[144] Thus, based on this account, juridification D, in its narrow sense, hinges upon the agency of political actors.

Another example of the agency-focused scholarship on juridification is Keith Whittington's study regarding reconstructive presidents and the legal order. According to Whittington, judicial supremacy, meaning "the ability of the Supreme Court to erase the distinction between its own opinions… and the actual Constitution"[145] is politically constructed. If Presidents benefit from the legal status quo (the legal regime they inherit), they defer to the federal courts. However, when "they find the judiciary to be an intrinsic challenge to their authority, even absent the contemporaneous exercise of judicial review," they can unilaterally "restructure inherited constitutional understandings."[146] In other words, Presidents can represent "departmentalist"[147] views of the law and effect legal change unilaterally. As for the tools that Presidents use in their enterprise to challenge inherited legal regimes, Whittington points to the bully pulpit: "Through his public statements the president is capable of expressing a constitutional vision that can stand opposed to that offered in the opinions of the Court."[148] Based on Skowronek's political time thesis, Whittington observes that "[n]ot all president [] have

---

[143] Howard Gillman, "Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism," in *The Supreme Court and American Political Development*, ed. Ronald Kahn and Kenneth Ira Kersch (Lawrence, Kansas: University Press of Kansas, 2006), 140 (partisan entrenchment is "an effort of a governing coalition to transform of fortify the policy-making bias of the federal judiciary so that it is in a position to represent the goals of that coalition even if they lose control of Congress or the presidency."); Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," *Virginia Law Review* 87, no. 6 (October 2001): 1068.

[144] Lee Epstein et al., "Ideological Drift among Supreme Court Justices: Who, When, and How Important," *Nw. UL Rev.* 101 (2007): 1483–1541.

[145] Whittington, *Political Foundations of Judicial Supremacy*, x.

[146] Id. 52.

[147] Id. x ("historically, departmentalism has been the primary alternative to judicial supremacy. For the departmentalist, the Court's interpretations of the Constitution might be persuasive or adequate, but the Court has no special institutional authority to say what the Constitution means. The judiciary is one institution among many that is trying to get the Constitution right, but the other branches of government have no responsibility to take the Court's reading of the Constitution as being the same as the Constitution itself.").

[148] Id. 16.

the authority to explain and legitimate [] changes" to the status quo.[149] Therefore, while "all president can and do talk about the Constitution," few Presidents "can speak with [the] authority" needed to construct a new legal regime.[150]

Although the presidency-focused,[151] agency-based accounts are useful in that they confirm the juridification of politics by highlighting the role of J_D in policy-making, they fail entirely to account for why the accretion of power in the judiciary is an acceptable (and accepted) alternative to elected politicians solving political problems. In other words, they do not address the phenomenon of J_C, i.e., depoliticization or the expropriation of conflict by the legal system. Indeed, there must be something culturally/societally rooted about the perception of the law that allows the legal resolution of political problems to be seen as superior, or at the very least, an adequate substitute for the political process.

Part of the answer, I believe, lies in the perception of the law in the United States. Indeed, the ethos of the law in America is imbued with an air of royal grandeur, as a survey of Founding-era documents suggests. A prime example of this is Thomas Paine's portrayal of the law as the real king of America. In Common Sense, Paine asserts that it is not arbitrary political power, but rather principled legal standards that should rule supreme in the United States:

> But where says some is the King of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law *ought* to be King; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.

---

[149] Id. 18.

[150] Id. 23.

[151] Kevin J McMahon, *Reconsidering Roosevelt on Race How the Presidency Paved the Road to Brown* (Chicago: University of Chicago Press, 2010), 14–20 ("the presidency-focused approach changes the terms of the analysis by displaying how non-judicial institutions and outside political forces at times structure decision making on the Court. Specifically, it seeks to uncover the political origins of Supreme Court decision by examining the formulation of presidential judicial policy and assessing its influence on judicial interpretation.")

I argue that the perception of the law as "morally superior,"[152] predictable, fair, and reliable lends it an air of legitimacy that trumps the vagaries of the political process. Law "aims at justice, while politics looks only to expediency," Silverstein writes; "the former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies."[153] Congress's reaction to the Watergate scandal is a testament to the perception of more law (J_B) being the panacea for political corruption and uncontrolled executive power. In fact, "Congress was explicitly attempting to adopt and emulate the approach, the precision, and what some thought and hoped was the clarity of law [J_C] and achieve equitable results that they came to believe could be accomplished by substituting procedural efficiency for the frustrating and prone-to-corruption gray of politics."[154]

Can it be then that it is agency alone that is the source of juridification? The puzzle, the structural characteristics of the U.S. political system, the critical juncture, and the perception of the law indicate otherwise.

The institutional revolution in presidency research has done a lot to refocus scholarly attention on the formal powers of the "office of the presidency and the features that make it distinctly modern: its staff and budget, the powers and responsibilities delegated to it by Congress, and the growth of agencies and commissions that collect and process information within it."[155] This ushered in a gradual break with the behavioral theories of presidential influence first proposed in the 1960s, which "posited skill, personality, style, and reputation as the ingredients of persuasion and thus the keystones of [] power."[156] Behavioralists failed to explain the steady expansion of presidential power, especially in the 20th century, which allowed "even lackluster presidents" to exercise policy-setting authority.[157] Nevertheless, early manifestations of the institutional literature remained stuck in a "bargaining framework,"[158] and measured

[152] Silverstein, *Law's Allure*, 3.
[153] Id.
[154] Id. *Law's Allure*, 9.
[155] Id. *Power without Persuasion*, 2003, 11.
[156] Id. 9 (also referred to as the "personal presidency" theory); *see also*, Matthew J. Dickinson, "We All Want a Revolution: Neustadt, New Institutionalism, and the Future of Presidency Research," *Presidential Studies Quarterly* 39, no. 4 (December 2009): 740–44.
[157] Id. 14; *see also*, Marshall, "Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters."
[158] Id. 13.

presidential power by the officeholder's ability to influence legislative affairs and largely "ignored the ability of presidents to set policy on their own."[159] The turn of the 21st century saw the advent of the administrative presidency and unilateral politics models, which observed that through the use of "power tools" such as executive orders or executive agreements, Presidents can take independent (unilateral) action and achieve policy objectives outside of the traditional legislative process.[160] The University of Chicago political scientist, William Howell, proposed that presidents are able to strike out on their own, without the consent of Congress or the courts, due to their "unique position within a system of separated powers."[161] Therefore, unilateral executive authority is predicated, according to Howell, not only on the formal powers of the institution, but also on the permissive structural context within which the Executive operates – a structural relationship in which the President *acts* and the rest of the system *reacts*.[162]

As this dissertation is concerned with both Executive-induced legal change and a form of unilateral presidential action, it lies at the intersection of the unilateral action model and the presidency-focused approach to legal development. Unlike Whittington or Gillman, who study how the President can influence legal change *indirectly* (either by pressuring judicial actors through public statements or by changing the ideological makeup of the federal judiciary through appointments), I am interested in how the Executive Branch can effectuate changes in the law directly, through endogenously rendered legal interpretation. While I rely heavily on Howell with regard to his model of presidential direct action, I delve into an area of unilateral action that the presidential-power-of-direct-action literature has overlooked: the "power tool" of executive legal interpretation.

Lastly, I would like to address the role of the law as an institution that becomes a conduit of political action under condition of juridification. As such, it is the keystone of my structural explanation of the juridification of executive politics and the operation of JEU. Since

---

[159] Id.

[160] Dickinson, "We All Want a Revolution," 756; Moe and Howell, "Unilateral Action and Presidential Power"; Howell, *Power without Persuasion*, 13 ("Rather than hoping to influence at the margins what other political actors do, the president can make all kinds of public policies without the formal consent of Congress.").

[161] Id.

[162] Id. 14 ("the president moves policy first and thereby places upon Congress and the courts the burden of revising a new political landscape."), *see also*, Mark V Tushnet, "Controlling Executive Power in the War on Terrorism," *Harvand Law Review* 118 (2005): 2677 ("first-mover advantage").

the onset of the GWOT, however, a number of prominent legal scholars and political scientists have invoked the writings of the German legal and political theorist Carl Schmitt[163] to argue for "extra-constitutional suspension of legality" in times of national security crisis.[164] Following the trend of Schmitt-revivalism, in 2010, law professors Eric Posner and Adrian Vermeule published a much-debated book, *The Executive Unbound*, which painted a picture of institutional power relations in modern American government based on Schmitt's *Political Theology*. In that once-infamous treatise that has recently experienced a measure of rehabilitation, Schmitt claimed that "the state of exception," meaning a genuine national emergency or "extreme peril," which is "not codified in the legal order,"[165] is characterized by "principally unlimited authority."[166] Therefore, in such a situation, no law can circumscribe the sovereign, "which means the suspension of the entire existing [legal] order."[167]

According to Posner and Vermeule, modern administrative government is in a constant state of Schmittian "exception." This is so, according to the authors, because of the twin pressures of a succession of economic and national security crises in the 20th century and the resulting legislative delegation of governing authority to the President.[168] Consequently, American government is now wholly "presidential."[169] In this new governing arrangement, liberal legalism, or the rule-of-law state, "has proven unable to generate meaningful constraints on the executive."[170] Therefore, while Presidents are able to disregard the law outright in times of crisis, Posner and Vermeule claim that the state of exception "operates de facto in all periods."[171] In this post-Madisonian order, the Schmittian argument goes, "the state remains,

---

[163] According to the Stanford Encyclopedia of Philosophy, Schmitt "is often considered to be one of the most important critics of liberalism, parliamentary democracy, and liberal cosmopolitanism. But the value and significance of Schmitt's work is subject to controversy, mainly due to his intellectual support for and active involvement with National Socialism;" *see*, Lars Vinx, "Carl Schmitt," ed. Edward N. Zalta, Spring 2016, https://plato.stanford.edu/archives/spr2016/entries/schmitt/.

[164] Mark V. Tushnet, ed., *The Constitution in Wartime: Beyond Alarmism and Complacency*, Constitutional Conflicts (Durham [N.C.]: Duke University Press, 2005), 44.

[165] Schmitt, *Political Theology*, 6; meaning the law does not provide for a control mechanism that automatically declares military government or endows the Executive with emergency powers.

[166] Id. 12.

[167] Id.

[168] Id. 7

[169] Posner and Vermeule, *The Executive Unbound*, 185.

[170] Id.

[171] Id. 33.

whereas the law recedes."[172] Therefore, Presidents have been "freed from the bonds of law,"[173] "legality and legitimacy" have diverged, and "legitimacy [has] prevail[ed]:"[174]

> This divergence merely exposes that legitimacy rather than legality is the main determinant of authority—and of power—in the administrative state, so the fact that legality and legitimacy coincide in normal times does not mean that legality is ever important in its own right.[175]

In sum, the picture that Posner and Vermeule paint is the antithesis of juridification.

The problem with Posner and Vermeule's theory is that it is inconsistent with the evidence that we see under Bush. In fact, the law (legal rules, legal actors, and legal modes of operation) was the lynchpin of the "Bush revolution." Moreover, presidential direct action is invariably grounded in formal grants of authority such as statutory and/or constitutional provisions. If we assume, like I argued above, that the juridification of the political expands the latitude of the Executive Branch to exploit its ample resources and capitalize upon the changing political environment in which legal resolutions trump institutional dialogue, then this trend indicates greater reliance on rather than the irrelevance of the law as Posner and Vermeule would have it.

As far as this dissertation is concerned, it must be acknowledged that in JEU the law is instrumentalized for political purposes. Instrumentalization, however, is the opposite of desuetude. The fact that Congress or the courts are unable to effectively check the power of the President is the consequence of an imbalance of institutional resources, different incentive structures, and the structural advantage of the Executive, rather than the irrelevance of the law. Indeed, the Executive Branch's ability to render authoritative legal opinions and the *need* to do so indicate the juridification of executive politics, not the ineptitude of the law. By extension of this logic, congressional deference to the Executive Branch's legal interpretations, as we saw in the Introduction, evidences the accretion of legal interpretive authority in OLC,

---

[172] Schmitt, *Political Theology*, 12.
[173]Posner and Vermeule, *The Executive Unbound*, 209.
[174] Id. 33.
[175] Id.

and the growing legitimacy of JEU. These indicators point toward juridification and not away from it.

JURIDIFIED EXECUTIVE UNILATERALISM IN OPERATION

> *The increased legalization of ethics and increased legalization of turf battles between the legislature and the executive have a common origin in Watergate, but they have also had a common effect: enhancing the influence of lawyers in the White House and in OLC.*
>
> – Nelson Lund, "Lawyers and the Defense of the Presidency"

In this chapter, I situated "juridified executive unilateralism" (JEU) in the existing literature. I argued that due to the structural coupling of the legal and political spheres, the attributes of the legal sphere such as legitimacy, rationales, tools, and actors have been transposed to the political sphere. I identified Watergate (shorthand for the Watergate Regime not the Watergate scandal) as a critical juncture that precipitated the wholesale juridification of inter-branch interaction: J_C. I also pointed out the structural reasons that facilitate the accretion of legal interpretive authority, or alternative J_D, in the Executive Branch. Before I can subject JEU to meaningful analysis, however, I need to develop a taxonomy of analytical metrics that are sufficiently concrete and measurable to be used in my empirical analysis.

It is not a straightforward task to undertake a systematic study of the instances of the juridification of executive politics. The novelty of my topic aside, the study of the juridification of politics in the U.S. has been in the state of what Sartori calls the "unconscious thinker":

> The unconscious thinker does not ask himself why he is comparing; and this neglect goes to explain why so much comparative work provides extensions of knowledge, but hardly *a strategy for acquiring and validating new knowledge*. It is not intuitively evident that to compare is to control, and that the novelty, distinctiveness and importance of comparative politics consists of a systematic testing, against as many

> cases as possible, of sets of hypotheses, generalizations and laws of the "if . . . then" type.[176]

The meager corpus of the subfield of political science dedicated to the study of juridification is a classic case study of the challenges of conceptualization and operationalization. As Sartori emphasizes, concepts and variables must be sufficiently precise to be meaningful in comparison. This is the reason why this chapter necessarily needs to develop a taxonomy, a set of organizing principles that will allow me to analyze the empirical section of this dissertation in a way that maintains conceptual coherence and avoids "conceptual stretching (vague, amorphous, often eviscerated, conceptualisations)."[177]

The theory above established that juridification happens; it also highlighted ways that juridification has affected inter-branch interaction; and it pointed out juridification's impact on the behavior of the Executive Branch. The question remains, however, whether OLC memos can be analyzed as functional equivalents of policy decisions. In other words: is it fair to assume that the legal opinions the empirical chapters examine are consequential beyond their advisory function.

In operationalizing the theory, I draw on the seminal works of Gordon Silverstein, William Howell, and James Pfiffner. Although none of the three offers a directly applicable set of tools to study JEU, in combination they provide a solid foundation that I will later complement with parameters that emerge from the textual analysis. In order to make sense of the theory, I need to situate JEU in the empirical literature and use conceptual containers that others have created. This will answer the questions: "How can we use the evidence in the empirical chapters to study JEU?"

The most authoritative source in the current U.S. political science literature on the phenomenon of juridification is Gordon Silverstein's *Law's Allure*. His book represents an important bridge that attempts to span the "artificial divide that has grown up between those who study law and those who study government and politics."[178] In *Law's Allure*, Silverstein

---

[176] Giovanni Sartori, "Concept Misformation in Comparative Politics," *American Political Science Review* 64, no. 04 (December 1970): 63.
[177] Flinders and Buller, "Depoliticisation," 294.
[178] Silverstein, *Law's Allure*, 283.

points out that the juridification of the political has caused "alternative policy processes" (my term not his) to emerge. He undertakes the analysis of these inter-branch processes which he describes as "a long, iterated chain, in which policies and decisions spiral from Court to elected branches, to administrative agencies, and back into Court – each decision at each step shaped by those that came before and, in turn, shaping and constraining those that will follow."[179] For all practical purposes, Silverstein seeks to break the mold of the judicialization of politics literature (J_D) by identifying the ways in which the elected branches and non-governmental players actively interact with the Judiciary to create alternative policy avenues (J_C) bypassing the classical lawmaking process. His examination of the coopting of the Judiciary into policy-making is a broader inquiry into J_D and J_C than the traditional "judicialization of politics" literature entertains. It represents an important first inquiry into how the legal sphere has affected the political sphere and rationales, rules, and processes that are associated with the legal system have been transposed to or superimposed on the political process. Similarly to the structural and juridico-political cultural reasons that I outlined above, Silverstein posits that:

- The American political culture is inherently suspicious of politics, "the uncontrolled child of competing interest and ideologies," and is attracted instead to the "predictability, propriety, and fairness" of the law.[180]
- Juridification of politics is often politically constructed for at least two reasons:
    - Because juridification can enable politicians to sidestep the costs of direct action, politicians themselves will often "facilitate, request, and plead for judicial intervention, happy to surrender responsibility (and blame) for tough choices."[181]
    - There is a tendency toward a "lawlike" approach to public policy; efforts to "formaliz[e], proceduraliz[e], and automat[e] the political process as [a] substitute[ ] or replacement[ ] for the traditional methods of politics – organizing, electioneering, negotiating, and bargaining."[182]

[179] Id. 30.
[180] Id. 3.
[181] Id. 33.
[182] Id. 15.

The alternative policy-making processes that Silverstein highlights are particularly relevant for the fleshing-out of my theory. Namely, they evince that the lawmaking process is porous; that non-traditional policy-setting processes exist; and that the legal sphere has substantially and demonstrably affected the process of policy-making. In short, lawmaking (or policy-making) is affected by juridification. Interestingly, Silverstein alludes to what I call juridified executive unilateralism, albeit in passing. In his discussion of the Bush administration's post 9/11 behavior, he points out that the Executive essentially exercised the power that is traditionally associated with the Judiciary, thereby "usurp[ing] [ ] the independent power of the judiciary itself."[183] I argue that it is only in light of the large-scale juridification precipitated by the critical juncture that we can see why the president would take direct action based on legal interpretation in order to effect policy change unilaterally.

Equally important as alternative policy processes, unilateral action is also essential to our understanding of JEU. In his groundbreaking book, *Power without Persuasion*, William Howell demonstrates that, through the use of various policy instruments, the President is able to actively participate in the making of public policy; which is not a feature of the "executive Power," as understood in classical political theory. In fact, Howell's empirical analysis shows that the unilateral policy setting capacity of the Executive preempts the traditional lawmaking process. By using alternative policy processes, "the president moves policy first and thereby places upon Congress and the courts the burden of revising a new political landscape."[184] This highlights the structural advantage that the president enjoys in the institutional setup. The problem, again, from the point of view of operationalization, is that unilateral action in Howell's sense is entirely legislative in nature, whereas the dilemma that animates this dissertation project has not so much to do with lawmaking as law interpretation.

Fortunately, a more searching analysis reveals that the logical disconnect only appears at first glance. First, legal interpretation often entails a form of lawmaking. Court scholars have

[183] Id. 241.
[184] Howell, *Power without Persuasion*, 2003, 14.

shown that judges, interpreters of the law, often "legislate from the bench."[185] If we accept the Jeffersonian idea of departmentalism, which holds that "each branch of government has an equal authority and responsibility to interpret the Constitution when performing its own duties," then, at a minimum, an authoritative interpreter within the Executive Branch has the potential to issue more than strictly *advisory* opinions.[186] Second, according to Whittington, "abstract constitutional review," meaning advisory opinions such as those issued by the Office of Legal Counsel, "allows [the issuer, whether a constitutional court or the Attorney General in the U.S. context] to directly evaluate the text of a law [or proposed executive action] prior to its application, or even its formal adoption, for its consistency with constitutional requirements and to exercise a veto to block the promulgation of the law [or the taking of executive action] or to issue instructions [] as to how to avoid the constitutional difficulty."[187] Therefore, advisory opinions are "similar to the American presidential veto and [are] essentially 'legislative' in character."[188]

As we saw above, juridification has had a transformative effect on the lawmaking process, giving rise to alternative policy processes. As Silverstein's study shows, juridification (or, in a more narrow sense: judicialization) manifests itself in the co-opting of the judiciary into the lawmaking process by Congress and non-governmental groups. How can Presidents engage and exploit the process of juridification? By utilizing their vast institutional resources and usurping the exclusive interpretive authority of the judiciary: (a) When the authority of the Executive to strike out on its own is contested or it ventures into uncharted territory, the juridification of the political dictates that the President consider the legal dimensions and repercussions of his/her actions. Failing to do so would invite questions of legitimacy, and it would expose executive agents to legal liability. (b) By using its structural advantage of acting first, the Executive can generously interpret, interpret away, and re-interpret existing statutory laws and constitutional strictures in order to

[185] This trope emerged during the Reagan administration's attack on "activist judges." *See*, Dorian B. Kantor, "President Reagan's Judicial Legacy: The Politics of Judicial Selection and the Limits of the Constitutional Counterrevolution." M.A. Thesis, University of Heidelberg, 2009.
[186] Whittington, *Political Foundations of Judicial Supremacy*, x.
[187] Id. 5-6.
[188] Id. at 6.

avoid the transaction costs associated with the inter-branch institutional process.[189] As in any area of policy-making, the coordinate branches can later revisit such interpretations or change executive-made law; however, the incentive structures and political hurdles outlined above make such revisions unlikely or at best uncommon.

There is another issue with squaring Howell's theory regarding unilateral direct action and JEU. In Howell's words, "presidents in modern times have manufactured a number of policy instruments that give shape and meaning to… prerogative powers."[190] On initial consideration, this, too, appears to weaken the theory I laid out above. JEU, however, is not a specific policy instrument. Rather, it is a strategy that is available to the President due to various institutional developments, and incentive and resource structures. Furthermore, while a form of unilateral action, JEU is conceptually distinct from prerogative power. According to Locke, prerogative is the "power to act according to discretion, for the publick good, without the prescription of the law and sometimes even against it."[191] Blatantly acting outside of the bounds of what the law prescribes is, however, problematic in a liberal legal system and is inimical to the concept of the juridification of politics:

> [E]veryone seems to agree that in a liberal democratic society it is difficult – if not impossible – to justify any policy, program, or measure that lacks a solid basis in law. Whether sincere or not, everyone appears to accept that law is the only legitimate basis for government action.[192]

Randolph Moss, head of OLC under President Clinton, similarly concluded that "the law is by its very nature supreme."[193] Accordingly, JUE assumes quite the opposite of prerogative power. It embodies unilateral action that is situated squarely in the midst of a vast an intertwined array of legal actors, rules, and rationales. This context shapes the space within which legitimate action is possible and determines the means by which unilateral action is exercised. When utilizing a

---

[189] Not to mention that it stakes a claim to unilateral presidential authority, which, if unchallenged, becomes part of the "institutional practice" of the Executive Branch.
[190] Howell, *Power without Persuasion*, 2003, 16.
[191] John Locke, *Two Treatises of Government* (New York: Cambridge Univ. Press, 1988), 237.
[192] Clement Fatovic, "Settled Law in Unsettling Times: A Lockean View of the War on Terror," *The Good Society* 18, no. 2 (2009): 14.
[193] Randolph D Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," *Administrative Law Review* 52, no. 4 (2000): 1330.

legal strategy based on JEU, presidents do not make policy directly; rather, they move the goal posts of what the law allows. In other words, OLC memoranda examine the existing laws (statutory, constitutional, international, as well as informal) to probe the scope of legitimate action. Once the scope is determined, presidents effectively self-bind. According to Posner and Vermuele, "[t]he legal authority to establish a new status quo allows the president to create inertia or political constraints that will affect his own future choices."[194] In my view, this self-binding mechanism does more than create inertia or political constraints, it is also a legitimating strategy: the Executive binds itself to endogenously rendered (executive) interpretations of the law, effectively unshackling itself from competing interpretations and creating a body of executive law often unchallenged by the coordinate branches.

This, in turn, gives substance to Whittington's claim that the judiciary and the president compete over the same "constitutional space."[195] It also explains how the president is able to effectively change constitutional and/or statutory meaning without involving the coordinate branches. James Pfiffner accurately summarized the operation of JEU in *Torture as Public Policy:*

> Authoritative, legal opinions can also constitute policy-making. If executive branch officials want to take some actions that are potentially against the law, the law is the official public policy limiting the actions. If authoritative legal opinions are issued, especially by the [OLC], whose opinions are binding on the executive branch, the legal memoranda constitute policy. Authoritative OLC opinions make public policy in the sense that they allow or disallow certain actions. Thus, the OLC legal opinions that enabled interrogators to use techniques previous forbidden by law are, in effect, policy, even though they did not mandate particular actions. They formally allowed previously forbidden interrogation techniques to be used.[196]

According to Pfiffner, "many of the legal memoranda of the Bush administration were in fact policy decisions, since the legal judgments determined what type of treatment of detainees was allowed"[197] Thus, OLC opinions are quasi-judicial opinions that do not only describe how the law works but also prescribe the operation of the law. While Professor Pfiffner's observation was

---

[194] Adrian Vermeule and Eric A. Posner, "The Credible Executive," *Harvard Law School Faculty Scholarship Series*, 2006, 23.
[195] Whittington, *Political Foundations of Judicial Supremacy*, 52.
[196] Pfiffner, *Torture as Public Policy*, 2010, 14.
[197] Pfiffner, 115.

made in the specific context of enhanced interrogation techniques, I propose that it is also true with regard to other non-torture-related memoranda produced under Bush 43. In fact, given the permissive conditions furnished by the juridification politics, I expect to see similarities in OLC memoranda from Watergate to Bush 43. Under condition of juridification, OLC's legal opinions should exhibit characteristics that make them potent "power tools"[198] or policy instruments.

This allows us to circle back to Silverstein, who claims that the law can "shape, constrain… and kill politics."[199] Under condition of the juridification of politics, when JEU is utilized by the Executive, OLC memoranda can effectively do just that by circumventing the traditional institutional process of policy-making. Relegated to a reactive position due to the Executive's structural advantage, the coordinate branches respond to a *fait accompli* with all the moving parts already in motion, which makes reversal so much more difficult.

By extending Vallinder's model (see page 70), it is apparent that, in its operation, JEU is more akin to the judicial process than to the legislative process. In essence, JEU is a form of conflict resolution of potential or actual "turf wars" between the Executive and the other branches. Vallinder admits that the columns "Courts" and "Legislature" are ideal types, and I, likewise, concede that the column "Executive" is an over-simplified model of executive legal interpretation. My aim with this comparison is simply to demonstrate that the Executive Branch's ability to render legal judgment endogenously is similar in its dimensions to the judicial process. Moreover, since OLC memoranda are binding across the Executive Branch, it is also comparable to binding judicial decisions; therefore, it overcomes the phenomenon of what Neal Katyal refers to as "internal separation of powers,"[200] and undermines the "personal presidency" theories of presidential influence.[201]

---

[198] Kelley, "The Unitary Executive and the Presidential Signing Statement."
[199] Silverstein, *Law's Allure*.
[200] Neal K. Katyal, "Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within," *The Yale Law Journal* 115, no. 9 (2006): 2314–49.
[201] Dickinson, "We All Want a Revolution."

	Courts	Legislature	Executive (JEU)
Actors	• Two parties and a third participant (the judge) – two parties pose a legal question	• Several parties	• One or multiple parties pose a legal question • OLC as issuer of advisory opinion based on contemplated action
Working methods	• Open hearings • Weighing of arguments	• Bargaining, often behind closed doors • Compromises • Log rolling	• Often confidential • Weighing of available legal arguments (element of institutional bias)
Basic decisionmaking rule	• Decision made by an impartial judge	• The majority principle	• Decision made by "impartial" partisans, legal actors performing the role of a judge.
Output	• Settling of individual cases but cf. precedents, esp. judicial review	• General rules(laws, budgets), policy-making	• Settling of individual cases, *stare decisis* toward Supreme Court precedents *and* OLC precedent
Implications	• Ascertaining the facts (what has happened) and the relevant rule (what should be applied), "the only correct solution"	• Allocation of values (often economic), "the politically possible solution"	• "The best reading of the law" based on OLC's analysis (which is often the only reading)

Table 2: Vallinder Model

THE MODERATING VARIABLE AND OLC'S PRO-EXECUTIVE JURISPRUDENCE

Before I move on to my analysis, a caveat is in order since the Bush administration's programmatic unilateralism, a corollary of the political agency model, has long historical roots. Those roots are not divorced from structural developments; in fact, they are inextricably intertwined with Watergate. Nonetheless, it is unlikely that the same "moderating variable" (MV) that is in play in the Bush case study and greatly amplifies the independent variable, "agency" (which I argued above that I would hold constant throughout this study), to be present in other post-Watergate administrations. In less social scientific language, important members of the Bush administration, among them Vice President Richard Cheney, David Addington, and John Yoo, had long felt that the power of the President needed to be strengthened to counteract the

constraints imposed by Watergate.[202] According to David Gergen who served as adviser to Presidents Nixon and Ford (and later President Clinton), policy actors that would become influential in the Bush White House saw the post-Watergate presidency as substantially emasculated:

> [F]rom the [Ford] White House point of view, those laws – you felt like you were Gulliver in Lilliput. You had all these strings that were tying you down, and you really couldn't act... So in effect we moved from the imperial presidency of Richard Nixon very quickly into what many of us thought was an imperiled presidency under Gerald Ford...
>
> That was a pivotal moment in the education of Dick Cheney. Many of us felt strongly that the power of the presidency was threatened, that America could not lead in the world and couldn't get much done in Washington unless you had a more effective chief executive…[203]

Thus, in the context of the momentum that characterizes the Bush administration's unilateralism, the dependent variable, JEU, is expected to be extremely high for two reasons: (i) juridification of the political as one independent variable, and (ii) the calculated agenda of executive branch actors as another:[204]

> Other post-Watergate administrations: $IV_{juridification} + IV_{agency} + IV_{institution} \rightarrow DV_{JEU}$
>
> Bush case study: $IV_{juridification} + (IV_{agency} + MV_{agenda}) + IV_{institution} \rightarrow DV_{JEU} \uparrow$

This does not negate my assumption regarding the structural dynamic that juridification creates, however, it is important to acknowledge that numerous members of the Bush administration had a substantial stake in and an ideological commitment to the strengthening of the presidency resulting in extremely high values on the DV.

From a structural perspective, OLC's aggressively pro-Executive bent is also a factor of the

---

[202] In general, see Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*.

[203] Gergen, PBS Frontline: Cheney's Law.

[204] Such as the author of many of the legal opinions analyzed in this chapter, John Yoo, who came to the DOJ's Office of Legal Counsel with an ideological commitment to the strengthening of executive power vis-à-vis the coordinate branches

institutional traditions of the Office itself.[205] According to John McGinnis, the tendentiousness of OLC, to which the Attorney General's legal advisory function has been delegated, is a result of the institutional pressures inherent in the separation of powers established by the Framers:

> In some specific areas of constitutional interpretation, a distinctive executive branch approach to interpretation may be necessary to create an appropriate jurisprudential equilibrium given the institutional interests of the other branches. For instance, the President is, in a very real sense, the party in interest in separation of powers cases that involve his prerogatives. Not surprisingly, the Framers believed that the President would use his power of legal interpretation to safeguard his own office. […] Thus, a vigorous advocacy by the Attorney General of the executive branch's institutional interests on separation of powers questions in his opinions could be seen to redound to the benefit of the constitutional system as a whole.[206]

And, since OLC is not the only legal advisor to the President, its pro-Executive bias is also predicted by rational choice theory.[207] Since seeking OLC's advice is entirely discretionary, an overly cautious jurisprudence could sideline OLC in favor of the White House Counsel's Office or other *ad hoc* groupings of Executive Branch lawyers. In other words, the loss of institutional prestige or reputational capital exposes the "oracle"[208] of Executive Branch legal interpretation to becoming marginalized. In sum, the pro-executive tendency of OLC is both an intrinsic institutional feature of the office *and* a hallmark of the Bush OLC due to the ideological commitments of members of the Bush administration.

***

[205] See Eric Posner and Adrian Vermeule, "A 'Torture' Memo and Its Tortuous Critics," *Wall Street Journal*, July 6, 2004, https://search.proquest.com/docview/398892081?accountid=14541.
Also, Walter Dellinger, "Principles to Guide the Office of Legal Counsel." (Dellinger justifies the pro-executive tendencies of the office on account of it "serv[ing] both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vets the executive power.")
[206] John O. McGinnis, "Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon Executive Branch Interpretation of the Law," *Cardozo Law Review* 15, no. 1–2 (n.d.): 399–400.
[207] See Nelson Lund, "Rational Choice at the Office of Legal Counsel," *Cardozo Law Review* 15 (n.d.): 437–505. See also Griffin B. Bell and Ronald J. Ostrow, *Taking Care of the Law* (Macon, Ga: Mercer University Press, 1986).
[208] McGinnis, "Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon Executive Branch Interpretation of the Law," 428.

I list three inter-related questions in the Introduction that inform the focus of this dissertation. The first question is: "Why did the Bush administration engage in a legal strategy after 9/11?" The answer that I proposed in this chapter is juridification. I analyzed the structural/institutional factors that lead to the emergence of alternative policy-making processes, of which Executive Branch legal interpretation is one. I argued that OLC's legal opinions fit the parameters of unilateral power tools, especially in the permissive structural context within which the Executive operates. The second question that I asked was "Are the Bush administration's legal opinions policy decisions?" my third question was "were they *sui generis*?" It is to these questions that I will now turn.

CHAPTER THREE

INTRODUCTION TO THE EMPIRICAL ANALYSIS: THE RAW DATA

In this chapter, I will present the raw data as it emerges from the textual analysis. My aim in this chapter is to provide an initial impression of the tenor of the Bush OLC's legal opinions as well as the legitimating authorities used to backstop its arguments. In this discussion I will treat the "construction of the GWOT legal architecture" memos as one concatenated corpus. This allows me to characterize the Bush OLC's foreign-affairs-and-national-security-related jurisprudence as a unit, rather than discussing individual opinions. While discrete memos differ considerably, the tallied numbers shed light on the overall thrust of the corpus of opinions.

My textual analysis of the Bush memoranda produced eight distinct groups of authorities that provide the basis for OLC's arguments. These groups are: *Courts*, *Congress*, *Historical Sources*, *International Sources*, *Academia*, the *Constitution and Judicial Doctrine*, *Legal Constructs*, and *Executive Branch* sources. It is evident from the sheer volume of data points that the Bush legal opinions marshal a wide range of authorities to substantiate their arguments. The 3339 textual segments marked *Authorities* break down as follows:

Courts	754 coded segments
Congress	550 coded segments
Constitution and Judicial Doctrine	485 coded segments
Executive Branch	378 coded segments
International	351 coded segments
Historical	336 coded segments
Legal/analytical Constructs	282 coded segments
Academia	193 coded segments
Non-Federal Law	10 coded segments

Table 3: Authorities cited in the Bush corpus

Furthermore, the parsing of the Bush memos also produced a number of discrete

interpretive arguments. Arguments either describe or modify an *Authority* code. Conceptualized as a syntactic relationship: authority is to argument as modifier is to subject. For example, OLC might make an interpretive argument that a certain statutory provision under scrutiny is "inapplicable" (modifier) in a given situation. Other arguments mark a coded segment as "narrow" or "broad," or denote a comparison of different authorities. Yet other arguments simply describe what is being done to an authority, such as "judicial ruling interpretation." Canons of construction are also subsumed under *Interpretive Arguments*, and they indicate a complex set of interpretive rules that the canon of construction requires. Interpretive arguments are not mutually exclusive; therefore, more than one argument might attach to the same authority, indicating that a complex argument is being made in a coded textual segment. Where it makes sense, I use these arguments in cross-tabulation with the authorities listed above to perform textual analyses. Where MaxQDA does not provide valuable insights through coding queries, document portraits, and cross-tabulation, I use the interpretive arguments as points of reference in my in-depth analyses of the OLC memos in Chapters Four to Six.

At the highest level of generality, OLC's arguments fall into two parent categories: legal and non-legal. The Bush OLC makes 127 non-legal arguments in the construction-of-the-GWOT-legal-architecture memos. Those arguments will be discussed in the section on OLC policy-making, and here I will focus on the former, legal arguments. The head code that comprises legal arguments, the *Legal Interpretive Toolkit*, is the most populous interpretive category. It contains close to 1,600 textual segments and its complete list of sub-categories is listed in the Codebook in the Appendix. Other legal arguments designate *Institutional Power Relations*, while the last category consists of arguments concerning legal interpretive authority such as *Interpretive Equivalency* or *Original Interpretation*. *Institutional Power Relations* and *Interpretive Authority* arguments will be discussed separately as examples of OLC's assertion of an independent and co-equal mandate to interpret the laws.

It is broadly recognized in the relevant scholarly literature that the Office of Legal Counsel's tradition is to backstop its arguments in Supreme Court opinions.[209] Legal scholars have

[209] See, e.g., Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands;" Rachel Ward Saltzman, "Executive Power and the Office of Legal Counsel," *Yale Law and Policy Review* 28, no. 2 (2010): 439–80.

compared the interpretive activity of OLC to that of a lower court: faithfully implementing the Supreme Court's rulings as *modus operandi*.[210] My textual analysis of the 20 legal opinions relating to the construction of the GWOT legal architecture appears to bear out this observation: the most populous parent code that emerged from the textual analysis is, indeed, *Courts*. Thus, at first glance (although later I will nuance this finding), the distribution of authorities corroborates the conventional wisdom that OLC operates under the presumption of (a version of) "judicial supremacy." I identified and coded 206 discrete Supreme Court cases and recorded 137 instances of reference to lower-court rulings. The most-often-quoted Supreme Court cases are (in descending order):

Case name	# instances	Case name	#
Ex parte Quirin	56	*U.S. v. Curtiss-Wright*	15
Johnson v. Eisentrager	21	*Haig v. Agee*	13
The Prize Cases	21	*Vernonia School District v. Acton*	9
In re Yamashita	20	*NY v. Quarles*	9
Youngstown v. Sawyer	18	*Cramer*	9
U.S. v. Verdugo-Urquidez	17	*Hamilton v. Dillin*	8
Ex parte Milligan	17	*Hamdi v. Rumsfeld*	8

Table 4: Most frequently coded SCOTUS cases in the Bush corpus

As a rule, I did not assign argument codes to Supreme Court cases, unless the Court's rationale was applied directly to the question being answered in a legal opinion. For example, in the *Padilla 1 Memo*, OLC uses the Supreme Court's ruling in *Quirin* to find that citizenship in the United States does not immunize one from "the consequences of a belligerency which is unlawful because in violation of the law of war;"[211] which triggered a *Citizenship Status* interpretive code.

Given the specific legal questions that were put to the Bush OLC, it is not remarkable that *Quirin* is the most often cited Supreme Court case in the corpus.[212] What is remarkable, however,

---

[210] Marty Lederman, "Balkinization: Chalk on the Spikes: What Is the Proper Role of Executive Branch Lawyers, Anyway?," Balkinization, accessed November 25, 2018, https://balkin.blogspot.com/2006/07/chalk-on-spikes-what-is-proper-role-of.html. ("As a general matter, OLC attempts to give the President the 'best' view of what the law allows, where 'best' is generally understood to mean the answer to which the governing legal doctrines would most likely point (more or less akin to what a lower court does when it's trying to follow the 'rules laid down' by the Supreme Court).")

[211] *Ex parte Quirin*, 317 US 1, 36 (1942).

[212] Five of the 20 construction-of-the-GWOT-legal-architecture memos directly or indirectly address the legal underpinnings of military commissions.

is that the seminal separation-of-powers case, *Youngstown*, does not appear at the frequency that one might expect. In fact, only 7 of the 20 legal opinions that frame the GWOT legal architecture reference the case, and 4 of the 7 use only Frankfurter's concurring opinion to assert that a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress, and never before questioned… may be treated as a gloss on the 'executive Power.'"[213] Thus, Justice Jackson's functionalist balancing framework, which is widely accepted as the touchstone of any separation of powers analysis appears to be absent from the vast majority of the Bush OLC memos.[214] As I will argue below, the lack of textual reference to *Youngstown* is not tantamount to complete disregard, as the Bush OLC implicitly acknowledges Justice Jackson's three-tier analysis but subsumes it to overriding constitutionally-derived authority.

As I predicted, statutory law sources (and the interpretation of those sources) are the other mainstay of the Bush memos. Of the 550 textual segments coded as *Congress*, *Acts of Congress* make up nearly 90% (493 coded segments, 62 discrete statutes), while the rest of the codes are *Historical Statutes* (no longer on the books), *Congressional Hearings* and *Committee Reports*, *Debates*, and *Declarations of War*. The single most-often cited Act of Congress (88 instances) is 18 USC §2340, the Torture Statute, followed by Pub. L. No. 107-40, the 2001 Authorization for the Use of Military Force (59 instances), with FISA (50 USC §1801) being the third-most-frequently cited statute (39 instances) in the corpus. The War Crimes Act (18 USC §2441), the Posse Comitatus Act (18 USC §1385), and the War Powers Resolution (50 USC §1541) also figure prominently in the Bush OLC's opinions, with 17, 16, and 16 textual segments, respectively. The rest of the sub-codes can be found in the Code Book in the Appendix.

Just how extensive and comprehensive statutory law analysis is in the Bush corpus can be further demonstrated by applying the interpretive codes located at *Interpretive Arguments/Legal Interpretive Toolkit/by source type*. In fact, the source-level interpretive code *Statutory Construction* is the single most-often recurring data point (after *Conclusions*, which I will elaborate on in Chapter 6) in the entire corpus of the Bush opinions. The ratio of arguments to

---

[213] *Youngstown Sheet & Tube Co. v.* Sawyer, 343 US 579, 610 (1952) (Frankfurter, J. concurring)

[214] *See*, in more detail, Kathleen Clark, "Ethical Issues Raised by the OLC Torture Memorandum," *Journal of National Security Law and Policy*, 2005, 461.

authorities in the corresponding categories (*Congress*, *Constitution*, *Courts*, *International Sources*, *CFR*) indicates that the Bush OLC's interpretation of authorities is most extensive with respect to statutory sources:

Legal Interpretive Toolkit/by source type	Authorities
Statutory (209)	*Acts of Congress* (494)
Judicial ruling (165)	*Courts* (754)
International source (84)	*International* (351)
Constitutional (42)	*Constitution & Judicial Doctrine* (485)
Regulatory (5)	*CFR* (6)

Table 5: Ratio of arguments to authorities

It is important to point out that the *Statutory* interpretation code, which attaches to *Acts of Congress* authorities, is not code duplication, since some congressional authorities cited in the Bush memos are not strictly speaking "interpreted." If OLC engages in no interpretation of the statutory language, purpose, or structure (statutory history is located in the coding structure at *Historical/statutory history*), then the statutory interpretive code does not attach.

What is notable in the Bush OLC's statutory interpretation, besides its pervasiveness in the body of opinions, is the overall tenor. To wit, the interpretive "timbre" of the entire corpus with regard to statutory authorities is uniquely negative. Two code groups located at *Interpretive Arguments/Legal Interpretive Toolkit/Construction/Negative Construction, Positive Construction* are illustrative of the quality of OLC's legal reasoning. The sum of codes indicates that negative construction codes outnumber positive ones two to one:

- *Interpretive Arguments/Construction*:
    - ***Negative (destructive) interpretation*** (exception, absence, expired/no longer in effect, inapplicable, incorrect, insufficient, no basis, non-binding, prohibited, silence, unlikely, violation, etc.) = 346
    - ***Positive (constructive) interpretation*** (authorized, available/applicable, consistent, constitutional, flexibility, high, increase, likely, must be used, necessary/exigent, overlap, override, proportional, reasonable, sufficient, etc.) = 160

The intersection of *Acts of Congress* with *negative* and *positive interpretation* codes, respectively, yields the following results:

Acts of Congress (& sub-codes) ∩ *destructive interpretation* (& sub-codes) → ∑ = 131

Acts of Congress (& sub-codes) ∩ *constructive interpretation* (& sub-codes) → ∑ = 48

Thus, extrapolating the quantitative measures onto *Acts of Congress* authorities reveals that OLC is 2.7 times more likely to engage in negative than positive interpretation of the statutory authorities it cites. Given the abundance of statutory law interpretation, one cannot say that the Bush OLC fails to consider statutory authorities. Rather, the data evince an extensive interpreting-away of statutory restrictions.

The third most-often-recurring code in the entire Bush 43 corpus is *Commander-in-Chief* (151 textual segments), located in the coding structure at *Constitution and Judicial Doctrine/Article II/C-in-C*. Moreover, it is the single most populous code located under the head code *Authorities*. With 483 textual segments, *Constitutional and Judicial Doctrine* closely trails *Congress* codes. In the Introduction, I hypothesized that post-Watergate OLC memos would devote more attention to statutory law than to constitutional law due to the constraints imposed on the Executive by framework legislation and the proliferation of legal restrictions attendant to the Watergate Regime.[215] The data that emerged from the textual analysis appear, at first sight, to confirm that hypothesis only weakly: *Acts of Congress* codes only narrowly outnumber *Constitutional and Judicial Doctrine* codes (by a slim 12% margin).

Once again, the source-level *Construction* arguments tip the balance. Indeed, the single most-often recurring code in the dataset is *Statutory* C*onstruction* (209 instances, see Table 5 on page 79). *Constitutional* C*onstruction* (43 instances), by contrast, was penultimate in frequency among source-level codes, surpassing only *Regulatory* construction with 5 coded segments. Thus, based on the quantitative data, the Bush OLC appears to engage in significantly more statutory than constitutional interpretation. To be sure, the formula that I created in the theory chapter, representing the result of quasi-constitutionalization and legal proliferation ($+J_A$; $+J_B$), predicted this outcome ($+J_C$ and $+_aJ_D$). Even if one were to argue that I mis-coded *Historical* segments such as the *Framers' Intent or Understanding* (47), *Founding Documents* (10), and *The Framers'*

[215] The formula that I used in the theory chapter is ($+J_A$; $+J_B$) → $+J_C$ and $J_D/_aJ_D$

Writings (58, which includes the Federalist Papers), statutory-law-related interpretive codes would still far outnumber constitutional-law-related ones. I will return to the question of statutory vs. constitutional construction in the descriptive analyses in Chapters Four to Six.

Uncomfortably wedged between *Congress* and *International* authorities are *Executive Branch* sources. These authorities appear to be a poor fit given that they do not easily square with the axiom in the existing literature that OLC operates under the presumption of judicial supremacy. In fact, as I will argue below, the Bush OLC behaves very much like a coordinate interpreter to the Supreme Court, especially given the lack of applicable precedent in the vast majority of legal questions that it sets out to answer. About one third, 134 of the 378 total segments coded as *Executive Branch*, falls within the category *Papers/Public Statements* of Executive Branch principals such as presidential letters, speeches, reports by Executive Branch agencies, etc., which OLC treats as authoritative under the rubric of "historical practice;" and, indeed, much of which intersects with *Historical* authorities and *Institutional Practice* arguments.

More importantly, for my purposes, this category also includes the sub-code *Legal Opinions* of the Office of Legal Counsel and Attorneys General, which make up about 50% of the 378 *Executive Branch* codes. These textual segments are extracts from previous Executive Branch constitutional and statutory construction, and, as such, the Bush OLC uses them to backstop its legal arguments. Of the 145 textual segments coded as *OLC*, 56 are self-referential, meaning that the Bush OLC refers to its own opinions in the corpus. Notably, more than half (59%) of the remaining codes, referring to previous administrations, are from Democratic post-Watergate OLCs (Clinton: 39 and Carter: 8), while only 33 (41%) were authored by their Republican counterparts (Reagan: 24 and Bush 41: 9). 9 coded segments reference pre-Watergate OLC opinions, although 6 of those codes refer to the same memo penned by William Rehnquist (the *Rehnquist Memo*) who was head of the OLC from 1969-1971 under President Nixon. I will discuss the significance of the precedential value of previous OLC opinions in the "Asserting Independent Interpretive Authority" chapter below. Pre-Watergate memoranda will be examined in Chapter 7. For now, it is important to point out that the ubiquity of OLC precedent (an average of 7.25 *OLC* coded segments per legal opinion) and the Bush OLC's lopsided reliance on Democratic predecessor administrations indicates that there is significant continuity of OLC jurisprudence

irrespective of party affiliation. Moreover, the data show that the Bush OLC backstops its arguments in branch-internal legal precedent.

Historical and *International* authorities are about evenly distributed in the corpus of opinions that constitute the construction of the GWOT legal architecture. *Historical* codes (339) intersect with most of what the memos refer to as *Institutional Practice* (84 coded segments):

Institutional Practice arguments ∩ *Historical* authorities (& sub-codes) = ∑67

Other *Institutional Practice* codes attach to OLC's discussion of the normative role of historical practice in constitutional law. Sub-categories of *Historical* include textual segments describing the *Framers' Intent or Understanding* (of constitutional law or institutional powers, 47 coded segments), *Treaty History* (26), *Statutory History* (47), *Founding Documents* (10), and the *Framers' Writings* (45). In a 2007 article in the *Presidential Studies Quarterly*, Andrew Rudalevige quipped that whatever the Framers' intent may have been regarding the limits of executive authority, the Hamiltonian vision of executive power won out over time.[216] This observation is demonstrably true with regard to the Bush memos. Of the 45 textual segments coded as *Framers*, an overwhelming majority (73%) cite Alexander Hamilton as the authoritative expositor of the Constitution's meaning. Hamilton's significance in OLC's legal interpretation will be discussed in detail in the empirical chapters.

International authorities comprise four principal sub-codes: *Multilateral Treaties* (178 coded segments), *International Organizations* (74), *Foreign Tribunals* (24), and *Customary International Law* (61). The two most-often-cited sources of international law are the Geneva Conventions (GCs) and the U.N. Convention Against Torture (CAT); together they make up nearly 90% of the textual segments under the head-code *Multilateral Treaties*. Several of the Bush memos are dedicated primarily to the interpretation of these two treaties and the domestic laws passed in implementation thereof; consequently, the argument code *International Law Source Interpretation* (84 coded segments) attaches most frequently to *CAT* and *Geneva* authorities (74 combined out of 84). *The* Geneva Conventions and CAT are also the most often coded

[216] Andrew Rudalevige, "'The Contemporary Presidency': The Decline and Resurgence and Decline (and Resurgence?) Of Congress: Charting a New Imperial Presidency," *Presidential Studies Quarterly* 36, no. 3 (September 2006): 507.

International authorities, followed by United Nations Security Council Resolutions (*UNSCR*), and customary international law (*CIL*). Much like statutory law construction, the interpretation of international authorities is decidedly negative:

Multilateral Treaties (& sub-codes) ∩ *negative construction* (& sub-codes) = ∑68
Multilateral Treaties (& sub-codes) ∩ *positive construction* (& sub-codes) = ∑23

Cross-tabulation reveals that the Bush OLC's construction of international sources is similar to its treatment of statutory law: the memos engage in international law construction in order to interpret away restrictions to a much greater degree (nearly 3 times more likely) than they do in order to identify a source of authority to act.

While most of the *Legal Interpretive Toolkit* is common to all *Authorities*, some specialized codes relate to international law only. These codes are: *Stateness* (16); *Breach* (16); *US sovereignty* (9); *Non-Self-Execution* (7); and *Object and Purpose*, *Only Bound if Consented*, *Constitution Governs the Meaning* with 2 coded segments each. I am going to discuss the significance of these codes in Part 2 of Chapter 5 on OLC's interpretation of international obligations.

During the coding process, I also created the head-code *Academia* subsumed under *Authority* types. *Academia* unifies a broad set of data sources ranging from dictionaries through law review articles to the APA's Diagnostic and Statistical Manual of Mental Disorders. These disparate *Academia* codes, most of which were not subdivided into narrower categories, are yet another example of authorities that the Bush OLC uses to backstop its arguments. *Academia* codes provide definitions (e.g.: *Black's Law Dictionary*, the Model Penal Code), corroborate *Historical* and *International c*odes (e.g.: *Wedgewood*),[217] point to newspaper articles, and draw on well-known tomes such as LaFave's *Criminal Law*, Oppenheim's *International Law*, Winthrop's *Military Law and Precedents*, or Justice Story's *Commentaries on the Constitution*.

These codes do not easily lend themselves to broad-brush generalizations. In fact, one would be hard-pressed to find corpus-wide ideological prejudice through content analysis alone:

[217] Professor Ruth Wedgwood whose article "*Responding to Terrorism: The Strikes Against bin Laden*" is cited extensively in the *Iraq Memo*.

from Robert Bork to Laurence Tribe, from Louis Fisher to John Yoo, OLC's opinions marshal an impressive range of scholarly sources to corroborate arguments, while regularly also identifying opposing views.[218] Nevertheless, the uncontextualized output of my content analysis is misleading as the following example indicates: The article "*The Continuation of Politics by Other Means: The Original Understanding of War Powers*,"[219] authored by John Yoo, appears in four different memos.[220] That, in and of itself, does not demonstrate selection bias; however, in two of those memos it is the only scholarly source cited in corroboration of a somewhat suspect generalization that the Framers understood the Commander-in-Chief power as "incorporating the fullest possible range of power available to a military commander."[221] The significance of the recurrence of Yoo's article will be discussed further in Chapter 5.

***

In conclusion, content analysis reveals that OLC backstops its arguments in several types of authorities. Apart from Supreme Court cases, which are indisputably prominent, OLC also relies heavily on self-referential Executive Branch authorities and institutional practice, indicating that its jurisprudence is uniquely "executive" rather than simply court-imitative. While statutory and international law sources figure prominently in the Bush corpus, the corresponding textual segments are overwhelmingly coded with negative construction markers. This signifies the interpreting-away of restrictions for greater latitude of action rather than compliance as a source of authority to act.

---

[218] E.g., *War Powers Memo* at 17 ("Some commentators have read the constitutional text differently. They argue that the vesting of the power to declare war gives Congress the sole authority to decide whether to make war. [FN6] Other scholars, however, have argued that the President has the constitutional authority to initiate military hostilities without prior congressional authorization."), *see also, War Powers Memo* FN6.

[219] John C. Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," *California Law Review* 84, no. 2 (March 1996): 167–305.

[220] *War Powers Memo*, *Domestic Military Memo, Military Commissions Memo, SJAA Memo*.

[221] *SJAA Memo*, p. 3

THE STRUCTURE OF THE BUSH OLC'S LEGAL MEMORANDA

The standard structure of the Bush OLC's legal opinions is as follows: they open with the consideration of the text and structure of the Constitution (discussing, mainly, Article II authorities, often in contrast to Article I), followed by (in no particular order) the Framers' understanding, historical practice, Supreme Court and Executive Branch precedent, and, lastly, statutory or international arguments. Some of the memoranda depart from this standard structure, nonetheless, the generalization holds overall. As I will demonstrate below, the foregrounding of constitutional arguments indicates their relative importance. The operative presumption of the Bush OLC's legal opinions is that the President's constitutionally-derived powers alone provide sufficient legal grounds for action in foreign and national security matters. Yet, as I will explain in Chapter 6 (Defining Institutional Power Relations) the Bush OLC's extensive statutory and international law interpretation evidences tentativeness in the novel, unsettled legal questions presented by 9/11. Furthermore, this tentativeness is also indicated by OLC's implicit recognition of the *Youngstown*-based institutional powers calculus.

CHAPTER FOUR

Unilateralizing the Government's Response to 9/11

"The Bush administration has operated on an entirely different concept of power that relies on minimal deliberation, unilateral action, and legalistic defense."

– Jack Goldsmith, The Terror Presidency

"[C]ategorical impunity creates moral hazard for policymakers. Economists warn that the availability of insurance can encourage people to take unwise risks. Under Cheney and Addington's direction, Yoo concocted legal opinions that amounted to a roving insurance policy for government overreaching. In relying on this dubious form of insurance, officials took risks with the United States' reputation and values."

– Peter Margulies, Law's Detour

In the afternoon of June 22, 2004, nearly two weeks after a controversial Office of Legal Counsel opinion authorizing enhanced interrogation techniques had appeared in the Washington Post, White House Counsel Albert Gonzales entered Room 350 of the Eisenhower Executive Office Building prepared to brief the press on the legal basis of the government's prisoner of war policy in the War on Terror. Within the short span of two months, the administration was facing scandal anew, giving rise to a mounting credibility crisis. In late April, revelations of prisoner abuse at Abu Ghraib had burst into public view. The shocking images of torture and humiliation first surfaced in CBS's *60 Minutes* followed by a graphic *New Yorker* article a few days later. Attempting to quell the outrage, in his weekly radio address, President Bush dubbed the acts the "wrongdoing of a few."[222] In no uncertain terms, the President assured a stunned nation that the deeds of "a small group of morally corrupt and unsupervised Soldiers and civilians"[223] by no means reflected the policy position of the government, which was "consistent with U.S. law and the Geneva

[222] George W. Bush, "President's Radio Address," (May 8, 2004), https://georgewbush-whitehouse.archives.gov/news/releases/2004/05/20040508.html.

[223] MG George R. Fay, "Investigation of Abu Ghraib Detention Facility and 205th Military Intelligence Brigade," August 25, 2004, 71, https://www.thetorturedatabase.org/document/fay-report-investigation-205th-military-intelligence-brigades-activites-abu-ghraib.

Conventions."[224] The Washington Post's publication of OLC's secret interrogation memo on June 8 left the administration scrambling for an explanation once more.

As aids were distributing to reporters a "2-inch-thick stack of papers documenting the administration's internal debate about interrogation techniques,"[225] Gonzales embarked on a "fairly lengthy opening statement," in which he attempted to highlight the "thorough deliberative process the administration used to make policy decisions on how [to] wage a global war against a terrorist organization."[226] As the war unfolded, the White House Counsel explained in the course of a nearly two-hour-long session, the government was forced to address pressing legal questions regarding captured enemy combatants: "What is the legal status of individuals caught in this battle? How will they be treated? To what extent can those detained be questioned to attain information concerning possible future terrorist attacks? What are the rules? What will our policies be?"[227]

"Two distinct sets of documents" were being presented to members of the press huddled in the briefing room. The White House Counsel drew the attendees' attention to one set, which he claimed "reflect[ed] the actual decisions issued by the President and senior administration officials directing the policies that our military would actually be obliged to follow."[228] The other set, "those generated by government lawyers," Gonzales described as "irrelevant" to action taken by the President.[229] OLC's legal opinions, according to the White House Counsel, were "unnecessary [and] over-broad discussions" that did no more than "explore the limits of the legal landscape as to what the Executive Branch can do within the law and the Constitution as an *abstract* matter."[230]

As I will demonstrate below, the White House Counsel's characterization of OLC's legal memoranda was dissembling their real import and direct policy effect. In this chapter, I undertake

---

[224] Bush, "President's Radio Address."
[225] Dan Froomkin, "White House Succumbs to Pressure," *Washington Post*, June 23, 2004, sec. Politics, http://busharchive.froomkin.com/A64079-2004Jun23.html.
[226] Alberto Gonzales, "Press Briefing by White House Counsel," (June 22, 2004), https://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040622-14.html.
[227] Id.
[228] Id.
[229] Id.
[230] Id. (emphasis added)

a systematic analysis of OLC's legal opinions relating to the Bush administration's response to the 9/11 terrorist attacks and the ensuing Global War on Terror (GWOT). This analysis is based on over 6,200 coded textual segments of nearly seven hundred pages of legal opinions spanning 20 OLC memoranda. Unlike studies produced by other "law oriented political scientists"[231] and legal scholars before me, my investigation is not outcomes-oriented. Instead of focusing only on the overall conclusions of the Bush memos, I delve into the specific authorities (or sources) and legal and political arguments employed to reach certain outcomes. My main period of interest lies largely between 2001 and 2003, the period that I call the "construction of the GWOT legal architecture." Some memoranda, such as the 2006 *NSA Memo* and the *Stellar Wind Memo*, fall outside of that specific time frame, but their arguments are intimately related to the crescendo of bold interpretive activism that characterized the immediate aftermath of 9/11. A couple of memoranda produced after 2004 will be discussed in Chapter Seven as examples of what other scholars have described as the curbing of the excesses of the GWOT legal architecture. Those memos, others have argued, are a result of a defensive reaction to the public outrage against the use of enhanced interrogation techniques at Abu Ghraib, and a somewhat moderated vision of presidential unilateralism represented by such figures as Jack Goldsmith.[232] This moderation supposedly signals the weakening of the MV_{agenda} and the segue to the kind of JEU that continued throughout the Obama administration.

The deep contextual analysis that I will perform in this chapter is based on the thematic clusters of authorities and arguments that emerged from the content analysis of OLC's legal opinions:

(i) **unilateralizing the response to the crisis at hand**: 9/11 and the GWOT (the war power, military commissions, enemy combatant designation, domestic use of the military (PCA), surveillance (NSA), military vs. law enforcement model);

(ii) **interpreting legal obligations under international law**: as a source of authority to act

---

[231] Persaud, *The Role of Judicial Advisory Opinions in Canadian Constitutionalism and Federalism: The Senate, Patriation and Québec Veto Reference Cases Considered*, 8.

[232] Dawn E Johnsen, "Faithfully Executing the Laws: Internal Legal Constraints on Executive Power," *UCLA Law Review* 54 (2007): 1559–1612.

or restrictions on action (Geneva Conventions, Convention Against Torture (CAT), customary international law (CIL), U.N. Security Council Resolutions (UNSCRs));

(iii) **defining the distribution of institutional powers and competencies**: essentially, OLC's separation of powers jurisprudence (separation of powers, limits of congressional power (SJAA, FISA, WPR), limits of the judicial power (political questions doctrine, judicial underenforcement)).

As I unpack the thematic clusters outlined above, I will not relitigate the rightness or wrongness of the Bush OLC's legal conclusions. Those conclusions (and the moral and ethical issues involved), have been discussed elsewhere[233] and they are not the primary focus of my interest in this dissertation. Instead, my main concern lies in the administration's *intent*, the *way* in which OLC reached its conclusions, and the policy *effect* that the Bush opinions had. By disaggregating the authorities and arguments used by OLC from the conclusions reached, I can highlight the inner workings of the memos and tease out whether they qualify as unilateral power tools. I will be paying particular attention to the following: the questions asked, the structure of the memos, constitutional vs. statutory arguments, negative vs. positive interpretation, reinterpretation of authorities (statutes, court cases, etc., when applicable), court precedent, branch-internal *stare decisis*, and original interpretation (where no precedent exists).

***

9/11 marks the single most devastating attack on U.S. soil, surpassing even the Japanese bombing of Pearl Harbor in 1941. Roughly 3,000 people perished as a result of four coordinated terrorist attacks[234] on high-value targets in New York City and Washington, D.C., "using highjacked commercial airliners as guided missiles."[235] Between 8:46 and 9:03 on the morning of

[233] John T. Parry, *Understanding Torture* (Ann Arbor: University of Michigan Press, 2010); Pfiffner, *Torture as Public Policy*, 2010; Clark, "Ethical Issues Raised by the OLC Torture Memorandum."
[234] *See*, e.g., Greg Dobbs, "The Parallels and Differences between Pearl Harbor and 9/11," *The Denver Post*, accessed December 14, 2018, https://www.denverpost.com/2016/12/06/the-parallels-and-differences-between-pearl-harbor-and-911/. (By comparison, the death toll of Pearl Harbor was approximately 2,400.)
[235] *Military Interrogation Memo* at 15

September 11, 2001, two Boeing 767s flew into the World Trade Center in Manhattan's financial district, causing both of its towers to collapse. A half hour after the second plane hit the WTC's South Tower, the Los Angeles-bound American Airlines Flight 77 crashed into the southwestern side of the Pentagon, just outside of the nation's capital. The fourth jetliner, Flight 93, United Airlines' scheduled morning flight from Newark to San Francisco, crash-landed southeast of Pittsburgh, after a group of passengers attempted to wrest control of the aircraft from the hijackers. The target of Flight 93 "was evidently the White House or the Capitol, strongly suggesting that its intended mission was to strike a decapitation blow to the Government of the United States."[236]

The response to the terrorist attacks that the Bush administration devised was based predominantly on unilateral presidential action. OLC acted swiftly to erect a legal framework that would put the administration's go-it-alone approach on a "good, [] strong, or [at the very least] plausible" legal footing.[237] OLC's memoranda that address the legal dimensions of the Executive Branch's authority to dictate national security policy in the War on Terrorism will be discussed in this chapter in order to determine whether they qualify as unilateral power tools.[238] Much of what is to follow is consistent with the insights gained from the uncontextualized data: strong constitutional arguments underpin the Bush OLC's legal framework, and the statutory and international law arguments pursued in the memos are overwhelmingly negative.

---

[236] *NSA Memo* at 27.

[237] Bob Bauer, "Power Wars Symposium: The Powers Wars Debate and the Question of the Role of the Lawyer in Crisis," *Just Security*, Power Wars Symposium, November 18, 2015, https://www.justsecurity.org/27712/powers-wars-debate-question-role-lawyer-crisis/:

> Whatever the circumstances, it does not matter that the legal position under consideration may be good, or strong, or plausible (or, as some might say, 'available,' a standard that is fatally ambiguous and that someone erroneously suggested to Charlie Savage that I had embraced). None of these standards is acceptable under the OLC-centered view: Only the 'best understanding' counts, and OLC determines what that understanding is — subject only to being overridden by the Attorney General or the President, both of whom would normally be expected to follow the advice of lawyers giving their 'best' view of the law.

[238] For a list of all the legal opinions used in this chapter, go to Appendix B, where I also list the full titles of the memos alongside the short titles that I assigned to them.

a. The war model of counterterrorism:

There is virtually no argument that, at least in the immediate aftermath of 9/11, President Bush was authorized, as a matter of statutory and constitutional law, to employ the military in response to the sudden emergency created by the terrorist attacks.[239] The architects of the GWOT, however, were determined to ensure that the Executive Branch would also be able to direct the course and terms of the government's response to the ongoing threat of terrorism in the long run. In order to guarantee maximum presidential control over counterterrorism operations, the administration sought to construct a legal framework that would shift the fight against al Qaeda from the realm of domestic law enforcement to the realm of military defense of the nation. A series of questions put to the Office of Legal Counsel between September and October of 2001 probed the dimensions of presidential authority to pursue a military campaign against international terrorists.[240] It was only after the White House received OLC's authoritative legal opinions regarding "novel and difficult questions of constitutional law"[241] that President Bush issued the Military Order of Nov 13,[242] proclaiming, among other things, that the United States was involved in a global war on terrorism that "require[d] the use of the [U.S.] Armed Forces."[243] Put differently, the MO instituted a legal paradigm that conceptualized post-9/11 counterterrorism efforts as part of a borderless armed conflict against international terrorists. In turn, the new model of counterterrorism made available the laws of armed conflict (LOAC), a cornucopia of wartime Commander-in-Chief authorities, as well as potent Executive-centric

---

[239] For more on this, see Part 3 of Chapter Five; *see* also, Pfiffner, *Power Play*, 5.

[240] *War Powers Memo* ("the scope of the President's authority to take military action in response to the terrorist attacks on the United States"); *Domestic Military Memo* ("the authority for the use of military force to prevent or deter terrorist activity inside the United States"); *Military Commissions Memo* (can "terrorist captured in connection with the attacks of September 11 or in connection with ongoing U.S. operations [] be subject to trial before a military court.")

[241] *Domestic Military Memo* at 22.

[242] *Military Interrogation Memo* at 20 (OLC reflecting that "[i]n a series of opinions examining various legal questions arising after September 11, we have explained the scope of the President's Commander-in-Chief power.")

[243] *Military Order* of November 13, 2001, Section 1 (a) ("International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that *has created a state of armed conflict that requires the use of the United States Armed Forces*.") (emphasis added).

separation-of-powers arguments. OLC's opinions that established the legal framework which provided the basis for the President's MO of November 13 are the subject of this section.

The war model is the lynchpin of the GWOT legal architecture. The distinction between the "criminal/law enforcement paradigm" and the "war paradigm" of counterterrorism is defined in the relevant literature along three axes: under the former, legal limitations on states are significantly greater, the protection of individual rights is more robust, and the courts are "useful," so to speak. In the latter, states have vastly greater freedom from legal restrictions, individual rights are subordinated to the government's interest in waging war against terrorists, and judicial intervention is viewed as inappropriate and undue interference with the war effort.[244] I coded 22 textual segments in the Bush corpus as *Military v. Law Enforcement Distinction*.[245] Although the *Military v. Law Enforcement* code does not appear in every memo, the principles governing that distinction pervade the entire corpus:[246] if the fight against terrorism is not conceptualized as war, then the LOAC do not apply, the war powers of the President are not triggered, institutional powers considerations are recalibrated,[247] and, consequently, the legal architecture that the Bush OLC built topples.

The answer to the crucial question whether "war" with al Qaeda exists was resolved in a series of legal opinions issued between September 25 and November 5, 2001, prior to the promulgation of the November 13 MO.[248] OLC's reasoning with regard to the *jus ad bellum* rests on two pillars: (i) an extended analogy with the Supreme Court's ruling in the *Prize Cases* involving President Lincoln's actions in the Civil War, and (ii) historical institutional practice, including the

---

[244] For a general overview, see: Christopher A. Ford and Amichai Cohen, eds., *Rethinking the Law of Armed Conflict in an Age of Terrorism* (Lanham, MD: Lexington Books, 2012), 167–68.

[245] Located at Interpretive Arguments/Legal Interpretive Toolkit/Specific Elements of Construction/Compare_Contrast in the coding structure.

[246] E.g., *Domestic Military Memo* at 22 ("Because the scale of the violence involved in this conflict removes it from the sphere of operations designed to enforce the criminal laws, legal and constitutional rules regulating law enforcement activities are not applicable, or at least not mechanically so."), *NSA Memo* at 33 ("Confronting al Qaeda 'is not simply a matter of [domestic] law enforcement' – we must defend the country against an enemy that declared war against the United States.").

[247] For the discussion of institutional powers see Chapter Six.

[248] OLC elaborates on the applicability of the laws of war and the war model of counterterrorism in the *War Powers Memo*, *Domestic Military Memo*, and *Military Commissions Memo* (among others).

Framers' understanding of presidential power (through the lens of John Yoo's article "The Continuation of Politics by Other Means: The Original Understanding of the War Powers").

OLC's rationale undergirding the war model is essentially a quasi-legal one: the scale of the attacks on 9/11 was so staggering and unprecedented, and the pattern of terrorist activity predating those attacks so consistent with the waging of a "jihad" against the United States, that war must be presumed to exist between the U.S. and al Qaeda:

> It is vital to grasp that attacks on this scale and with these consequences are "more akin to war than terrorism." These events reach a different scale of destructiveness than earlier terrorist episodes, such as the destruction of the Murrah Building in Oklahoma City, Oklahoma in 1994. Further, it appears that the September 11 attacks are part of a violent terrorist campaign against the United States by groups affiliated with Al-Qaeda, an organization created in 1988 by Usama bin Laden. […] A pattern of terrorist activity of this scale, duration, extent, and intensity, directed primarily against the United States Government, its military and diplomatic personnel and its citizens, can readily be described as a "war."[249]

Admittedly, the Bush OLC did not invent this formulation out of whole cloth. Instead, it relied on an analogous Civil War-era standard articulated by the Supreme Court. In the *Prize Cases*, the Court held that President Lincoln's invocation of the laws of war and blockade of southern ports was an appropriate response to the seceding states' warlike acts. Therefore, war existed *de facto* after the firing on Fort Sumter. A conflict, according to the Court "becomes [a war] by its accidents – the number, power, and organization of the persons who originate and carry it on."[250]

As OLC states in the *Military Commissions Memo*, "it would be difficult [] to articulate any precise multi-pronged legal 'test' for determining whether a particular attack or set of circumstances constitutes 'war.'"[251] Hence, courts have consistently deferred to the political branches' judgement regarding the status of the country as to peace or war. The SCOTUS acknowledged the limitations of the judicial function in this area in the 1887 *Three Friends* case, and held that "it belongs to the political department to determine when belligerency shall be

---

[249] *Domestic Military Memo* at 19 (quoting Lewis Libby, "Legal Authority for a Domestic Military Role in Homeland Defense," in *The New Terror: Facing the Threat of Biological and Chemical Weapons* (Hoover Institution Press, 1999).)
[250] *Prize Cases*, 67 US 635, 666 (1862).
[251] *Military Commissions Memo* at 66.

recognized, and its action must be accepted according to the terms and intention expressed."[252] A number of lower courts have affirmed this deferential stance, ruling that the Judicial Branch is bound by the decision of the political branches.[253] By extension, OLC goes on to say, devoid of a congressional declaration of war, "the President, in his constitutional role as Commander in Chief, and through his broad authority in the realm of foreign affairs, [] has full authority to determine when the Nation has been thrust into a conflict that must be recognized as a war and treated under the laws of war."[254] *The Prize Cases* lend support to OLC's claim that the President alone can determine when a state of war exists and call forth special legal authorities to deal with the emergency:

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is *a question to be decided by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case.[255]

By analogy, the events of September 11th, especially in the context of the "scale, duration, extent, and intensity" standard that OLC propounds, can also be said to have "compel[led]" the President "to accord [the terrorists] the character of belligerents." Thus, the "President was bound to meet [the emergency] in the shape it presented itself," without waiting for "any special legislative authority."[256]

---

[252] *The Three Friends*, 166 US 1 (1897).

[253] See, e.g., *Verano v. De Angelis Coal Co.*, 41 F. Supp. 954, 954 (M.D. Pa. 1941) ("It is well-settled that the existence of a constitution of war must be determined by the political department of the government; and the courts take judicial notice of such determination and are bound thereby.") (internal citations omitted); *The Ambrose Lights*, 25 F. 408, 412 (S.D.N.Y 1885) (courts "must follow the political and executive departments, and recognize only what those departments recognize.").

[254] *Military Commissions Memo* at 69 (internal citations omitted); Moreover, as I will demonstrate below, the Bush OLC interpreted Pub. L. No. 107-40, the Authorization for the Use of Military Force, as an acknowledgement of the emergency created by 9/11, a recognition of the President's war powers, and an explicit endorsement of broad unilateral executive action.

[255] *The Prize Cases*, 67 US 635, 670 (1863) (emphasis added).

[256] Id. 668-669 (quoted in the *War Powers Memo* at 54; *Domestic Military Memo* at 46).

It is not immediately evident why the Civil War, which threatened the disintegration of the United States, is a suitable parallel to the 9/11 attacks aside from the "more or less apt quotations"[257] from the *Prize Cases*. However, the catastrophizing language[258] OLC uses to describe the terrorist attacks as an abortive "decapitation strike"[259]demonstrates that, much like the actions of President Lincoln to save the Union, the measures taken by the Bush administration were understood as part of a struggle to ensure the very continuity of government in the face of a grave menace. Thus, OLC's use of "lateral" precedent[260] in support of its quasi-legal determination that war exists creates, at the very least, a plausible legal basis for the application of the war paradigm. Furthermore, even if "the scale, duration, extent and intensity" argument carried insufficient legal weight, the Bush OLC points out, NATO's invocation of Article 5 of the North Atlantic Treaty following the 9/11 terrorist attacks should serve as a "factor … virtually conclusive in itself in establishing that the attacks rise to the level of an armed conflict."[261]

Moreover, OLC explains, the fact that a terrorist organization is not a nation-state does not affect the conclusion that a war with al Qaeda exists. As the Supreme Court stated in the *Prize Cases*, "it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign States."[262] The Bush memos also draw on two 19th century Attorney General opinions involving armed conflicts against hostile Indian tribes as precedent. In 1871, A.G. George Williams concluded that ongoing hostilities with Native American "dependent

---

[257] *Youngstown v. Sawyer*, 343 US 579, 634 (1952) (Jackson, J. concurring).

[258] The 9/11 attack are described in 7 of the 20 construction-of-the-GWOT-architecture opinions (12 textual segments coded as *9/11*) as "unprecedented," "unprecedented level of destruction," "decapitation blow," "highest single-day death toll from hostile foreign attacks in the Nation's history," "more than five thousand deaths, and thousands more were injured," "intended to… kill the President, Vice President, or Members of Congress," "culmination of years of attacks."

[259] *NSA Memo* at 27 ("The intended target of this fourth jetliner was evidently the White House or the Capitol, strongly suggesting that its intended mission was to strike a decapitation blow on the Government of the United States—to kill the President, the Vice President, or Members of Congress.").

[260] According to Gordon Silverstein, "lateral precedent" is used when "precedent from one doctrinal area [in this case, a civil war] is used to frame and even decide a case in what would seem to be a different doctrinal area [in the instant case, international terrorism]."

[261] *Military Commissions Opinion* at 88. Article 5 of the North Atlantic Treaty provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." NATO invoked Article 5 for the first time in its history after 9/11.

[262] *Prize Cases*, 67 US 635, 666 (1862).

domestic nations"[263] amounted to war. In much the same way that the Bush OLC relies on "scale, duration, extent, and intensity" to determine that the war paradigm is appropriate in the fight against terrorism, Williams stated that:

> It is not necessary to the existence of war that hostilities should have been formally proclaimed. When any Indian tribes are carrying on a system of attacks upon the property or persons, or both, of the settlers upon our frontiers, or of the travelers across our Territories, and the troops of the United States are engaged in repelling such attacks, this is war[.][264]

Two years later, Attorney General Amos Ackerman opined that the LOAC applied to "organized and protracted *wars*" against Native American tribes. Therefore, Modoc tribesmen who killed U.S. officers under a flag of truce could properly be tried by military commission:

> It is difficult to define exactly the relations of the Indian tribes to the United States; but […] as they frequently carry on organized and protracted wars [against the United States], they may properly, as it seems to me, be held subject to those rules of warfare which make a negotiation for peace after hostilities possible, and which make perfidy like that in question punishable by military authority.[265]

One might argue that a quasi-legal determination of the existence of war by the Office of *Legal* Counsel is an inappropriate exercise of its legal advisory function. However, the position of the Office within the Executive Branch gives it more wiggle room than courts have under applicable standards of justiciability. In practice, this means that due to its position as the Executive Branch's authoritative legal interpreter, OLC is free to decide quasi-legal questions because it is not bound by the political question doctrine (or other justiciability hurdles or lack of legal standing) which would make similar questions in the courts nonjusticiable.[266]

Having concluded that the conflict between al Qaeda and the United States is one that is appropriately understood as war, OLC goes on to define the war powers of the President under

---

[263] *See* C.J. John Marshall's definition of American Indian nations in *Cherokee Nation v. Georgia*, 30 US 1, 2 (1831) ("They may more correctly, perhaps, be denominated domestic dependent nations.").
[264] *Unlawful Traffic with Indians*, 13 Op. Att'y Gen. 470, 472 (1871).
[265] *The Modoc Indian Prisoners*, 14 Op. Att'y Gen. 249, 253 (1873) quoted in *Military Commissions Op*. at 79.
[266] Cf. *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (holding that plaintiffs lacked standing as they had a political remedy which they had not exhausted); *Goldwater v. Carter*, 444 US 996 (1979) (vacated Circuit Court's ruling, remanded with directions to dismiss on the grounds that the question was essentially a political and not judicial one).

the Constitution. In elucidating the ambit of the "executive Power" and the Commander-in-Chief power, as well as the proper reading of the institutional hierarchy in matters of national security, OLC relies extensively on historical authorities such as the Framers' understanding of constitutional law and institutional powers. Alexander Hamilton's views of the emergency powers of the government in general, and the power of the President in particular, inform both the *Domestic Military Memo* and the *War Powers Memo*:[267] Content analysis reveals that of the 15 textual segments in the pre-MO memos[268] coded as *Framers' Writings*, 11 refer to *Hamilton* as the authoritative expositor of the Constitution.[269] Hamilton believed that the federal government should possess "an indefinite power of providing for emergencies as they might arise,"[270] whether domestic or foreign in nature. Moreover, according to Hamilton, the war powers of the government are also entrusted to the direction of the Chief Executive:

> The direction of war implies the direction of the common strength, and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.[271]

That authority, according to Federalist No. 23, should be free from legislative micromanagement, or congressionally mandated boundaries of action (or "turf battles"), because

> the circumstances which may affect the public safety are [not] reducible within certain determinate limits, ... it must be admitted, as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy.[272]

Thus, OLC's view of the extent of the President's power and the proper reading of the constitutional structure are staunchly Hamiltonian. In light of its Hamiltonian proclivities, it may be unsurprising that the Bush OLC completely disregards Madison's side of the Pacificus-Helividius Debates regarding the roles of the Executive and Legislative Branches in the conduct

---

[267] In fact, as I noted above, as a practical matter (regardless of any normatively attractive theories to the contrary), Hamilton's vision of the executive power under the Constitution have prevailed over competing understandings of institutional power relations.
[268] *War Powers Memo, Domestic Military Memo*, and *Military Commission Memo*.
[269] 3 coded segments refer to Madison, while one refers to Jefferson's *Opinion on the Powers of the Senate* (1790).
[270] Hamilton, Madison, and Jay, *Federalist Papers (Amazon Classics Edition)*, 235, No. 34 (Hamilton).
[271] Id. 547, No. 74 (Hamilton).
[272] Id. 164, No. 23 (Hamilton).

of American foreign and national security policy, while it relies heavily on Hamilton's reasoning in that public argument.[273] In fact, the views of "Hamilton's great opponent"[274] are cited but five times in the entire Bush corpus. In the *Domestic Military* and the *War Powers Memos*, the singular reference to Madison's views is his admonition in Federalist No. 41 (and a congressional speech to the same effect) that a standing army and a permanent navy would be indispensable for the protection of the United States from foreign threats;[275] a reference that OLC uses in support of the President's broad authority to use military force without prior congressional approval.[276]

As I observed in Chapter Three, constitutional vagueness is a major driver of power-redistribution within the state. Historical authorities, both in the form of institutional practice and the understanding of the Framers, are routinely used in constitutional law to disambiguate equivocal provisions. As Justice Frankfurter wrote in concurrence in *Youngstown*, "it is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[277] Accordingly, the Bush OLC makes extensive use of that historical gloss to demonstrate the bounds of permissible executive action. In footnote 3 of the *AUMFI Memo*, OLC lays bare the significance of relying on "the practical statesmanship of the coordinate branches:"[278]

---

[273] The debate was occasioned by President George Washington's issuance of the Neutrality Proclamation of 1793. The crux of the disagreement was whether President Washington had the authority unilaterally to declare American neutrality in the conflict between Britain and France despite the United States' existing military alliance with France signed in 1788. Hamilton's position was that the substantive grant of authority inherent in the "executive Power" encompassed all authority over foreign relations; and that Article II of the Constitution vests that power in the President of the United States. Therefore, Washington's actions were constitutional. Madison, on the other hand, believed that Washington's unilateral actions introduced "new principles and constructions" into the original design of the Constitution's separation of powers. The Pacificus-Helvidius Debates defined the terms of the still-ongoing discussion over the separation of institutional powers in the area of foreign relations; *Treaties and Laws Memo* at 234, 240, 246; *Domestic Military Memo* at 30; *ABM Treaty Memo* at 20, 27, 32, 60, 61; *SJAA Memo* at 43; *War Powers Memo* at 23; *Cf.*, *ABM Treaty Memo* at 27 ("Even Hamilton's great opponent, James Madison, did not challenge the view that the [sic.] Article II, §2 gave the President unenumerated treaty powers, although he argued they could not be read to frustrate Congress's power to declare war.")

[274] *ABM Treaty Memo* at 27.

[275] *Domestic Military Memo* at 36.

[276] Id. at 34; quoting, 1 *Annals of Congress* 724 (Joseph Gales ed. 1789) (statement of Rep. James Madison) ("By the constitution, the President has the power of employing these troops for the protection of those parts [of the frontier] which he thinks require[] them most.").

[277] *Youngstown v. Sawyer*, 343 US 579, 610 (1952)

[278] *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. OLC 232, 234 (1994)

> The normative role of historical practice in constitutional law, and especially with regard to separation of powers, is well settled. As the Supreme Court has repeatedly recognized, governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers: "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned ... may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."[279]

The role of practice has especially high precedential value in the areas of foreign affairs and national security, OLC argues, since the "the decisions of the Court in th[ese] area[s] have been rare, episodic, and afford little [guidance] for subsequent cases."[280] Thus, Hamilton's writings regarding Washington's issuance of the Neutrality Proclamation, and the act of issuing the proclamation itself, become part of the "institutional practice" of the Executive Branch and the "operational reality"[281] of the separation of powers. If that practice goes unopposed by Congress and unchallenged in the courts, then the Executive Branch's legal position (whether written, in the form of an OLC opinion, or unwritten), becomes integrated into the "functional departmentalism"[282] of the coordinate branches. Therefore, in OLC's jurisprudence, unchallenged "institutionalized" practice is functionally equivalent to the formalization of informal powers.

Relying on two Clinton-era legal opinions detailing the historical practice of the branches in deploying U.S. troops into hostilities,[283] the Bush OLC highlights that Presidents had moved the country from a state of peace to a state of "armed conflict,"[284] on their own authority, at least 125 times in the nation's history.[285] Those episodes of executive unilateralism form the foundation of institutional practice claims of constitutional magnitude which substantiate the

---

[279] *AUMFI Memo*, Footnote 3.
[280] *Dames & Moore v. Regan*, 453 US 654, 661 (1981)
[281] Curtis A. Bradley and Trevor W. Morrison, "Historical Gloss and the Separation of Powers," *Harvard Law Review* 126, no. 2 (December 2012): 456.
[282] Dawn E Johnsen, "Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?," *Law and Contemporary Problems* 67 (n.d.): 105–47.
[283] *Uruguay Round Agreements*, 18 Op. OLC 232; *Bosnia Opinion*, 19 Op. OLC 331-332.
[284] To use the modern terminology for war.
[285] By OLC's count, *see, War Powers Memo* at 58, *quoting*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (Rehnquist, C.J., majority opinion) ("[t]he United States frequently employs Armed Forces outside this country - over 200 times in our history - for the protection of American citizens or national security.").

Bush OLC's assertion that the President can "determine when the Nation has been thrust into a conflict that must be recognized as a war."[286] OLC cites two full-scale wars in the second half of the 20th century that have precedential value: President Truman's Korean War, and President Clinton's war in Kosovo.[287] OLC's historical survey also includes "[m]ajor recent deployments […] in Central America and in the Persian Gulf" as indicators of the President's authority as Commander in Chief to use the armed forces.[288] Most on-point, however, are those historical precedents where Presidents took unilateral action against terrorists: Clinton's use of military force against terrorist sites in Afghanistan and Sudan in 1998,[289] the 1993 cruise missile strike on the Iraqi Intelligence Headquarters;[290] and, lastly, Reagan's bombing of Tripoli and Benghazi in 1986.[291]

---

[286] *Military Commissions Memo* at 69.

[287] In the Korean War, President Truman asserted that his Commander in Chief power rendered a congressional authorization to deploy troops abroad unnecessary. He ordered troops to Korea and ignited one of the bloodiest and most costly wars in U.S. history: the war lasted over three years and mobilized 5.72 million service personnel; it claimed 33,741 battle deaths, 20,505 other deaths; 103,284 were wounded; and the war cost in excess of $340 billion (in current dollar value) (*See*, Ragsdale, L., *Vital Statistics on the Presidency*, 403) The State Department's legal defense of President Truman's unilateral deployment of armed forces to Korea claimed that the President "has authority to conduct the foreign relations of the United States." In accordance with the Supreme Court's decision in *Curtiss-Wright*, the department argued, the President "is charged with the duty of conducting the foreign relations of the United States and in this field he 'alone has the power to speak or listen as a representative of the Nation'" ("Authority for the President to Repel the Attack in Korea," 23 *Department of State Bulletin*, 173-174). This gave rise to what Louis Fisher calls the first unconstitutional war because it left Congress completely out of the decisionmaking process. ("'The Law': Scholarly Support for Presidential Wars." 592) The weakening of Congress's power in foreign affairs is apparent in that Truman did not accept a proffered resolution to authorize the war and instead relied on his own constitutional authority as Commander in Chief. His Secretary of State cautioned against setting a dangerous "precedent in derogation of presidential power to send our forces into battle." (Bernstein, B. "The Road to Watergate and Beyond: The Growth and Abuse of Executive Authority Since 1940," 79).

[288] *War Powers Memo* at 65 (In 1994, President Clinton ordered 20,000 troops into Haiti; in 1990, Bush 41 ordered "the deployment of substantial forces into Saudi Arabia in Operation Desert Shield;" Bush 41 also deployed 15,000 troops into Panama in 1990.)

[289] *War Powers Memo* at 68 (President Clinton initiated the strikes "because of the threat they present to our national security" and stated that the purpose of the operation was to "to trike at the network of radical groups affiliated with and funded by Usama bin Ladin, perhaps the preeminent organizer and financier of international terrorism in the world today."); *War Powers Memo* at 73 ("President Clinton's action in 1998 illustrates some of the breadth of the President's power to act in the present circumstances.")

[290] *War Powers Memo* at 75 (The missile strike was in retaliation of "an unsuccessful attempt to assassinate former President Bush in Kuwait in April, 1993. Two United States Navy surface ships launched a total of 23 missiles against the" Iraqi Intelligence Service headquarters.)

[291] *War Powers Memo* at 78 (President Reagan, "acting on his own independent authority, ordered United States armed forces to engage in military action against the government of Colonel Gadhafi of Libya" in retaliation for the La Belle discotheque bombing); Bernard Weinraub, "U.S. Jets Hit 'Terrorist Centers' in Libya; Reagan Warns of New Attacks If Needed," *The New York Times*, April 15, 1986, sec. Politics,

But the question remains: Based on the Constitution's text, historical practice, and the Framers' understanding, what are the dimensions of the President's authority to use military force in the context of the Global War on Terrorism? According to the *War Powers Memo*,

> [t]he text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to *use military force* in situations of emergency. Article II, Section 2 states that the "President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." U.S. Const. art. II, § 2, cl. 1. He is further vested with all of "the executive Power" and the duty to execute the laws. U.S. Const. art. II, § 1. These powers give the President broad constitutional authority to use military force in response to threats to the national security and foreign policy of the United States.[292]

The pre-MO opinions demonstrate that unilateral troop deployment is but one facet of the President's power to "take military action in response to the terrorist attacks."[293] Moreover, Executive Brach legal precedent indicates that the understanding of the Commander-in-Chief Clause as "a substantive grant of authority to the President" to use the armed forces in hostilities abroad is not the Bush OLC's original interpretation. To wit, President Roosevelt's Attorney General, Robert Jackson, concluded in a 1941 legal opinion that the Commander-in-Chief power "has long been recognized as extending to the dispatch of armed forces outside of the United States… for the purpose of protecting… American interests."[294] Furthermore, in an OLC opinion authored in 1970, Assistant Attorney General William Rehnquist also found that, based on constitutional powers alone, "the scope of the President's authority to commit the armed forces to combat is very broad."[295] Therefore, combined with the corresponding historical practice from Truman to Clinton, the President's legal authority in this area is rather well-settled.

---

https://www.nytimes.com/1986/04/15/politics/us-jets-hit-terrorist-centers-in-libya-reagan-warns-of-new-attacks.html.

[292] *War Powers Memo* at 15.

[293] *War Powers Memo* at 8.

[294] *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62. (quoted in the *Iraq Memo*)

[295] *War Powers Memo* at 16.

Thus, it is not the commitment of troops to armed conflict that is novel in the Bush OLC's pre-MO opinions; that appears to have been the stated legal position of the Department of Justice since at least the Roosevelt administration. What is peculiar, is the Bush OLC's "incorporati[on in the Commander in Chief of] the fullest possible range of powers available to a military commander," which is to say, the unilateralization of the government's response to 9/11.[296] In other words, the Bush OLC operated with a particularly broad conception of the Commander-in-Chief power and interpreted the vesting of Article II's "executive Power" and the "Commander in Chief Power" in the President to encompass a range of powers and authorities far beyond the commitment of the armed forces to combat. Therefore, any unfixed residual powers related to the conduct of war must be resolved in the President's favor:

> Article II, § 1's Vesting Clause requires that we construe any ambiguities in the allocation of executive power in favor of the President. If Article II, § 2 fails to allocate a specific power, then Article II, § 1's general grant of the executive power serves as a catch-all provision that reserves to the President any remaining federal [national security and] foreign affairs powers.[297]

In the context of the Global War on Terror, those broad powers encompass the use of military force abroad, and even domestically; intelligence gathering (both human intelligence and electronic surveillance); and the use of deadly force. OLC offers the following examples of the uses of military force which, though they are "unlike those that have occurred in American's other [] wars," are, nonetheless, inherent in the President's expansive Commander in Chief authority:

> [U]ses [of military force] might include, for example, targeting and destroying a hijacked civil aircraft in circumstances indicating that hijackers intended to crash the aircraft into a populated area; deploying troops and military equipment to monitor and control the flow of traffic into a city; attacking civilian targets, such as apartment buildings, offices, or ships where suspected terrorists were thought to be; and employing electronic surveillance methods more powerful and sophisticated than those available to law enforcement agencies. These military

---

[296] Yoo, "The Continuation of Politics by Other Means;" *see* page 84 above discussing *Academia* coded segments.
[297] *ABM Treaty Opinion* at 24; In the *War Powers Memo* (at 21) and the *Domestic Military Memo* (at 31), OLC states that "[t]he Framers altered other plenary powers of the King," and those powers were "diluted or reallocated" by, for example, the inclusion of the Senate in their exercise (such as treaties and appointments). "Any *other*, unenumerated executive powers, however, were conveyed to the President by the Vesting Clause."

> operations, taken as they may be on United States soil, and involving as they might American citizens, raise novel and difficult questions of constitutional law.[298]

According to OLC's institutional powers reasoning, when the President is directing such military operations as Commander in Chief of the Armed Forces of the United States, his power is "at its zenith under the Constitution," because the "power of Commander in Chief is assigned solely to the President."[299]

***

In this segment, I argued that the war model is the lynchpin of the Bush OLC's GWOT legal framework. It is more fundamental than the constitutional arguments that OLC put forward, since the constitutionally-derived powers of the President are only triggered if war exists. By framing the fight against terrorism in terms of a military campaign, the direction of which properly belongs to the President as Commander in Chief, the architects of the GWOT ensured that the Executive Branch would retain tight control over counterterrorism operations for the duration for the campaign. Thus, the pre-MO memoranda laid the groundwork for a new kind of war and dramatically expanded the scope of presidential power to respond to the 9/11 attacks and to direct the policy of the United States toward the ongoing threat of terrorism. In conclusion, OLC played a central role in the conceptualization and implementation of the war paradigm of counterterrorism.

[298] *Domestic Military Memo* at 22.
[299] *War Powers Memo* at 16.

b. Domestic Use of Military Force: The Posse Comitatus Act vs. inherent presidential authority

> "Article II, Section 2, makes the Chief Executive the Commander in Chief of the Army and Navy. But our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs."
>
> - Justice William O. Douglas

As I argued above, the pre-Military Order (MO) memoranda inaugurated a new kind of war which is neither temporally nor spatially limited. Seeing as the terrorists brought the war front to the very soil of the United States, a key piece of the legal puzzle presented by the GWOT is whether the "battlefield" can extend into the homeland.[300] The United States' historical record of relative isolation from external dangers makes for scant legal guidance as to the use of military force domestically.[301] Indeed, with the exception of the Japanese bombing of Pearl Harbor in 1941, no foreign power had launched an attack on American soil in nearly 200 years, and the U.S. armed forces had not been engaged in war within the territorial United States since the Civil War. OLC's legal paradigm, calling as it did for the large-scale militarization of counterterrorism operations, changed that after 9/11. The unprecedented nature of a borderless war against terrorism is reflected in the Bush OLC's tentativeness in the *Domestic Military Memo*: The Office explores multiple avenues of squaring the use of military force in "domestic law enforcement operations,"

---

[300] *Domestic Military Memo* at 95:

> While, no doubt, these terrorists pose a direct military threat to the national security, their methods of infiltration and their surprise attacks on civilian and governmental facilities make it difficult to identify any front line. Unfortunately, the terrorist attacks of September 11 have created a situation in which the battlefield has occurred, and may occur, at dispersed locations and intervals within the American homeland itself.

[301] Domestic Military Memo at 20:

> Except for the Revolutionary War, the War of 1812, and the Civil War, the United States has been fortunate that the theatres of military operations have been located primarily abroad. This allowed for a clear distinction between the war front, where the actions of military commanders were bound only by the laws of war and martial law, and the home front, where civil law and the normal application of constitutional law applied. September 11's attacks demonstrate, however, that in this current conflict the war front and the home front cannot be so clearly distinguished — the terrorist attacks were launched from within the United States against civilian targets within the United States.

as counterterrorism had traditionally been regarded, with the statutory barrier erected by the Posse Comitatus Act (PCA) of 1878.[302] According to the terms of the PCA, anyone who "willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws" faces a criminal penalty or a monetary fine or up to two years' imprisonment.[303]

In this section, I will first look at the trends that emerge from the textual data alone. Then, I will highlight the need to look beyond the conclusions of the Bush OLC's legal memoranda in order to situate them in the context of juridification. Next, I will delineate OLC's statutory analysis of the PCA, followed by its constitutional analysis. Finally, I will draw conclusions that only emerge from the detailed dissection of OLC's legal reasoning in the *Domestic Military Memo*. Although the opinion also discusses the application of the Fourth Amendment's warrant and reasonableness requirements to domestic military operations (and foreshadows the arguments used in opinions justifying the NSA's content collection activities), I will limit my analysis in this section to the broader question of the domestic use of the military force.

The Bush OLC's *Domestic Military* analysis is incontrovertibly negative. Content analysis reveals that the PCA-related textual segments marked as *Statutory Construction* were also overwhelmingly coded with *negative construction* markers, such as *exception*, *non-binding*, and *unconstitutional*.[304] Thus, OLC's *Domestic Military* analysis demonstrates the interpreting-away of statutorily imposed restrictions on the Executive. It is unremarkable that the constitutionally-based arguments regarding the Commander-in-Chief power carry positive construction markers; what is more noteworthy albeit expected under the war paradigm, is OLC's Fourth Amendment analysis: it is heavily laden with negative construction markers such as *exception* or *inapplicable.*

---

[302] Geraint Hughes, "The Military's Role in Counterterrorism: Examples and Implications for Liberal Democracies," *Strategic Studies Institute: U.S. Army War College, Carlisle, PA*, The Letort Papers, May 2011, 25; W.C. Banks, "Troops Defending the Homeland: The Posse Comitatus Act and the Legal Environment for a Military Role in Domestic Counter Terrorism," *Terrorism and Political Violence* 14, no. 3 (September 2002): 3 ("Construed literally, the PCA could compromise homeland defense or hinder a response to widespread disorder in society. Interpreted too generously, the exceptions could give rise to regrettable excesses.").

[303] The PCA, 18 USC §1385, states that:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

[304] Six negative construction markers attach to *PCA* coded segments. By contrast, no positive construction markers attach to textual segments analyzing the applicability of the *PCA*.

This shows that the Fourth Amendment should be interpreted to impose as little restriction on the President's conduct of domestic counterterrorism operations as possible.

The conclusions the Bush OLC drew in the *Domestic Military Memo,* based on its statutory analysis of the PCA and relevant constitutional considerations, are the following: under the war model, the Posse Comitatus Act either does not apply to domestic counterterrorism operations at all, or other statutory or constitutional exceptions allow the Executive to bypass the law's restrictions. The constitutional analysis, on the other hand, focuses on the Commander in Chief's authority to repel sudden attacks, and argues that the President's power on this score is very broad and untrammeled by statutory legislation.

This pithy summary of complex legal arguments, while correct, highlights the flaws inherent in much of the existing literature on OLC's jurisprudence: it masks the very complexity of the legal arguments pursued by the Office, disregards branch-internal *stare decisis*, and downplays the loopholes that do in fact exist in the U.S. Code. All too often, the approach that only highlights the outcomes of extensive legal reasoning goes on to assign blame to OLC for its pro-Executive reading of the law, while failing to acknowledge the permissiveness of relevant statutory and constitutional provisions. With the lofty ambition of correcting that record in the existing literature, I will now to turn to an in-depth look at the Bush OLC's PCA analysis, followed by the constitutional arguments that it makes in the *Domestic Military Memo*.

Statutory analysis

In the statutory portion of its *Domestic Military* analysis, OLC explores the feasibility of executive action within the framework of the Posse Comitatus Act. Based on the history and language of 18 USC §1358, OLC emphasizes that Congress's legislative intent was one related to law enforcement: The original purpose of the PCA was to put a stop to the use of the military in policing post-Civil War states where civilian rule had been reestablished. Given that the statutory language specifically prohibits the domestic engagement of the military for *law enforcement purposes*, "[i]t does not address the deployment of troops for domestic military operations

against potential [terrorist] attacks on the United States."[305] Since, under the war paradigm, domestic operations by the armed forces conducted to "prevent and deter terrorism" are fundamentally military rather than law enforcement in character, the statutory history and original intent of the PCA make clear that its restrictions cannot reach the President's deployment of military resources for counterterrorism purposes.[306] Therefore, in a broader sense, the Posse Comitatus Act does not apply to domestic military operations in the borderless war against al Qaeda:

> [The GWOT] is armed conflict between a nation-state and an elusive, clandestine group or network of groups striking unpredictably at civilian and military targets both inside and outside the United States. Because the scale of the violence involved in this conflict removes it from the sphere of operations designed to enforce the criminal laws, legal and constitutional rules regulating law enforcement activity are not applicable, or at least not mechanically so.

Notably, the Bush OLC was not the first to opine on the limitations of the PCA vis-à-vis domestic military operations. In fact, both the Department of Defense and the Bush 41 OLC had found that the PCA does not bar the use of the armed forces domestically for primarily *military* or foreign affairs purposes:

> [T]he regulations provide that actions taken for the primary purpose of furthering a military or foreign affairs function of the United States are permitted. 32 C.F.R. § 213.10(a)(2)(i). We agree that the Posse Comitatus Act does not prohibit military involvement in actions that are *primarily* military or foreign affairs related, even if they have an incidental effect on law enforcement, provided that such actions are not undertaken for the purpose of executing the laws.[307]

Considering the extant provisions in the Code of Federal Regulations as well as the George H. W. Bush administration's interpretation of those provisions, the *Domestic Military Memo*'s conclusion that the PCA does not apply to military counterterrorism operations in the GWOT is neither new nor a departure from the Executive Branch's internal understanding of the law. The Bush OLC acknowledges, however, that within the confines of the 1989 opinion's "primary

---

[305] *Domestic Military Memo* at 68.
[306] Id. at 62.
[307] *Application of the Posse Comitatus Act to Assistance to the United States National Central Bureau*, 13 Op. O.L.C. 195 (1989)

purpose" test, there would likely be considerable overlaps between domestic military operations and traditional law enforcement activities in the war against terrorism:

> [T]he September 11 attacks were both acts of war and crimes under United States law. Future terrorist incidents could continue to have both aspects. If the President were to deploy the Armed Forces within the United States in order to engage in counter-terrorism operations, their actions could resemble, overlap with, and assist ordinary law enforcement activity. Military action might encompass making arrests, seizing documents or other property, searching persons or places or keeping them under surveillance, intercepting electronic or wireless communications, setting up roadblocks, interviewing witnesses, and searching for suspects. Moreover, the information gathered in such efforts could be of considerable use to federal prosecutors if the Government were to prosecute against captured terrorists.[308]

Acknowledging also that there is no applicable Supreme Court precedent to elucidate the commingling of the law enforcement and military aspects of counterterrorism operations, the Bush OLC analogizes the 1989 *Posse Comitatus Opinion*'s "primary purpose" standard to the already functional legal distinction enacted by the Foreign Intelligence Surveillance Act of 1978. That statute, OLC reports, "created a special procedure by which the Government may obtain warrants for foreign intelligence work."[309] The court of jurisdiction in foreign intelligence matters is a special Article III court, the Foreign Intelligence Surveillance Court (FISC), which "consider[s] whether 'the government is primarily attempting to form the basis for a criminal prosecution,' or is indeed acting for the purpose of obtaining foreign intelligence."[310] OLC points out that the FISC has found little difficulty in applying FISA's "purpose" test; which reflects "the care and circumspection with which the executive branch itself reviews and prepares FISA applications, and the courts' justified confidence in the executive branch's self-monitoring."[311]

Thus, in line with the universal description of the war model that I laid out at the beginning of Section (a), OLC appeals for judicial deference to the Executive Branch's determinations of when the deployment of the armed forces is necessary to accomplish counterterrorism-related goals; even if those goals overlap with law enforcement purposes:

---

[308] *Military Commissions Memo* at 72.
[309] *Domestic Military Memo* at 75.
[310] *Id.* (quoting *US v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980)).
[311] Id.

> [Ultimately,] it rests within the President's discretion to determine when certain circumstances — such as the probability that a terrorist attack will succeed, the number of lives at risk, the available window of opportunity to stop the terrorists, and the other exigencies of the moment — justify using the military to intervene.

OLC does not recommend "particular tests or procedures for consideration by the Secretary of Defense," but counsels that in order to ensure compliance with the statutory and regulatory framework, "an appropriate list of factors to be considered in establishing whether there is a military purpose for a domestic use of the Armed Forces in a counter-terrorist action" may become necessary.[312]

Alternative interpretative avenues

In a section of the *Domestic Military Memo* that I refer to as "Risk Assessment/Alternative Options," OLC explores alternative sources of statutory authority for the President to deploy military force domestically, in case the PCA were found by a reviewing court to apply to the use of the military in an anti-terrorism role. The Bush OLC identifies two statutory avenues that circumvent the criminal sanction of the PCA, both of which are in line with the "in cases and under circumstances expressly authorized by [an] Act of Congress" exception that §1385 expressly recognizes.

First, the AUMF (Pub. L. No. 107-40) authorizes "the use of United States Armed Forces against those responsible for the recent attacks launches against the United States."[313] Indeed, as OLC points out, the statutory language is broad, and it does not distinguish between foreign or domestic deployment of the armed forces; nor does it discriminate between counterterrorism operations for law enforcement or military purposes. Thus, OLC argues, the AUMF satisfies the statutory exception contained in the PCA. In fact, as the 2016 *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (hereinafter *Obama Report*) demonstrates, the AUMF has been a very useful and widely utilized tool for the Executive to claim statutory authorization for various

[312] Id. at 76.
[313] *Authorization for the Use of Military Force*, Pub. L. No. 107-40.

counterterrorism-related activities since the enactment of the Joint Resolution on September 18, 2001.[314] I will discuss the AUMF in detail in Chapter Six, "Defining Institutional Power Relations," below.

Second, OLC also identifies §332 and §333 of Title 10[315] which likewise fulfill the PCA's "authorized by [an] Act of Congress" exception. Those statutory provisions empower the President to federalize state militias or to use the Armed Forces to "suppress mass violence and to restore law and order." [316] 10 USC §333 states that:

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it — (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.[317]

The Bush OLC's argument that the provisions contained in the Insurrection Statute[318] confer authority on the President to circumvent the PCA is in line with established Executive Branch legal precedent. In an opinion authored in 1882, Attorney General Brewster advised President Arthur that no "further legislation is needed to authorize the employment of the military forces of the United States to aid in the execution of the laws [within the United States]" in situations

---

[314] "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," December 2016, https://assets.documentcloud.org/documents/3232594/Read-the-Obama-administration-s-memo-outlining.pdf.

[315] Now codified under 10 USC §§251-253.

[316] *Domestic Military Memo* at 84.

[317] This language is now codified under 10 USC §252:

> Use of militia and armed forces to enforce Federal authority:
> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

The companion provision, §253 stipulates that the President may federalize the state militia or use the armed forces "to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy" if (1) "any part of class of [a State's] people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection;" or (2) it "it opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws."

[318] 10 USC Chapter 13.

where enforcement is "obstructed… by powerful combinations of outlaws and criminals."[319] Instead, Brewster pointed out that the laws of Congress already in force "expressly authorize[] [the President] to employ the military forces of the United States to aid" local law enforcement efforts.[320] A half a century later, Attorney General Brownell opined that President Eisenhower could, without violating the Posse Comitatus Act, "call the National Guard into service and [] use those forces, together with such of the Armed Forces as [the President] considered necessary, to suppress the domestic violence, obstruction and resistance of law" that arose in the wake of to the Supreme Court's school desegregation order in *Brown v. Board of Education*.[321]

The factual circumstances considered by the Bush OLC in the *Domestic Military Memo* and those under which Attorneys General Brewster and Brownell advised the Presidents they served that they could employ the armed forces domestically are at least roughly commensurate: "'domestic violence' within the states of New York and Virginia [had been perpetrated by a group of individuals] and [they] ha[d] violated numerous federal laws."[322] Since al Qaeda also threatened future attacks against "airports and public gatherings, and has studied the use of biological and chemical warfare against the United States," the Bush OLC concludes, the President is justified under existing Executive Branch precedent to invoke authority under 10 USC §333 "to use the military to respond to such coordinated, violent terrorist attacks within the continental United States."[323] Thus §333 authorizes the use of the military domestically in certain exigent circumstances, even if it is for law enforcement purposes.

In sum, the *Domestic Military Memo* identifies multiple statutory avenues to circumvent the PCA's restrictions: Not only is the Posse Comitatus Act inapplicable if domestic military action

---

[319] *Suppression of Lawlessness in Arizona*, 17 Op. Att'y Gen. 333, 333-334 (1882).
[320] Id. 334-335 (1882).
[321] *President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders – Little Rock, Arkansas*, 41 Op. Att'y Gen. at 326; s*ee* also "'Mob Rule Cannot Be Allowed to Override the Decisions of Our Courts:' President Dwight D. Eisenhower's 1957 Address on Little Rock, Arkansas," September 24, 1957, http://historymatters.gmu.edu/d/6335/.
[322] OLC lists aircraft piracy (49 USC §46502), aircraft sabotage (18 USC §32), murder (18 USC §1111), murder of federal employees (18 USC §1114), malicious damage or destruction of building used in interstate or foreign commerce (18 USC §844(i)), malicious damage or destruction of building owned by the United States (18 USC §844(f)), terrorist acts transcending national boundaries (18 USC §2332b), racketeer influenced and corrupt organizations (18 USC §1926).
[323] *Domestic Use of the Military* at 85.

is undertaken for a purpose other than the execution of the laws (such as counterterrorism operations under OLC's war model), but multiple provisions of Title 10 also specifically authorize the deployment of military resources for domestic law enforcement purposes in certain exigent circumstances. Thus, even within the confines of statutory legislation, President Bush had broad discretion to employ the armed forces in domestic counterterrorism operations in the aftermath of 9/11 without risking criminal repercussions. Despite the permissiveness of the pertinent statutory framework, Attorney General Brownell maintained in a 1957 legal opinion that "[t]here are [] grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate."[324] It is to those constitutional powers that I will now turn.

Non-statutory analysis

In the Bush OLC's legal opinions, executive action, when permissible, is invariably justified on the basis of strong constitutional arguments. The Bush OLC's penchant for finding constitutionally-based authorities is undoubtedly related to the administration's programmatic commitment to the strengthening of the President vis-à-vis the other branches. Therefore, as expected, the *Domestic Military Memo* seeks to establish the existence of an independent, non-statutory presidential power to deploy the military domestically in exigent circumstances. Arguably, if OLC can identify such a power, then the President is able to take unilateral action in the domestic realm, which congressional legislation cannot frustrate.

The *Domestic Military Memo*'s constitutional analysis is imbued with John Yoo's unorthodox "absolutist" beliefs regarding the original understanding of the war powers, as put forth in his 1996 article "The Continuation of Politics by Other Means." Paraphrasing Yoo's position on the Framing generation's understanding of constitutional law, OLC states that

> [t]here can be little doubt that the decision to deploy military force is "executive" in nature, and was traditionally so regarded. At the time of the Framing, the commander in chief and executive powers were commonly understood to include

[324] *President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders – Little Rock, Arkansas*, 41 Op. Att'y Gen. at 326; Similar avoidance-canon arguments will be discussed below.

> *the executive's sole authority to use the military to respond to attacks, invasions, or threats to a nation's security*.[325]

Therefore, Article II's vesting in the President of the "Chief Executive and Commander in Chief Powers," entails that the Framers "granted him the broad powers necessary to… the security of the nation."[326] As OLC explains in painstaking detail, the textual contrast between the Vesting Clauses of Article I and Article II – the former giving Congress only the powers "herein granted," while the latter conferring "*all* federal executive powers," even those unenumerated in the Constitution, on the President – indicates that any executive power not textually present in Article II §2, "must remain with the President."[327] In turn, the Executive's authority "to use force [domestically] in response to threats to national security," is rooted in such an unenumerated (or inherent) power.[328] Indeed, as the Records of the Federal Convention indicate, James Madison explicitly contemplated that the Executive would have a measure of independent, non-statutory "power to repel sudden attacks."[329]

Furthermore, as OLC goes on to show, the historical practice of the Executive Branch evinces the existence of such an inherent constitutional authority. While the bulk of the use of force in response to threats to the nation's security has involved the deployment of force abroad, "there have been [instances]… in which the President has deployed military force within the United States against armed forces operating domestically."[330] As Alexander Hamilton forewarned in Federalist No. 28, "there may be some cases [such as seditions and insurrections] in which the national government may be necessitated to resort to [military] force."[331] Indeed, on a number of occasions such as the 1794 Whiskey Rebellion, the Civil War, the War of 1812, as well as in armed hostilities with Indian tribes, and in response to violent resistance to federal

---

[325] *Domestic Military Memo* 52 (summarizing John Yoo's position in "The Continuation of Politics by Other Means.") (emphasis added).
[326] Id. at 29.
[327] Id.
[328] Id. 45.
[329] Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. 2nd (New Haven: Yale University Press, 1911), 318.; *Domestic Military Memo* at 33 ("the Framers understood the executive and commander in chief powers to give the President the full constitutional authority to respond to an attack.").
[330] *Domestic Military Memo* at 24.
[331] Hamilton et al., *The Federalist Papers*, 135.

court orders, "President[s] ha[ve] deployed military force within the United States" to fight enemy armies, "to protect the officials, agents, property or instrumentalities of the federal Government, or to ensure that federal governmental functions can be safely performed."[332] As a matter of fact, Article IV of the Constitution envisions some overriding federal law enforcement responsibilities that may well involve the domestic use of military force, such as the "guarantee to every State… [of] a Republican Form of Government," and the "protect[ion] [of] each [state] against Invasion," as well as "against domestic Violence." Curiously, the Bush OLC makes no reference to those textually-identifiable duties of the national government. The omission appears to me to be a calculated one, the reason for which lies in the fact that the duties expressed in Article IV do not belong to the President alone; instead, they reside in the national government as a whole. As a result, they do not lend themselves to the argument that they confer on the President an exclusive unilateral authority to use force domestically.[333]

OLC also identifies the structural position of the Executive Branch in the constitutional system as a crucial factor in the President's ability to use the armed forces in exigent circumstances. At the time of the Framing, both Hamilton and Madison thought it necessary to have a standing army and permanent navy for the protection of the United States. Against the objections of the Anti-Federalists, Hamilton and Madison insisted on the necessity of vesting in Congress the power to raise and support armies and to provide and maintain a navy. In Federalist No. 24, Hamilton cautioned that without such permanent federal forces, the United States would be "a nation incapacitated by its Constitution to prepare for defense before it was actually invaded... We must receive the blow before we could even prepare to return it."[334] In Federalist No. 41, Madison laid out the "palpable necessity of the power to provide and maintain a navy" for the protection of the coastline.[335] The Bush OLC draws on these historical authorities to make the structural argument that

---

[332] *Domestic Military Memo* at 24.
[333] Of the 485 *Constitution and Judicial Doctrine* codes only 3 reference Article IV as a source of authority. The *Article IV* code appears once in the *Torture Memo*, once in *The Military Interrogation Memo*, and once in the *NSA Memo*, serving as a complement to the Supreme Court's decision in *In re Neagle*.
[334] Hamilton, Madison, and Jay, *Federalist Papers (Amazon Classics Edition)*, 178.
[335] Id. 301.

> by creating such forces and placing them under the President's command, Congress is necessarily authorizing him to deploy those forces… [T]he clauses of Article I relating to a standing army and a navy flow together with Article II's Commander in Chief and Executive Power Clauses to empower the President to use the armed forces to protect the nation from attack, whether domestically or abroad.[336]

Consequently, as Madison stated in the course of a floor debate during the 1st Congress in 1789, "[b]y the Constitution, the President has the power of employing [U.S.] troops for the protection of those parts [of the frontier, i.e., domestically] which he thinks requires them most."[337]

In short, the Bush OLC's reading of the text, structure, and history of the Constitution demonstrates that the President has "the primary responsibility, and therefore the power, to ensure the security of the United States in situations of compelling, unforeseen, and *possibly recurring*, threats to the nation's security."[338]

Importantly, the Bush OLC did not have to rely solely on its own reading of the constitutional text, structure, and history in reaching the determination that the President has inherent constitutional authority to use the military domestically. Previous opinions of Attorneys General also support that conclusion. As Lincoln's Attorney General Edward Bates wrote in 1861:

> It is the plain duty of the President (and his peculiar duty, above and beyond all other departments of the Government) to preserve the Constitution and execute the laws over all the nation; and it is plainly impossible for him to perform this duty without putting down rebellion, insurrection, and all unlawful combinations to resist the General Government .... In such a state of things, the President must, of necessity, be the sole judge, both of the exigency which requires him to act, and of the manner in which it is most prudent for him to deploy the powers entrusted to him, to enable him to discharge his constitutional and legal duty — that is, to suppress the insurrection and execute the laws.[339]

Thus, *arguendo*, even if the Bush OLC had done none of its own constitutional analysis, Bates's opinion would have lent some legal justification for President Bush's finding that the events of 9/11 made the domestic engagement of the military in a counterterrorism role necessary.

---

[336] *Domestic Military Memo* at 37.
[337] Id. at 34, quoting 1 Annals of Congress, 724 (statement of Rep. James Madison on August 11, 1798).
[338] Id. at 25.
[339] Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 82, 84 (1861).

Further elaborating on the President's non-statutory authority to deal with exigent situations, in a more recent Attorney General opinion, Frank Murphy explained that

> [t]he Executive has powers not enumerated in the statutes — powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances... The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.[340]

What these two A.G. opinions make eminently clear is that the Bush OLC's constitutional analysis regarding the domestic deployment of military force is not *sui generis*. Instead, previous Attorneys General had also authored legal opinions (the functional equivalent of present-day Office of Legal Counsel memoranda) that explicitly recognized the President's broad inherent authority under the Constitution to respond to exigent situations whether foreign or domestic.

Moreover, in at least three cases cited by the Bush OLC, the Supreme Court has also acknowledged that the President has inherent emergency powers to respond to sudden attacks. As Justice Story wrote early in the Republic's history: "[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws."[341] While Story's comment was made *obiter dictum*, it nevertheless signals implied recognition by the Supreme Court of inherent authority vested in the Executive to take emergency measures that are not sanctioned by statute.

That inherent authority was explicitly endorsed by a five-Justice majority of the Court in the *Prize Cases*. Although President Lincoln's military actions in the Civil War were taken in the absence of a congressional declaration of armed hostilities, Justice Grier held that "[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting

---

[340] *Request of the Senate for an Opinion as to the Powers of the President "In Emergency or State of War,"* 39 Op. Att'y Gen. 343, 347-348 (1939).
[341] *The Apollon*, 22 U.S. (9 Wheat.) 362, 366-67 (1824).

for any special legislative authority."[342] Grier went on to say that the War Between the States "sprung suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name."[343]

Another case cited by the Bush OLC is *Duncan v. Kahanamoku*, in which the Supreme Court considered the power of the military authority in Hawaii to try civilians after the bombing of Pearl Harbor. Concurring in the Court's judgment, Chief Justice Stone wrote that martial law is the exercise of the "power which resides in the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety."[344] While the Court ruled that military tribunals were unconstitutional after "January 27, 1942, [when the military authorities] permitted the courts to exercise their normal functions," Stone's concurrence indicates the Court's explicit recognition of the existence of executive emergency authority under the right constellation of circumstances.

Finally, Congress has also acknowledged the President's inherent power on this score. For one, Section 1541(c) of the War Powers Resolution provides that

> [t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to […] (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[345]

Although, as an *ad rem* Regan OLC opinion points out, the Executive Branch "has taken the position from the very beginning that §2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces,"[346] the resolution's language does acknowledge the President's unilateral authority to deploy the armed forces into hostilities in exigent circumstances. According to the Bush OLC's reading of the statute, the WPR "signifies

---

[342] *Prize Cases*, 67 U.S. 635, 668-669 (1862).
[343] Id. 669.
[344] *Duncan v. Kahanamoku*, 327 US 304, 335 (Stone, C.J., concurring).
[345] 50 USC §1541 (c).
[346] *Overview of the War Powers Resolution*, 8 Op. OLC 271, 274 (1984).

Congress' recognition that the President's *constitutional* authority alone enables him to take military measures to combat the organization or groups responsible for the September 11 incidents."[347]

In addition, even the Posse Comitatus Act includes language that permits the domestic deployment of military force when such deployment is "expressly authorized by the Constitution."[348] As one legal scholar observed, Congress's incorporation of this constitutional exception indicates that it did not intend to "impair the President's 'express' constitutional authorities."[349]

In conclusion, it appears from the foregoing that the branches are in universal agreement regarding the existence of some measure of inherent, non-statutory presidential emergency authority which allows the Executive to undertake military operations even in the domestic realm. Therefore, the Bush OLC broke no new legal ground when it identified that such unenumerated authority is available to the Commander in Chief. Instead, it is the Executive Branch's decisionmaking process, one that is enabled by the juridification of politics (i.e., OLC's issuance of the pre-MO opinions) that distinguishes the *Domestic Military Memo* from, say, Edward Bates's *Suspension of the Writ of Habeas Corpus* opinion (hereinafter *Suspension Opinion*).

QUASI-JUDICIAL LEGISLATION

To illustrate the contrast between the *Suspension Opinion* and the *Domestic Military Memo*, a concise historical review is in order: After the fall of Fort Sumter on April 13, 1861, the Civil War quickly escalated in scope and intensity. Although the Maryland Assembly voted against secession in late April, the railroad connection between Washington, D.C. and the North

---

[347] *Domestic Military Memo* at 50.
[348] 18 USC §1385.
[349] Banks, "Troops Defending the Homeland: The Posse Comitatus Act and the Legal Environment for a Military Role in Domestic Counter Terrorism," 13; see also, Kevin Adams, "Can President Trump Legally Send Troops to the Border? It's Complicated.," *Washington Post*, April 17, 2018, sec. Made by History, https://www.washingtonpost.com/news/made-by-history/wp/2018/04/17/can-president-trump-legally-send-troops-to-the-border-its-complicated/..

remained severed, "practically… isolat[ing Washington] from the part of the Nation of which it remained the Capital."[350] Yielding to the urgent necessity, and against his profound misgivings, President Lincoln directed General Winfield Scott to suspend the writ of *habeas corpus* on April 27. His Attorney General, Edward Bates, however, did not deliver an opinion regarding the legality of the measure until over two months after the President had taken matters into his own hands. When the 37th Congress convened on the 4th of July, Lincoln delivered a special message cataloguing his actions in a state of grave "military *necessity*."[351] Although he ably exploited the occasion to justify the steps he had taken on the grounds that "we have a case of rebellion, and the public safety does require" it, the President ultimately deferred to the Attorney General's opinion regarding the suspension, promising that a detailed legal analysis would be promptly forthcoming:

> Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion. No more extended argument is now offered; as an opinion, at some length, will probably be presented by the Attorney General. Whether there shall be any legislation upon the subject, and if any, what, is submitted entirely to the better judgment of Congress.[352]

When Bates did deliver his opinion the next day, it "reached the conclusion that the President had been both legally and morally right and within his constitutional powers, when he suspended the privilege of the writ of *habeas corpus*."[353] Upon learning of the President's unilateral suspension order, Congress took no immediate legislative measure. In fact, it was not until 1863, nearly two years into the Civil War, that it passed the Habeas Corpus Suspension Act which

---

[350] Sherrill Halbert, "The Suspension of the Writ of Habeas Corpus by President Lincoln," *The American Journal of Legal History* 2, no. 2 (April 1958): 98.

[351] Abraham Lincoln and Don Edward Fehrenbacher, *Speeches and Writings, 1859-1865: Speeches, Letters, and Miscellaneous Writings, Presidential Messages and Proclamations* (New York, N.Y: Literary Classics of the United States, Inc., 1989), 248. (emphasis original)

[352] Id. 253.

[353] Halbert, "The Suspension of the Writ of Habeas Corpus by President Lincoln," 102–3.

empowered the President, "whenever, in his judgment, the public safety may require it," to withhold the privilege of the writ "in any case throughout the United States, or any part of it."[354]

In light of the sequence of events that transpired in the early stages of the Civils War, it is evident that Bates's legal opinion is best described as an *ex post facto* justification of a *fait accompli*.[355] While it does, as a matter of branch-internal *stare decisis*, carry precedential value for OLC, there is no evidence that the A.G.'s legal opinion had any discernible policy consequences at the time, beyond, perhaps, assuaging congressional malcontent. When legislators eventually weighed in on the matter, which Lincoln invited in his special message to Congress, they willingly provided statutory sanction for the President to suspend *habeas corpus* as he deemed necessary. Albeit delayed, Congress's grant of authority to the Executive illustrates the Legislative Branch's dominant constitutional position in the realm of domestic policy-making.

By contrast, the Bush OLC's pre-decisional advice is best understood as a form of "quasi-judicial legislation." As such, it had far-reaching policy consequences for the conceptualization and implementation of the GWOT. As I will explain in Chapter Six on institutional power relations, the Bush OLC's separation of powers jurisprudence is predicated on the notion that while the "President [is in a] dominant constitutional position [in matters of foreign affairs and national security],"[356] Congress enjoys primacy in the domestic realm. Moreover, like I noted above, and as I shall further elaborate on in Chapter Seven, most of the existing scholarly literature expects OLC to operate under the presumption of judicial supremacy. The evidence presented in this section debunks both of those expectations: (i) the non-statutory portion of OLC's *Domestic Military* analysis involves considerable conceptual stretching of classical legal categories which is

---

[354] 12 Stat. 755 (1863).

[355] John P. Frank, "Edward Bates, Lincoln's Attorney General," *The American Journal of Legal History* 10, no. 1 (January 1966): 43:

> "Perhaps Bates' only intellectual failure was the opinion backing the President's suspension of habeas corpus. The best that can be said for the opinion is that for this reader it is simply incomprehensible. The power to suspend the writ is so clearly a congressional rather than an executive power that it is essentially impossible to rationalize what the President did; his act was a political necessity in the absence of Congress, but it was force majeure, not constitutionalism. The best Bates could do with it was to say that while only Congress could suspend the writ, the President could "suspend the privilege of persons arrested" to make use of the writ. Probably no one else could have done much better. [...] Bates did not believe that the Supreme Court would uphold the suspension if the question were presented and was wholly unwilling to risk it."

[356] *Military Interrogation Memo* at 48.

tantamount to the reinterpretation of Supreme Court precedent, and (ii) OLC's pre-ordination of broad executive power in the domestic realm amounts to the usurpation of Congress's lawmaking authority.

First, OLC's elongation of the legal concept of "exigency/emergency" in the *Domestic Military Memo* recalibrates the Supreme Court's legal interpretations in corresponding jurisprudential areas, all of which pertains to immediate emergency measures occasioned by a sudden attack. It is unlikely that the Court contemplated that a global war against terrorism – a drawn-out and, indeed, potentially interminable military campaign, "in times [] when the other branches of Government are [able] to function" – fit the parameters of "act[ing] on a sudden emergency." Indeed, in *Kahanamoku* the Court considered a similar scenario (when the other branches of government are open and functioning) and reached the opposite result. Therefore, the Bush OLC's reinterpretation of SCOTUS precedent fundamentally undermines the notion that the Office operates under a fully actualized version of judicial supremacy.

Second, OLC also effectively pre-litigated the scope of executive authority to use military force in the domestic realm. By employing the stretched-out concept of "exigency," it determined that the President does not only have the power to "repel sudden attacks," but that he can also engage the military domestically in the long term – as part of a global strategy in a borderless armed conflict against an international network of terrorists. In the language of the *Domestic Military Memo*, the President's power to protect the nation "must include deployment of troops to prevent and deter attacks on the United States and its people by enemies operating secretly within this country."[357] This is conceptually different from presidential wars abroad, because, under the Bush OLC's own institutional powers analysis, Congress is in a dominant constitutional position in the domestic realm. Hence, by unilaterally deciding on the policy framework applicable in the GWOT, including what amounts to the suspension of statutory barriers to military action, for all practical purposes, the Bush OLC usurped the lawmaking authority of Congress. In other words, it cut the Legislature out of the process of making domestic law enforcement decisions.

[357] Id. at 45.

In the Civil War, President Lincoln took unilateral action when he suspended the writ. Reasonable minds can disagree whether it was plainly illegal, and therefore an exercise of prerogative power, or an instance of the President's inherent emergency authority in operation. Either way, in 1863, Congress gave Lincoln more power than he sought and retroactively validated the emergency measures the wartime President ventured. By contrast, after 9/11, President Bush took unilateral action based on a pre-ordained legal framework erected by OLC, which made the President's emergency authority permanent, and rebuffed the need for statutory authorization (such as the AUMF). This reflects both the administration's disdain for the legislative process, and the existence of an alternative policy-making avenue that arises as a result of the juridification of politics.

In conclusion, in the *Domestic Military Memo*, the Bush OLC introduced a new concept of the battlefield: one that necessarily extends into the homeland, and one in which "legal and constitutional rules regulating law enforcement activity are not applicable."

***

Immediate emergency authorities, including the use of the armed forces domestically, are undoubtedly necessary and proper exercises of the President's inherent power to repel sudden attacks. Where the Bush OLC's domestic-use-of-force analysis falls short as a policy decision is in the temporal delimitation of the President's emergency powers. Because the Bush OLC made the legal case for domestic military operations in absolute terms, it failed to enforce the very "self-monitoring" that it proposed the Executive Branch would engage in. As the *Stellar Wind Memo* indicates, self-monitoring was only implemented in one particular area of counterterrorism: In the 2004 memorandum related to the NSA's content collection activities in the Stellar Wind program, OLC points out that the Bush administration put in place a reauthorization mechanism that would only allow the National Security Agency's activities to continue as long as an overwhelming necessity for self-defense was clearly demonstrated to the Office of Legal Counsel:

> Based upon the information provided in the [Director of Central Intelligence's memorandum for the President outlining selected current information concerning the continuing threat that al Qaeda poses for conducting attacks in the United States], and also taking into account information available to the President from all sources, this Office assesses whether there is a sufficient factual basis demonstrating a threat of terrorist attacks in the United States for it to continue to be reasonable under the standards of the Fourth Amendment for the President to authorize the warrantless searches involved in Stellar Wind.[358]

Neither the Bush OLC nor other sources provide any indication that such a mechanism was in place with respect to other aspects of the war model. Instead, evidence shows that the open-ended legal authorization for the borderless war model of counterterrorism continued unabated through at least the end of the Obama administration. Importantly, the Obama OLC acknowledged, at least rhetorically, Congress's dominant constitutional role in the domestic sphere. That acknowledgement, however, came only after *Hamdi v. Rumsfeld*, in which the SCOTUS gave its stamp of approval to military operations targeting U.S. citizens, effectively opening the door to virtually untrammeled claims of statutory authority that could plausibly be categorized as "a fundamental and accepted [] incident of war."[359]

According to the *Obama Report*, "[h]ostilities against an enemy like al-Qa'ida are unconventional and presumably will not come to a conventional end… And given their radical objectives, groups like al-Qa'ida are also highly unlikely ever to denounce terrorism and violence and to seek to address their perceived grievances through some form of reconciliation or participation in a political process."[360] While President Obama recognized that "this war, like all wars, must end," the *Report* goes on to state that the war model of counterterrorism is still in effect: "Unfortunately that day has not yet come… [And] these groups still pose a real and profound threat to U.S. national security. As a result, the United States remains in a state of armed conflict against these groups as a matter of international law, and the 2001 AUMF continues to provide the President with domestic legal authority to defend against these ongoing threats."[361]

---

[358] *Stellar Wind Memo* at 9.
[359] *Hamdi v. Rumsfeld*, 542 US 507 (2004).
[360] "Obama Report."
[361] "Obama Report," 11–12.

c. The President's power to capture and detain in the GWOT

Under classical law-of-war principles, as articulated in the Third Geneva Convention, parties to an armed conflict have the right to capture and detain enemy combatants, at least for the duration of hostilities.[362] In *Padilla 1* and 2, the Bush OLC explores the applicability of those principles to U.S. citizens in the non-traditional Global War on Terrorism. The legal questions presented to OLC deal with (i) the President's power to designate suspected terrorists, even U.S. citizens, as "unlawful enemy combatants," and (ii) the power to detain those "unlawful belligerents," who are turned over to military authorities, regardless of citizenship in the United States. Although, as a matter of chronology, the third pre-MO opinion, the *Military Commissions Memo*, pre-dates the *Padilla 1 and 2 Memoranda*, it is instructive to first consider those opinions that specifically examine and apply the Supreme Court's decision in *Ex pare Quirin*, in order to help elucidate the logic of OLC's *Military Commissions* analysis, which I will consider in Section (d).

In brief, OLC's conclusion that Jose Padilla "qualifies as an enemy combatant under the laws of armed conflict, and [that] he may be detained by the United States Armed Forces" is based on the President's inherent wartime authority to capture and detain enemy belligerents.[363] Extrapolating the Supreme Court's logic in *Quirin* to the GWOT, the Bush OLC finds that Jose Padilla was properly designated and detained as an "unlawful enemy combatant." Furthermore, OLC explains, neither the PCA (18 USC §1385) nor 18 USC §4001(a)'s prohibition against the imprisonment of U.S. citizens except pursuant to an Act of Congress applies to what I call the "Padilla category." Once again, I will show that focusing solely on conclusions oversimplifies the complexity of the arguments that the Bush OLC made in *Padilla 1* and *2* and obscures the policy

---

[362] The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 UST 3317, Article 21:

> The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

[363] *Padilla 1 Memo* at 8.

impact of the opinion. In order to better understand the Executive Branch's national security jurisprudence, it is important to examine the precedents (if any) that OLC decisions rely on and the specific arguments they make.

Declaring the policy of the United States toward foreign terrorists, President Bush's Military Order of November 13, 2001 found that "members of al Qaeda have carried out attacks on the United States" and that a "state of armed conflict" exists and "requires the use of the United States Armed Forces."[364] Therefore, in order to "protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks" the order proclaimed it "necessary for individuals subject to this order […] to be detained, and […] to be tried for violations of the laws of war."[365] The term "individuals subject to this order" was defined in §2 of the Military Order as *non-U.S. citizens* to whom one or more of the following applies:

i. Current or former members of al Qaeda;
ii. "[E]ngaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation thereof, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy;"
iii. Knowingly harbored individuals who fall within categories (i) or (ii)

Thus, the President's Military Order covered only non-citizens, and left U.S. citizen members, collaborators, co-conspirators, and/or aiders and abettors of al Qaeda unaffected. I call this the "Padilla category." It is reasonable to assume that U.S. citizens who did not fall within the scope of the Military Order but were members, collaborators, co-conspirators, and/or aiders and abettors of al Qaeda remained subject to standard domestic law enforcement regimes. However, under the war model of counterterrorism, the Padilla category inevitably raises vexing jurisdictional questions. In the *Padilla Memos*, the Bush OLC undertook the determination of the legal status of a United States citizen who fell within such a category: Jose Padilla, "aka 'Abdullah Al Muhair.'"[366]

---

[364] George W. Bush, "Military Order - Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism," 37 WCPD 1665 § (2001), 1665, https://www.govinfo.gov/app/details/WCPD-2001-11-19/WCPD-2001-11-19-Pg1665.
[365] Id.
[366] *Padilla 1 Memo* at 8.

Inbound from Pakistan, Padilla reentered the United States in May of 2002. Upon entry into the country at Chicago's O'Hare Airport, he was apprehended by U.S. marshals and held as a material witness in a criminal investigation. Later, however, he was transferred to military custody.[367] The factual circumstances upon which the *Padilla 1 Memo's* conclusions are based are the following: Padilla entered the country "as part of a plan to conduct acts of sabotage that could result in a massive loss of life."[368] While in Pakistan, at the direction of a senior al Qaeda operative with whom he discussed the plan of sabotage, Padilla received training in and conducted research into the construction of a radiological explosive device. As he entered the United States in May of 2002, Padilla was "engaged in preliminary reconnaissance at the direction of al Qaeda officials," and did not at that time have "any weapons or materials for the planned bomb."[369]

Based on the facts that were made available to OLC and drawing heavily on the Supreme Court's decision in *Ex parte Quirin*, the first of the twin memos concludes that Padilla was an unlawful enemy combatant, and, therefore, an "individual subject to [the President's November 13 military] order." As the Court held in *Quirin*, under the LOAC, both "[l]awful" and "[u]nlawful combatants are […] subject to capture and detention."[370] Furthermore, the Court declared, "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants."[371] Since Padilla had "entered the United States in furtherance of a plan to commit sabotage," the fact that he was apprehended before he could execute his plan "does not alter his status as a combatant subject to seizure."[372] As the Supreme Court put it in *Quirin*, persons are "not any the less belligerents if ... they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations."[373] Consequently, in a global *war* against terrorism, under the

[367] See in general, Pfiffner, *Power Play*, 121.
[368] *Padilla 1 Memo* at 9.
[369] Id. 15.
[370] *Ex parte Quirin*, 317 US 1, 35-37.
[371] Id.
[372] *Padilla 1 Memo* at 12.
[373] *Quirin*, 317 US 1, 38.

laws of armed conflict (LOAC), Padilla could properly be designed and detained as an enemy combatant.

In order to understand the constitutional basis of the Bush OLC's conclusion that the President can capture and detain enemy combatants in the GWOT, it is imperative to first examine some of the arguments made in the *Transfer Memo* dated March 13, 2002. In the section that follows, I will not discuss OLC's complex statutory and international law arguments regarding the transfer of detainees to foreign countries; instead I will limit my investigation to what is pertinent to the case of Jose Padilla. Portions of the *Transfer Memo* dealing with Congress's and the President's relative authority to "dispose of the liberty" of POWs will be discussed in Chapter Six on OLC's interpretation of institutional power relations.

The foundation of OLC's claim that the President has broad non-statutory authority to detain enemy combatants in wartime is long-standing institutional practice: "[t]hroughout history," OLC claims "army commanders-in-chief have exercised the power to 'dispose of the liberty' of prisoners captured during military engagements."[374] Although there is no textual reference to his article in the *Transfer Memo*, John Yoo's claim regarding the scope of the Commander-in-Chief authority as "incorporating the fullest possible range of power available to a military commander" controls the Bush OLC's legal arguments undergirding the war paradigm of counterterrorism. Thus, in keeping with its strong (unitary) constitutional claim that Article II's vesting of the "executive Power" includes *all* executive authority,[375] OLC asserts that even if the Commander-in-Chief Clause did not endow the President with the power to capture and detain enemy combatants, the broad sweep of the Vesting Clause would nevertheless confer that inherent power on the President.[376]

---

[374] *Transfer Memo* at 13.

[375] *See* also Id. at 23 ("The unification of executive power in Article II requires that unenumerated powers that can fairly be described as 'executive' in nature belong to the President, except where the Constitution expressly vets the power in Congress.").

[376] Id.

> Even if the Constitution's entrustment of the Commander-in-Chief power to the President did not bestow upon him the authority to make unilateral determinations regarding the disposition of captured enemies, the President would nevertheless enjoy such a power by virtue of the broad sweep of the Vesting Clause

The *Transfer Memo* is the only legal opinion in the Bush corpus that delves into non-U.S. *Founding Documents*,[377] or in this case, unwritten constitutional practice in the British Empire. Citing the absolute authority of the Crown under British constitutional practice to "dispose as it saw fit of prisoners of war and other detainees," OLC argues that it is reflective of the Framer's understanding of the scope of the President's authority in this area.[378] As OLC's historical survey demonstrates, the King of England could "order[] the execution of a large number of French prisoners of war" at the Battle of Agincourt; and, even as "the treatment of prisoners of war generally improved" over time, the King's "unilateral control of their handling remained undiminished."[379] Accordingly, it was the Privy Council, the monarch's "cabinet," and not the legislative body that assumed responsibility for a case-by-case determination of the prisoner-of-war status of captured soldiers.[380] OLC's overview of POW policy under British constitutional practice concludes with the observation that Parliament never interfered with the authority of the Crown regarding the disposition of POWs.

The purposes of OLC's foray into British history and institutional practice is to demonstrate that the Framers' understanding of the President's "plenary power to dispose of the liberty of military detainees" was informed by the British Constitution's allocation of institutional authority between the Legislature (Parliament) and the Executive (the Crown).[381] The historical practice of the U.S. government largely confirms the British analogy: from the early wars of the United States to global warfare in the 20th century, POWs were subject to the exclusive control of the Executive.[382] When the Congress did get involved in prisoner-of-war issues, it "did not establish any substantive standards governing the disposition of prisoners, and it did not lay any claim to congressional authority in the area."[383] According to OLC, the unitary nature of the Executive makes it well-suited for making determinations about POW policy, which, OLC claims, is a central element of the overall conduct of military campaigns:

---

[377] The code *British Constitution* located under *Historical/Founding Documents* appears only in the *Transfer Memo*.
[378] *Transfer Memo* at 28.
[379] Id.
[380] Id. (This is the functional equivalent of the development of prisoner of war policy.)
[381] *Transfer Memo* at 27.
[382] Id. 33-64.
[383] Id. 42.

> The handling and disposition of individuals captured during military operations requires command-type decisions and the swift exercise of judgment that can only be made by "a single hand." The strength of enemy forces, the morale of our troops, the gathering of intelligence about the dispositions of the enemy, the construction of infrastructure that is crucial to military operations, and the treatment of captured United States servicemen may all be affected by the policies pursued in this arena. Quick, decisive determinations must often be made in the face of the shifting contingencies of military fortunes. This is the essence of executive action.

Having established that under the war paradigm of counterterrorism the President has broad authority to capture and detain enemy combatants, and having also determined that Jose Padilla could be designated as an "unlawful enemy combatant" per the Supreme Court's decision in *Quirin*, the Bush OLC undertook to answer three related legal questions in the *Padilla 1* and *2* memos:

(1) Can the laws of war be applied to a US citizen who was seized in the United States where the civil courts are open and functioning?
(2) Does the detention of Padilla by the US military violate the PCA?
(3) Does the detention of a US citizen as enemy belligerent by the U.S. Armed Forces violate 18 USC §4001(a)?[384]

Milligan vs. Quirin

In *Padilla 1*, the Bush OLC's task was to decide whether the Supreme Court's decision in *Ex parte Milligan* could limit the administration's wartime authority to apply the LOAC to a U.S. citizen in the Global War on Terrorism.[385] In the *Milligan* case, the Supreme Court held that "no

[384] 18 USC §4001(a) states that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

[385] Lambdin Purdy Milligan, a resident of Indiana, was arrested in 1864 on charges of collaboration with the Confederacy and, pursuant to Lincoln's executive order, tried and sentenced to death before a military tribunal. Fortunately for Milligan, the war ended before the date of his execution. Milligan sought a writ of *habeas corpus* to challenge his detention and the Supreme Court agreed to review the conviction. The legal question in the case was whether a civilian could be tried and convicted by a military commission where the civil courts were in operation. A five-justice majority, emphasizing that *Milligan was a civilian who had not been captured while participating in hostile activities against the government*, ruled against the military commissions. The Court held in *Ex parte Milligan* that the President could not unilaterally suspend the writ of *habeas corpus* in a place where the civil courts were open and functioning, and establish instead a system of military detentions and trials. (*See in more detail*: William J.

usage of [LOAC] could sanction a military trial [in a state where the civil courts are open and no direct military threat exists] for any offence whatever of a citizen in civil life, in nowise connected with the military service."[386]

OLC's juxtaposition of *Milligan* and *Quirin* is rather convoluted, but it essentially boils down to the following: The Supreme Court found Milligan to be an enemy *sympathizer* – he had lived in Indiana for twenty years, was non-belligerent, and "conspired with bad men" for which he was punishable in the courts of Indiana. Therefore, as Justice Davis wrote for the majority, "when tried for the offence, [Milligan] cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?"[387]

By contrast, the Nazi saboteurs in *Quirin* were clearly belligerent, as they were "part of or associated with the armed forces of the enemy."[388] Furthermore, they entered the United States with the intention to commit "hostile [or] war-like act[s]."[389] The LOAC "subject those who [engage in sabotage] to the punishment prescribed […] for unlawful belligerents," and, consequently, to military jurisdiction. Neither U.S. citizenship,[390] nor being away from the front lines at the time they were captured[391] could alter the status of the Nazi saboteurs as enemy

---

Brenna, "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises." (December 22, 1987).) Justice David Davis writing for the majority emphasized that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 71 US 2 (1866)

[386] *Ex parte Milligan*, 71 US 2, 122.

[387] *Id*. 131.

[388] *Ex parte Quirin*, 317 US 1, 45.

[389] *Id*. 36.

[390] *Id.* 37. ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."); a*lso*, Id. 38. ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.")

Lower courts' rulings support this conclusion: *In re Territo*, 156 F.2d at 144 ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) ("[T]he petitioner's citizenship in the United States does not… confer upon him any constitutional rights not accorded any other belligerent under the laws of war.")

[391] *Id.* 37.

belligerents subject to LOAC and military authority. "Nor are petitioners any less belligerent, if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations."[392] As OLC points out, "the opposite result would be absurd," because it would provide those who surreptitiously enter the country to attack the nation directly with greater procedural protections and a "higher standard of treatment […] under the federal criminal laws" than those captured abroad.[393]

Thus, as OLC explains, *Quirin* distinguished *Milligan* along the lines of belligerency: (i) Non-belligerent civilians away from the frontlines could not be subjected to the LOAC, detained by the military, and tried by military commission. By contrast, "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."[394] Therefore, they are subject to capture and detention by the Armed Forces.

The Bush OLC admits that neither *Quirin* nor *Milligan* is "on all fours with… [t]he facts of this case," since the GWOT is not a war with another nation-state with all the attendant expectations on which the LOAC are predicated.[395] Nevertheless, the argument goes, Padilla's case if far more analogous to *Quirin* than it is to *Milligan*. Padilla travelled to Pakistan, associated himself with the al Qaeda, and entered the U.S. in furtherance of a plan to detonate a WMD.

Due to the non-traditional nature of the GWOT, *Quirin* necessarily falls into the category of lateral court precedent, and OLC admits as much. However, unlike the cases in the constitutional portion of OLC's *Domestic Military* analysis, it would be difficult to see the Bush OLC's LOAC analysis as a departure from or reinterpretation of SCOTUS precedent. Based on the facts provided to OLC, Padilla squarely fit the category of "unlawful belligerent" as defined by the

---

> It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. [The rules of land warfare] plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States.

[392] *Id.* 38.
[393] *Padilla 1 Memo* at 31.
[394] *Ex parte Quirin*, 317 US 1, 38.
[395] Such as "a uniformed, regular armed force."

Quirin Court. It is as true today as it was on the day it was decided that "[a]n important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."[396] However, the determination of enemy belligerent status under the LOAC was only part of the holding of the Court in *Quirin*, and this is where the case as precedent suffers from serious flaws.

Although *Quirin* is technically good law, the historical circumstances of the case are disquieting from the perspective of the institutional independence of the Supreme Court.[397] In brief, President Roosevelt had political reasons to mete out the harshest punishment on the eight German saboteurs, and to deny the civil courts' jurisdiction. A paramount consideration being that George Dasch, one of the saboteurs who had a change of heart, was going to admit in open court that he had assisted the government in apprehending the Nazi saboteurs. The historical record shows that the FBI ignored as a crank call Dasch's initial attempt to give himself up to the authorities. Instead, Dasch had to travel from New York to Washington, D.C. to find an FBI agent who believed him. Such an admission, if allowed, would have undermined the administration's claim that the "FBI had an uncanny ability to discover and apprehend saboteurs."[398] In Executive Order 9185, issued on July 2, 1942, President Roosevelt convened a military commission to try the German men. Historians point out that the Supreme Court denied *habeas* review of the saboteurs' case due to pressure from the President. The President's threat was plain: "if the Courts did not give [him] the power he wanted, then he would take it away anyway, causing undeniable damage to the authority and sovereignty of the Court."[399] The Court's denial of *habeas* review effectively authorized the military commission to reach Roosevelt's desired outcome: the death sentence.[400] In the months between the *per curiam* decision and the Court's issuance of its full opinion, Chief Justice Stone struggled to justify his Court's ruling. He realized

---

[396] *Quirin*, 28-29.

[397] See "Brief of Historians and Scholars of Ex Parte Quirin as Amicus Curiae in Support of Petitioner," Al-Marri v. Spagone, n.d.

[398] *Id.*

[399] *Id.*

[400] John Dash and Ernest Burger who cooperated with the FBI were sentenced to 30 years in prison, and life in prison, respectively. They were later released and deported to Germany by President Truman. The six other saboteurs were executed by electric chair.

that "the President's order was probably [in] conflict[] with the Articles of War" as the alleged saboteurs were rushed to execution without affording them trial rights.[401] Regardless, the damage had already been done and error could not be admitted. According to Alpheus Mason, the foremost scholar on Justice Stone's Court career, when the Chief composed a decision to vindicate both the Court and the President, he was keenly aware that the judiciary was "in danger of becoming part of an executive juggernaut."[402]

As I stated above, it would be hard to argue that the *Quirin* Court's LOAC analysis (or OLC's extrapolation of that analysis) was flawed: It is indisputably true that enemy belligerents are subject to capture and detention for the duration of hostilities. The fatal weakness of the holding is that the Supreme Court signed off on the truncated process that the Executive Branch followed in the military commission established by the President.[403] Moreover, the Court's decision foreclosed interbranch institutional cooperation by deciding only that military commissions were properly constituted under common law standards, without the prescriptions of the 5th (grand jury indictment) and 6th (jury trial in a civil court) Amendments; and that the Articles of War (AW) did not "afford any basis for issuing the writ."[404] The Court could not, however, retroactively impose on FDR's military commission even the minimal procedural safeguards prescribed in the AW.[405] To use Silverstein's language in *Law's Allure*, the Supreme Court's ruling in *Quirin* is an archetypal example of how the law "shapes, constrains … and kills politics." According to Mason, "Attorney General Biddle [] realized how executive power could be bolstered by judicial sanction. Proceedings in court being allowed to go on, the executive gained the advantage of having the supreme bench approve what it was doing."[406] Although the Chief Justice struggled to forge a

---

[401] Alpheus Thomas Mason, "Inter Arma Silent Leges: Chief Justice Stone's Views," *Harvard Law Review* 69, no. 5 (March 1956): 822, https://doi.org/10.2307/1337581.
[402] Mason, 831.
[403] In fact, Fisher points out that this emboldened Roosevelt to use military commissions without any input from the coordinate branches, *see* Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (Lawrence, Kan: University Press of Kansas, 2003), 107–20. Moreover, Chief Justice Stone and three other members of the Court were quite convinced that Roosevelt's order was in violation of Articles 46 and 5 ½ of the Articles of War.
[404] 317 US 1, 47.
[405] Indeed, Fisher notes that the commission made up rules as it went along. Fisher, Nazi Saboteurs on Trial, 64–67. *See also*, "The Articles of War," accessed November 28, 2018, https://www.ibiblio.org/hyperwar/USA/ref/AW/index.html (Articles 46 and 50 ½ required the transfer of trial records to the Judge Advocate General for review and approval before a sentence could be carried into execution).
[406] Mason, "Inter Arma Silent Leges," 829.

unanimous decision that amounted to more than "a ceremonious detour to a pre-determined goal," Biddle's comment in a contemporary *New York Times* article exposes the real-world political impact of the Court's ruling: the Attorney General did not believe that "lower courts would accept petitions by such petitioners [saboteurs], in view of the Supreme Court ruling upholding Presidential power to establish military commissions. Future saboteur trials would be held 'very promptly' before a military commission or a court-martial… and the whole matter would be more or less 'routine' now."[407] In other words, the Court's stamp of approval on the military commission's proceedings, as determined by the President alone, obviated the need for interbranch cooperation. Indeed, as I will demonstrate below, *Quirin* would have far reaching consequences for the military commissions established by the Bush administration a half a century later.

The Posse Comitatus Act

Based on the rationale laid out in the *Domestic Military Memo*, OLC concludes in *Padilla 2* that the PCA does not apply to domestic military operations, such as the detention of Jose Padilla, on one of three grounds: (i) the law's original intent was to bar the military from performing domestic law enforcement functions. Since, under OLC's legal framework, military counterterrorism operations are part of a global armed conflict against al Qaeda, they are not law enforcement, hence the PCA does not apply; (ii) the constitutional exception of the PCA is satisfied by the President's "deploying the military pursuant to his powers as Chief Executive and Commander in Chief in response to a direct attack on the United States;" or (iii) Pub. L. No. 107-40, the AUMF, meets the requirements of the PCA's statutory exception by recognizing that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and authorizing "the President […] to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11,

[407] Id. 830.

2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[408]

18 USC §4001(a) and the AUMF

Part III of Title 18 of the U.S. Code governs the treatment of prisoners and the operation of prisons. §4001(a), which falls under the General Provisions comprising Chapter 301, states the following:

> No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.[409]

OLC's analysis of the "Limitations on Detention" provision is based on the canon of construction which provides that the interpretation of a statute "is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."[410] Based on the "whole text canon," OLC argues that the placement of sub-section (a) in §4001 and in Title 18 demonstrates that it cannot reach the President's Commander-in-Chief power to detain enemy combatants in the Global War on Terrorism.

OLC's statutory-structure analysis is as follows: Since Title 18 deals with "Crime and Criminal Procedure," and §4001 makes clear that it pertains to the "federal civilian prison system," sub-section (a) must be understood to have the same purview. Furthermore, if Congress wanted to regulate the President's power to detain enemy combatants, it would have placed §4001(a)'s language under Title 50 (War and National Security) or Title 10 (Armed Forces). Lastly, nothing in the rest of Part III of Title 18's provisions, which includes the Bureau of Prisons,

---

[408] Pub. L. No. 107-40.

[409] 18 USC §4001(a) ("Limitations on Detention").

[410] *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd*, 484 US 365. 371 (1988); *Kokoszka v. Belford* 417 US 642, 650 (1974) "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute… and the object and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.'"); also referred to as the "whole text canon."

employment of prisoners, and institutions for women, among others, "can plausibly be construed to apply to the detention of enemy combatants."[411]

Furthermore, neither the existing judicial construction of §4001(a)[412] nor Congress's subsequent enactments indicate any legislative intent that the sub-section was meant to govern the detention of enemy combatants in the Padilla category. In fact, in enacting 10 USC §956 in 1984, thirteen years after §4001(a), OLC claims that Congress "plainly contemplate[d] that the President has the power to detain prisoners of war and other enemy combatants, presumably as an exercise of his constitutional authority as Commander in Chief." §956 of Title 10 authorizes the Department of Defense to direct funds

> appropriated to the [DOD toward] expenses incident to the maintenance, pay, and allowance of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of the Army, Navy, or Air Force pursuant to Presidential proclamation.[413]

According to the Bush OLC's statutory interpretation, this language is difficult to reconcile with §4001(a) "unless sub-section (a) does not interfere with the President's constitutional power to detain enemy combatants."[414] Since Congress has traditionally refrained from interfering with POW policy, and since in OLC's interpretation of Congress's Article I powers it cannot constitutionally do so,[415] §956 must be an implicit recognition of the President's authority to capture and detain enemy combatants, regardless of their citizenship in the United States.

Finally, after a thoroughgoing run of statutory construction, OLC invokes the talismanic canon of constitutional avoidance.[416] The avoidance canon, also known as the doctrine of

---

[411] *Padilla 2 Memo* at 45.
[412] *Howe v. Smith*, 452 US 473, 479 (1981); *Lono v. Fenton*, 581 F.2d 645, 648 (7th Cir. 1978); *Seller v. Ciccone*, 530 F.2d 199, 201 (8th Cir. 1976); *Bono v. Saxbe*, 462 F. Supp. 146, 148 (E.D. Ill. 1978)
[413] 10 USC §956 ("Deserters, prisoners, members absent without leave: expenses and rewards.").
[414] *Padilla 2 Memo* at 49.
[415] See section "Defining Institutional Power Relations," p.
[416] I identified 14 canons of construction in the Bush corpus (see the Codebook in the Appendix), the avoidance canon is by far the most common with 31 coded textual segments (of 85 total).

"constitutional doubt," requires that a statute be construed "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score:"[417]

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress… 'The elementary rule is that every reasonable construction must be resorted to, in order to save a statue from unconstitutionality.' This approach not only reflects the prudential concerns that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution.[418]

In the context of OLC's pro-Executive jurisprudence, a finding by the Office that a legislative enactment encroaches on a core executive function could result in noncompliance or nonenforcement or partial compliance and enforcement by the Executive Branch.[419] Accordingly, OLC concludes that §4001(a) must be read so as not to interfere with the Commander in Chief's core constitutional authority to conduct a military campaign. According to the Bush OLC, this approach is important in order to protect the institutional integrity of the Executive Branch: "we must interpret statutes and treaties so as to protect the President's constitutional powers from impermissible encroachment and thereby to avoid any potential constitutional problems."[420]

The final piece of OLC's statutory puzzle is the AUMF, whose broad language authorizes the President "to use all necessary and appropriate force," and explicitly recognizes that "the

---

[417] *US v. Jin Fuey Moy*, 241 US 394, 401

[418] *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)) quoted in *Statutory Construction and Interpretation*, Government Series (The Capitol Net Inc, 2010), 21.

[419] An example is the 1973 War Powers Resolution, which every President since Nixon has deemed to be an unconstitutional infringement on their Commander in Chief authority and compliance with the law has been spotty. For example: In 1981 President Reagan sent troops to El Salvador and ignored the consultation and reporting requirements of the WPR; President Clinton's 1999 bombing campaign in Kosovo exceeded the 60-day clock stipulated in the WPR. Courts have been unwilling to decide the institutional powers question: 31 congressmen filed suit against Clinton claiming violation of the WPR's reporting requirement and the 60-day limit on non-authorized hostilities; the district court dismissed the suit for lack of standing, and on February 8, 2000, the Court of Appeals of the District of Columbia Circuit affirmed the lower courts' ruling in *Campbell v. Clinton* 203 F.3d 19 (D.C. Cir. 2000) ("Because the parties' dispute is therefore fully susceptible to political resolution, we would [under circuit precedent] dismiss the complaint to avoid "meddl[ing] in the internal affairs of the legislative branch.")

[420] *Transfer Memo* at 82; *see also*, Memorandum for the General Counsel of the Federal Government from Assistant Att'y Gen. Walter Dellinger, *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. OLC 124 (quoting *Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. at 65) ("it is "the President's 'duty to pass the executive authority to his successor, unimpaired by the adoption of dangerous precedents.").

President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."[421] As OLC points out, nothing in the Joint Resolution's language could be read to carve out U.S. citizens from the President's authority to detain enemy combatants. As the Bush OLC does time and time again in the corpus, it invokes the AUMF as "provid[ing] further support to the President's existing constitutional authority,"[422] rather than being a grant of authority *per se*. Although it is not put in the terms of the *Youngstown* framework, it is an indication of the Bush OLC's implicit recognition that the AUMF puts the President's power to capture and detention (U.S. citizens enemy belligerents) in the first of Justice Jackson's three canonical categories:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty.[423]

***

As I demonstrated in this section, the Bush OLC engages in in-depth statutory interpretation, judicial ruling interpretation, and constitutional construction to find that the President has broad inherent authority to capture and detain enemy combatants regardless of their citizenship status. *Padilla 1*, *2* and the *Transfer Memos* cannot be seen as anything less than effective unilateral presidential power tools: Not only did they sanction government action (like an executive order does), they also defined the law as it applies to enemy combatants beyond the scope of the President's Nov 13, 2001 Military Order. In doing so, they enlarged the purview, and policy-impact of the MO. Since the MO applied to non-citizens only, the legal opinions discussed in this section dictated (and still dictate) the policy of the U.S. government vis-à-vis the Padilla category. Moreover, as the *Obama Report* indicates, the legal arguments put forward in

---

[421] Pub. L. No. 107-40.
[422] Coded as *endorsement of action*, which, with a closely related category of codes, *recognition of powers*, will be discussed under Definition of Institutional Power Relations.
[423] *Youngstown v. Sawyer*, 343 US 579, 635-636.

the opinions discussed in this section survived through the end of President Obama's second term in office.[424] As I will point out in Chapter Eight, the Supreme Court's opinion in *Hamdi* does not change this conclusion. In *Hamdi v. Rumsfeld* the Government proposed both the constitutional and the statutory arguments laid out above. While the Court declined to answer whether "the Executive possesses plenary authority to detain pursuant to Article II of the Constitution,"[425] it did so because the AUMF-based rationale advanced by the government was sufficient to sustain the President's power to detain enemy combatants. Also, since the Court deemed the AUMF to have authorized detention of U.S. citizens "pursuant to an Act of Congress," it did not reach the merits of OLC's analysis of Chapter 301's statutory structure (although the Solicitor General proposed that interpretation to the Court).

The complexity of the capture-and-detention opinions is evident from the intricate tapestry of *Constitutional* and *Statutory Construction* as well as *Judicial Ruling Interpretation*. It is not striking that OLC chose to employ *Quirin* in the unilateralization of the government's response to the crisis, rather than distinguish it due to the problems inherent in that case. After all, *Quirin* is good law and the Supreme Court cited it in both *Hamdi*[426] and *Hamdan*. What is notable in these memoranda is OLC's expropriation of authority to make judgments about statutory meaning devoid of a clear statement by the Legislature; indeed, the kind of statutory analysis that OLC uses in *Padilla 2* is quite analogous to what one would expect from an Article III court. The structure-based statutory construction is an instance of what I call "original interpretation," and I will discuss it in detail in Chapter Seven. Something else that is of note in the *Padilla 2 Memo* is the lack of pertinent intra-branch precedent; in fact, of the three OLC opinions that are cited in the statutory structure analysis, two are self-referential, meaning they refer to Bush 43 legal opinions: the *SJAA Memo*, and the *War Powers Memo*. The third OLC

[424] "Obama Report," 28 ("as terrorist suspects have been captured or apprehended, the U.S. Government has used all available tools at its disposal — including military, law enforcement, and intelligence authorities — to maximize intelligence collection and to incapacitate terrorists while adhering to U.S. legal obligations, policies, and values. These tools include the use of law-of-armed-conflict detention authority.").

[425] *Hamdi v. Rumsfeld*, 542 US 507

[426] Although, in dissent, Justice Scalia wrote that *Quirin* "was not this Court's finest hour," hinting at the issues that I delineated above.

opinion is a Bill Comment[427] authored by the Clinton OLC titled *Re: Defense Authorization Act*. Although the *Defense Authorization* Bill Comment does not appear to have been released to the public, the contexts in which the Bush OLC refers to[428] indicate that it censured Congress for attempting under its Article I powers to set the "terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of military operations during the course of a campaign."[429] The Bill Comment Practice (coupled with the §4001(a) analysis) indicates that OLC is quite comfortable in a statutory law interpreting role, in which it presumably also employs the avoidance canon, in order to indicate non-compliance or for veto signaling purposes.[430] I will discuss veto signaling in more detail in the "Defining Institutional Power Relations" chapter below.

---

[427] Cornelia TL Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands," *Michigan Law Review* 103, no. 4 (2005): 711:

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

[428] *Torture Memo*, *Military Interrogation Memo*, and the *Padilla 2 Memo*

[429] *Padilla 2 Memo* at 54.

[430] Meghan M Stuessy, "Regular Vetoes and Pocket Vetoes: In Brief" (Congressional Research Service, August 2, 2016), https://www.senate.gov/CRSpubs/090a8d2a-c3f8-4c8a-9e48-e47dc35a11d9.pdf.

d. Trying Violators of the Laws of Armed Conflict

One of the keystones of the Bush OLC's legal framework for unilateralizing authority to conduct the GWOT is the power to "try and punish terrorists captured in connection with the attacks of September 11 or in connection with U.S. military operations in response to those attacks."[431] Although in *Hamdan v. Rumsfeld* the Supreme Court invalidated military commissions (MCs) as they had been constituted up to 2006, MCs properly constituted continued to be employed through at least the end of President Obama's second term in office.[432] I am going to delve into the Supreme Court's ruling in *Hamdan* in my evaluation of the Bush OLC's legal opinions as unilateral power tools in Chapter 8. Here, I will look at how the Bush OLC used constitutional arguments, existing Court precedent, and statutory law to unilateralize the government's response to the crisis; or in this instance, to justify the President's unilateral determination of the policy of the United States toward the trial of suspected terrorists.

MILITARY COMMISSIONS IN THE GLOBAL WAR ON TERRORISM

Military commissions are "common law war courts"[433] that were "born of military necessity,"[434] whose authority and jurisdiction inheres in the laws of armed conflict (LOAC). As Justice Stevens wrote in *Hamdan v. Rumsfeld*, MCs are "tribunal[s] neither mentioned in the Constitution nor created by statute."[435] In the *Military Commissions Memorandum*, the third of the pre-MO troika of opinions, the Bush OLC undertook to formalize MCs in constitutional law terms. In OLC's legal analysis, the power to convene and to determine the procedure of these military courts of ill-defined character derives from the President's Commander-in-Chief

---

[431] Military Commissions Opinion at 6.
[432] Steve Vladeck, "President Obama's Military Commissions," *Just Security*, August 3, 2015, https://www.justsecurity.org/25188/president-obamas-military-commissions/.
[433] *Madsen v. Kinsella* 343 US 341, 347 (1952).
[434] *Hamdan v. Rumsfeld* 548 US 557 (2006) (Justice Stevens describes military commissions as "tribunal[s] neither mentioned in the Constitution nor created by statute, [but instead] born of military necessity").
[435] Id.

authority. Indeed, as institutional practice demonstrates, MCs had been used before they were ever mentioned in statutory law. Also, the Bush OLC argues, while §821 of the Uniform Code of Military Justice (UCMJ) acknowledges military commissions, it does not purport to regulate either the President's power to convene them or to dictate their mode of proceedings; and nor could it constitutionally do so. At the beginning of the *Military Commissions Memo*, OLC promises that it would "address more thoroughly the charges that could be brought before a military commission and the procedures that would be required before such a commission in a subsequent memorandum;" however, if such a legal opinion exists, it remains classified.[436] Nevertheless, as the purpose of the *Military Commissions Memo* is to unilateralize decisionmaking regarding the trial and punishment of enemy combatants captured in the Global War on Terrorism, I will demonstrate below that the Bush OLC regards MCs' procedure-setting to be either entirely or predominantly a factor of the President's unilateral wartime authority.[437]

In order to highlight the significance of the question of whether military commissions can be properly utilized in a non-traditional war against an international network of terrorists, it is instructive to first examine the Bush OLC's definition of what a military commission is: Based on William Winthrop's seminal work, *Military Law and Precedent*, OLC defines a military commission as a form of military tribunal "typically used … (i) to try individuals (usually members of enemy forces) for violations of the law of war."[438] Military commissions are, essentially, Article I courts, "convened by order of the commanding officer," and comprised of "a board of officers who sit as adjudicators without a jury."[439] Since they are not Article III courts, MCs are not subject to the 5th and 6th Amendments' jury trial requirements, and neither are their decisions subject to Article

---

[436] *Military Commissions Memo* at 10.

[437] In the *SJAA Memo* at 31*,* the OLC makes a much more pointed claim regarding the President's procedure-setting authority than at any point in the *Military Commissions Memo*:

> The Court, moreover, indicated that serious questions would be raised if military commissions were treated as anything other than creatures of the President's authority as Commander in Chief, as it pointedly declined to address the question 'whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents' by imposing procedures for military commissions.

[438] Id. at 12. (Winthrop's other categories are not relevant for OLC's analysis.)

[439] Id.

III review.[440] Instead, their conclusions are liable only to "review by the convening authority."[441] As the Supreme Court put in *Madsen v. Kinsella*, "[n]either [MCs'] procedure nor their jurisdiction has been prescribed by statute… In general [Congress] has left it to the President, and the military commanders representing him, to employ the commissions, as occasion may require, for the investigation and punishment of violations of the laws of war."[442] Since terrorists violate the laws of war *ipso facto*, under the war paradigm of counterterrorism, military commissions allow the meting out of military justice based solely on Executive Branch determinations, essentially obviating input from the coordinate branches.

Since both the existence of military commissions and their jurisdiction under the LOAC to try war crimes are well settled in American law and constitutional practice, OLC's "burden of proof" is to show that the President can establish military commissions on his own authority even in the non-traditional Global War on Terrorism. According to William Winthrop, "the premier 19th century authority on military law"[443] military commissions have cognizance and jurisdiction over war crimes in a limited range of circumstances:

> (1) A military commission, (except where otherwise authorized by statute,) can legally assume jurisdiction only of offences committed within the field of the command of the convening commander [...] (2) The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission, (unless specially empowered by statute,) will have no jurisdiction of offences committed there.[444]

Since the location ("theatre of war") requirement is crucial for military commissions to be able exercise jurisdiction, nearly half of the *Military Commissions Opinion* is devoted to the examination of domestic and international authorities to establish that a state of (borderless)

---

[440] Id. (based on the Supreme Court's opinion in *Ex parte Quirin*).
[441] Id.
[442] *Madsen v. Kinsella*, 343 US 341, FN 9 (Quoting William Winthrop's Military Law and Precedent); *see* also, William Winthrop, *Military Law and Precedents*, 2nd ed. (Washington: Government Printing Office, 1920), 831 ("The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code.").
[443] Louis Fisher, "Military Tribunals: Historical Patterns and Lessons" (Congressional Research Service, July 9, 2004), 65, https://apps.dtic.mil/dtic/tr/fulltext/u2/a463084.pdf.
[444] Winthrop, *Military Law and Precedents*, 836.

war exists with the terrorist network that planned and executed the 9/11 attacks, and that, consequently, the president may apply the laws of war:

> Use of the laws of war, after all, can be a key component in a strategy for conducting and regulating a military campaign. The ability to apply the laws of war means the ability to punish transgressions by an enemy against those laws, and thereby to compel an enemy to abide by certain standards of conduct.[445]

In Section (a) of this chapter, I presented an overview of OLC's legal and quasi-legal arguments in support of the war model of counterterrorism. That legal paradigm, along with the *Domestic Military Memo*'s definition of the battlefield, is crucial for the activation of the President's war powers, the application of the LOAC, and military commissions' jurisdictional threshold to be met. Although in the *War Powers Memo* the Bush OLC cites Pub. L. No. 107-40, the AUMF, as "acknowledgement" of the President's inherent powers, that statute is conspicuously missing from the *Military Commissions Memo*. It is so, I believe, because OLC's military commissions analysis is based on pre-existing constitutional powers. Thus, since military commissions "ha[ve] no statutory existence,"[446] the AUMF did not activate the President's power to convene them – under OLC's analysis, the existence of war did. Moreover, as the statutory section of the *Military Commissions Memo* demonstrates, §821 of the Uniform Code of Military Justice (10 USC Ch. 47) already recognizes the President's power on this score, and that recognition, while "constitutionally unnecessary,"[447] is sufficient for OLC's purposes.

In this section I will delve into four areas that are of interest from the point of view of JEU: (i) a critique of OLC's overbroad and tendentious constitutional arguments based on a straightforward legal analysis of the President's power to convene and determine the mode of operation of military commissions; (ii) an assessment of the applicable Supreme Court precedent, drawing mainly on contemporary commentary; (iii) an examination of the long-term impact of the Supreme Court's decision to rule on *Quirin* and *Yamashita* from a judicialization-of-politics perspective; and (iv) lastly, OLC's *Military Commissions Opinion* through the lens of the "presidential power of unilateral action" in the context of the juridification of politics.

---

[445] *Military Commissions Memo* at 71.
[446] Id. at 21 (citing the testimony of Judge Advocate General Crowder).
[447] SJAA *Memo* at 11.

i. Legal analysis of the Military Commissions Memorandum

The Bush OLC relies extensively on Supreme Court precedent from and prior to World War II in order to validate the use of military commissions to try enemy combatants in the GWOT. Supreme Court precedents on this point are quite permissive:[448] As the Court stated in *Yamashita*, "[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war."[449] Likewise, in *Madsen v. Kinsella*, the Court employed an expansive interpretation of the President's power to convene and promulgate regulations for the conduct of military commissions. As Justice Burton wrote for an eight-Justice majority, "it appears that, as Commander-in-Chief of the Army and Navy of the United States, [the President] may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions."[450] Justice Douglas's concurring opinion in *Hirota v. MacArthur*, as quoted in the *Military Commissions Memo*, is similarly broad and latitudinarian:

> The Constitution makes the President the "Commander in Chief of the Army and Navy of the United States ...." Art. II, § 2, Cl. 1. His power as such is vastly greater than that of troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country, and to punish those enemies who violated the law of war.[451]

Although, strictly speaking, *Quirin* should be the most pertinent Supreme Court decision on the subject of the authority of military commissions to try violators of the laws of war, as I explained above, the *Quirin* Court failed entirely to elucidate any bright-line rules for the procedures of military commissions; nor did the *ex post facto* decision insist on inter-branch consultation in order to create a set of procedural rules to be followed in commission proceedings. Instead, it

---

[448] As I will argue in Chapter 8, it is a fact of our functional separation of powers system that the Judiciary has tended to defer to the Executive during times of emergency. The track record of the Court in balancing national security against individual liberty interests prior to the GWOT bears out this observation. In the GWOT cases, however, the Supreme Court bucked this trend.

[449] *In re Yamashita*, 327 US 1, 11 (1946).

[450] *Madsen v. Kinsella*, 343 US 341, 348 (1952).

[451] *Hirota v. MacArthur*, 338 US 197, 208 (1948).

allowed the judgment of President Roosevelt's military commission to stand and effectively signed off on the inadequate process the commission followed.[452] Therefore, the Bush OLC correctly infers from the Court's ruling in *Quirin* that "it is within the constitutional power of the National Government to place [violators of the LAOC] upon trial before a military commission,"[453] and within the President's power to determine the procedural rules to be followed in such a commission.

Based on the Supreme Court's rulings, the Bush OLC concludes that "the logic of the Court's explanation[s] suggest[] that the power to convene military commissions is an inherent part of the authority the Constitution confers upon the President by naming him Commander in Chief of the armed forces."[454] An important element of OLC's logic to formalize MCs in constitutional law terms is John Yoo's definition of the Commander in Chief power as "incorporating the fullest possible range of power available to a military commander."[455] In accordance with that definition, any residual war powers not textually assigned to the President, must be resolved in his favor.[456] Therefore, the Bush OLC argues, the President's authority over military commissions is a "necessary and proper" corollary of his war powers. As the Supreme Court held in *Johnson v. Eisentrager*, "[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution."[457] In practical terms, the Bush OLC concludes, "[i]t is essential for the conduct of war… that an army have the ability to enforce the laws of war by punishing transgressions by the enemy."[458]

OLC also notes that historical practice demonstrates the existence of inherent presidential authority to convene military commissions. Within the first half century of American

---

[452] For more detail see: Fisher, *Nazi Saboteurs on Trial*.
[453] *Ex parte Quirin*, 317 US 1, 29 (1942).
[454] Military Commissions Memo at 32.
[455] Id. at 29; based on Yoo, "The Continuation of Politics by Other Means."
[456] See also, *Transfer Memo* at 23 ("The unification of executive power in Article II requires that unenumerated powers that can fairly be described as 'executive' in nature belong to the President, except where the Constitution expressly vests the power in Congress.").
[457] *Johnson v. Eisentrager*, 339 US 763, 788 (1950).
[458] Military Commissions Memo at 28.

independence, MCs were created by Generals George Washington,[459] Andrew Jackson,[460] and Winfield Scott[461] without sanction from Congress. Furthermore, during the Civil War, "under the general orders drafted for governance of the Army in 1862," military commanders also established MCs to try offenses against the LOAC.[462] Thus, OLC concludes, "[i]n investing the President with full authority as Commander in Chief, the drafters of the Constitution surely intended to give the President the same authority as General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the laws of war."[463]

In the context of the GWOT, OLC points out that the President need not rely on inherent powers alone when establishing military commissions, since 10 USC §821 "endorses sufficiently broad jurisdiction for the commissions."[464] First inserted into the US Code in 1950, §821 essentially re-codified article 15 of the Articles of War (AW), on which both the *Yamashita* and *Quirin* decisions were based.[465] The statutory analysis of article 21 of the Uniform Code of Military Justice, titled "Jurisdiction of courts-martial not exclusive," is rather unusual in the Bush corpus, because it is not packed with negative construction markers. Instead, the Bush OLC argues, article 21 is simply a recognition of the pre-existing authority of military commissions. Therefore, §821 does not "*create* military commissions… [i]nstead, it refers to military commissions primarily to acknowledge their existence and to *preserve* their existing jurisdiction," concurrent with courts-

[459] Id. at 29 (Washington as Commander in Chief of the Continental Army "appointed a 'Board of General Officers' to try the British Major Andre as a spy.").

[460] Id. at 30 (Gen. Andrew Jackson "convened military tribunals to try two English subjects… for inciting the Creek Indians to war with the United States.").

[461]Id. (During the Mexican American War in 1847, Scott "appointed tribunals called 'council[s] of war' to try offenses under the laws of war and tribunals called 'military commissions' to serve essentially as occupation courts administering justice for occupied territory.")

[462] Id.

[463] Id. at 29.

[464] Id. at 27.

[465] The text of Article 21, "Jurisdiction of courts-martial not exclusive" is as follows:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals. This section does not apply to a military commission established under chapter 47A of this title.

martial.[466] As the Supreme Court explained in *Madsen*, MCs have "taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth."[467] In any case, OLC cautions, "since the President alone… is constitutionally invested with the entire charge of hostile operations," legislative restrictions on the President's power over military commissions would be an unconstitutional infringement on his Commander in Chief authority.[468] While the Bush OLC concedes that Congress possesses war-related powers under the Constitution such as the power to "declare War," to "raise and support Armies," to "make Rules for the Government and Regulation of the land and naval Forces," and to "define and punish… Offences against the Law of Nations," it intones that the exercise of those powers is only permissible as long as they do not interfere with the President's constitutionally superior wartime authority as Commander in Chief.[469]

While it maintains that statutory endorsement of the President's inherent authority is constitutionally unnecessary,[470] the Bush OLC implicitly recognizes the *Youngstown* framework. In Part B of the opinion, OLC claims that "there will likely be no need to rely solely on the President's inherent authority as Commander in Chief to convene commissions in the present circumstances:"[471] Article 21 of the UCMJ puts the President's power over military commissions in Justice Jackson's first category which is the zenith of Executive authority, "includ[ing] all that he possesses in his own right plus all that Congress can delegate."[472] While ceding no war-related

---

[466] *Military Commissions Memo* at 18 (emphasis original); As OLC explains, the jurisdiction of courts-martial was expanded upon the original enactment of the Articles of War in 1916 in order to cover all offenses against the LOAC. That expansion, according to Senate testimony, was not intended to deprive MCs of their concurrent jurisdiction.
[467] *Madsen v. Kinsella*, 343 US 341, 347-348 (1952).
[468] *Hamilton v. Dillin*, 88 US 73, 74 (1874); The only negative construction marker (*Unconstitutional*) that attaches to the statutory analysis of §821 is at 24: "Indeed, if section 821 were read as restricting the use of military commissions and prohibiting practices traditionally followed, it would infringe on the President's express constitutional powers as Commander in Chief. *Cf. Quirin*, 317 U.S. at 47 (declining to "inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents" by restricting use of military commissions).
[469] Id. at 25.
[470] Id. at 31 ("Precisely because it confirms that military commissions existed before any express congressional authorization, the history of section 821 also supports the conclusion that the President has constitutional authority to convene commissions even without legislation authorizing them.")
[471] Id. at 27.
[472] *Youngstown*, 343 US 579, 636 (1952).

constitutional ground to Congress, OLC seeks to eschew a potential institutional "showdown"[473] in a court of law. Recognizing that the President's relative institutional power is advanced even if courts uphold the Executive Branch's legal interpretations on statutory grounds, the Bush OLC embraces section 821 as an "express congressional approval for the traditional use of military commissions under past practice."[474]

Although the *Military Commissions Memo* does not address the substantive or procedural rules that would govern the MCs, it strongly suggests that the President alone could devise those rules. However, in an opinion dated April 8, 2002, the *Swift Justice Authorization (SJAA) Act Memo*, OLC makes a much more pointed claim regarding the President's procedure-setting authority than at any point in the *Military Commissions Memo*. Referring to the Supreme Court's decision in *Ex parte Quirin*, OCL states that "[t]he Court [] indicated that serious questions would be raised if military commissions were treated as anything other than creatures of the President's authority as Commander in Chief, as it pointedly declined to address the question 'whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents' by imposing procedures for military commissions."[475]

Notably, branch-internal precedent in the form of an Attorney General opinion throws the Bush OLC's arrogation of plenary process-prescribing authority to the President into sharp relief. The pertinent A.G. opinion was authored on the grievous occasion of President Lincoln's assassination in 1865. After Lincoln was mortally wounded by John Wilkes Booth, eight individuals were arrested and subsequently tried and sentenced by a military commission for the

---

[473] Eric A. Posner and Adrian Vermeule, "Constitutional Showdowns," *University of Pennsylvania Law Review* 156, no. 991–1048 (2007): 997, http://www.ssrn.com/abstract=1002996:

> [A] constitutional showdown is (1) a disagreement between branches of government over their constitutional powers that (2) ends in the total or partial acquiescence by one branch in the views of the other and that (3) creates a constitutional precedent. Constitutional showdowns are a subset of legal showdowns generally; the latter would include, for example, a disagreement between the President and the courts over whether the President has been granted particular powers by statute, rather than by constitutional law.

[474] Military Commissions Memo at 21.

[475] *SJAA Memo* at 31; *also*, *SJAA Memo* at 50 ("It bears noting, moreover, that in over 225 years, Congress has never before attempted to dictate the procedures used by military commissions to try enemy combatants."); *SJAA Memo* at 72 ("The Court's suggestion that Congress may properly express its unqualified approval of Executive practice in this field in no way suggests that Congress possesses the far different power to curtail the President's ability as Commander in Chief to prescribe the procedures for such commissions.").

crime of conspiracy to kill the President of the United States. The military commission was convened by order of incoming President Andrew Johnson. Subsequently, Attorney General Speed issued an opinion titled *The Constitutional Power of the Military to Try and Execute the Assassins of the President*, in which he argued that the military commission that tried the conspirators had jurisdiction to do so:

> My conclusion, therefore, is, that if the persons who are charged with the assassination of the President committed the deed as public enemies, as I believe they did, and whether they did or not is a question to be decided by the tribunal before which they are tried, they not only can, but ought to be tried before a military tribunal. If the persons charged have offended against the laws of war, it would be as palpably wrong of the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.[476]

General Speed did not, however, claim that the President had plenary power over MCs. Instead, he wrote "*in default of Congress defining*… the mode of proceeding to ascertain whether an offense [against laws of war] has been committed," the President could establish their procedural rules:[477]

> A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offenses as the laws of war permit; they must proceed according to the customary usages of such tribunals in time of war, and inflict such punishments as are sanctioned by the practice of civilized nations in time of war.[478]

Thus, Speed's 1865 opinion states in plain language that the President may establish military commissions "according to the laws and usages of civilized warfare" only if "Congress fail[s] to create such tribunals." Therefore, while the President's unilateral establishment of MCs is constitutionally permissible, the President may prescribe the proceedings of those commissions

---

[476] James Speed, "Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President," Attorney General Opinion, July 1865, http://famous-trials.com/lincoln/2157-commissionorder.
[477] Id. (emphasis added)
[478] Id. (emphasis added)

only if Congress failes to exercise its constitutionally-derived authority to pre-determine their procedural rules.

Upon closer inspection, the Bush OLC's Supreme Court precedents also fail to establish the existence of inherent presidential authority beyond the convening of MCs. Instead, they reinforce the Constitution's allocation of process-prescribing authority as properly belonging to Congress. The controlling opinions in Part I of the *Military Commissions Memo* are *Quirin*, *Madsen*, *Yamashita*, and *Hirota*. Below I will examine each one in some detail. As I already explained the defects of *Ex parte Quirin* above, I will not repeat them here.

First, it is evident in the Supreme Court's broad and sweeping language to uphold the authority of military commissions in occupied Germany[479] that MCs are powerful instruments of wartime justice of which the President may constitutionally avail himself.[480] In line with Attorney General Speed's reasoning, however, the Supreme Court also held that it is only "[i]n *absence of attempts by Congress to limit the President's power*" that he may "prescribe the jurisdiction and procedure of military commissions."[481] Thus, quite contrary to the Bush OLC's legal analysis, the Court made it unmistakably clear that Congress is not without power to legislate with regard to the procedure of MCs; instead, it had been "[t]he policy of Congress to refrain from leglislat[ively regulating] this uncharted area."[482]

In *Yamashita*, the Supreme Court similarly concluded that Congress has power under Article I, §8 of the Constitution to "define and punish… Offenses against the Law of Nations," of

---

[479] To try Yvette J. Madsen for the crime of murder of her husband.

[480] For a detailed analysis see John M. Raymond, "Madsen v. Kinsella--Landmark and Guidepost in Law of Military Occupation," *The American* Journal *of International Law* 47, no. 2 (April 1953): 300–308; *notably*, in dissent, Justice Black vehemently repudiated the majority's ruling, saying:

> It appears that the court that tried her and the law she was judged by were not established or authorized by the Congress. Executive officers acting under presidential authority created the system of courts that tried her, promulgated the edicts she was convicted of violating, and appointed the judges who took away her liberty.
>
> The very first Article of the Constitution begins by saying that "All legislative Powers herein granted shall be vested in a Congress," and no part of the Constitution contains a provision specifically authorizing the President to create courts to try American citizens. Whatever may be the scope of the President's power as Commander in Chief of the Fighting armed forces, I think that, if American citizens in present-day Germany are to be tried by the American Government, they should be tried under laws passed by Congress and in courts created by Congress under its constitutional authority.

[481] *Madsen*, 343 US 341, 348 (1952) (emphasis added).

[482] Id. 348-349.

which the LOAC are a part. In the exercise of its constitutional authority, Congress chose not to "attempt[] to codify the law of war or to mark its precise boundaries," but instead "recognized the 'military commission' appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war."[483]

Finally, Justice Douglas's expansive language in *Hirota* that the Bush OLC quotes as controlling precedent amounts to mere judicial *dictum*. Indeed, the very next sentence of the concurring Justice's opinion reveals that the procedure of military commissions is nowise related to the Court's ruling:

> We need not consider to what extent, if any, the President, in providing that justice be meted out to a defeated enemy, would have to follow, as he did in *Ex parte Quirin* and *In re Yamashita*, the procedure that Congress had prescribed for such cases.[484]

Instead, the grounds on which he reaches the majority's holding that "the courts of the United States have no power or authority to review, to affirm, set aside, or annul the judgments and sentences imposed on these petitioners," are related to the President's treaty powers and, more broadly, the conduct of the nation's foreign relations:

> Here, the President did not utilize the conventional military tribunals provided for by the Articles of War. He did not act alone, but only in conjunction with the Allied Powers. This tribunal was an international one arranged for through negotiation with the Allied Powers. The President is the sole organ of the United States in the field of foreign relations. Agreements which he has made with our Allies in furtherance of our war efforts have been legion. Whether they are wise or unwise, necessary or improvident, are political questions, not justiciable ones.[485]

In sum, while the Bush OLC's reading of the relevant judicial doctrine is correct – the Court does appear to allocate the authority to convene military commissions to the President in an unqualified fashion – it then goes on to infer plenary process-prescribing authority that the Supreme Court did not grant, and more importantly, the Constitution properly assigns to

---

[483] *In re Yamashita*, 327 US 1, 7 (1946).
[484] *Hirota v. MacArthur*, 338 US 197, 208 (1948).
[485] Id.

Congress. Two broad conclusions can be drawn from the Bush OLC's legal analysis: under certain factual circumstances,[486] the President does have power under the Constitution to establish military commissions to try violators of the LOAC. Second, institutional practice indicates that Congress has refrained from micromanaging the authority of the Executive in this area, in order to allow maximum flexibility for the President's conduct of military operations. Nevertheless, based on the available legal precedent, the Bush OLC's conclusion is plainly overbroad with regard to the procedures that MCs must observe, since both the Supreme Court and the A.G. opinion on point have made clear that the "policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate."[487]

ii. The Court's decisions in Yamashita (and Quirin)

As the "straightforward legal analysis" above evinces, it is quite possible to find flaws or overbreadth in OLC's *Military Commissions* analysis. First, as the *Hirota* precedent shows, the Bush OLC has a demonstrable tendency to rely on judicial *dicta* and to elevate it to holding.[488] Second, the *Madsen* decision was made in the context of an occupation court in post-World War II Germany, and as such it falls within William Winthrop's second category, "a general court administering justice in occupied territory."[489] As I pointed out above, that is not the category that fits OLC's legal analysis. Third, and most importantly for my purposes, it might be argued that using *Yamashita* as precedent is admission of the President's inferior constitutional position

---

[486] *See*, *Military Commissions Memo* at 12 (According to William Winthrop, military commissions are used in three scenarios: (i) to try individuals (usually members of enemy forces) for violations of the laws of war; (ii) as a general court administering justice in occupied territory; and (iii) as a general court in an area where martial law has been declared and the civil courts are closed); *see also*, Justice John Stevens's opinion in *Hamdan v. Rumsfeld*, 548 US 557 (2006); whether the GWOT fits those factual circumstances, I will discuss below.

[487] *Madsen v. Kinsella*, 343 US 341, 349 (1952).

[488] For more on the dilemma inherent in *dictum* vs. holding, see: Judith M. Stinson, "Why Dicta Becomes Holding and Why It Matters," *Brooklyn Law Review* 76, no. 1 (2010): 219–64 (*see*, 241, "there is a ripple effect that occurs when any of the players demonstrates an inability or an unwillingness to distinguish between holding and dicta. […] There is incentive to think of the law in amorphous terms. Most of what lawyers do is to persuasively argue that prior decisions should be read broadly (or narrowly)—and that invites arguments that the point from an earlier case is non-binding dicta (rather than binding holding) or is binding holding (rather than only potentially persuasive dicta). Furthermore, judges may prefer to create rules even when the case before them does not directly require them to decide the issue.).

[489] *Military Commissions Memo* at 12, see FN 43 above.

in deciding on the mode of proceedings of MCs, because, in OLC's words, "the Court was addressing a situation in which Congress [in at least articles 15 and 38 of the AW] had recognized this power [of using military commissions] in the commander of armed forces."[490] Such an argument, however, would be in error.

As I already outlined the inadequacies that taint *Quirin* in Section (c) above, here I will focus on *Yamashita* as an example of what Cornelia Pillard calls "judicial underenforcement" of fundamental legal principles.[491] Indeed, critics of the Court's decision such as the dissenters, Justices Rutledge and Murphy, and Captain Reel, who was assigned to General Yamashita's defense, were vehement in their rebuke of the Court's majority for failing to uphold procedural requirements emanating from the Constitution, the AW, and the Geneva Convention of 1929. As this analysis will make manifest, the Bush OLC chose to rely on *Quirin* and *Yamashita* precisely due to the institutional deference that Executive Branch decisions received in those cases. One might argue, as some contemporary critics did, that the Court's decisions in *Quirin* and *Yamashita* demonstrate an excessively high degree of deference to the Executive Branch's determinations regarding military commissions' proceedings. Reasonable minds might even label *Quirin* and *Yamashita* as a rubber stamp on wartime presidential authority. Given the Congress's historical indisposition to prescribe regulations for military commissions, *Quirin* and *Yamashita* symbolize the kind of institutional balance of powers that the Bush OLC seeks to enforce in the *Military Commissions Opinion*: Congressional recognition of and judicial deference to the President's authority to conduct the military campaign, including the trial and punishment of enemy combatants. Below, I will recapitulate the factual circumstances of *In re Yamashita*, the military commission's procedural irregularities, and the contemporary critique of the Supreme Court's decision.

General Tomoyuki Yamashita arrived in the Philippines on October 9, 1944, less than two weeks before American troops invaded Leyte, in the Eastern Visayas of the Philippine

[490] Id. at 32.
[491] Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands," 2005.

Archipelago.[492] After the fall of Leyte, under the unified command of General MacArthur, the Sixth Army swiftly pushed northeast toward the island of Luzon. Keenly aware that reinforcements were not forthcoming, Yamashita did not intend to defend Manila. Instead, he ordered the Japanese infantry to evacuate from the capital and withdraw into the mountainous areas of northern Luzon to establish a stronghold. However, Japanese marines "only nominally under Yamashita, decided to ignore [the general's evacuation orders] in favor of defending Manila and Manila Bay to the death."[493] Yamashita's withdrawal had catastrophic consequences: at the hands of the Japanese marines "Manila… suffered through the most unbelievable orgies of mass murder, rape, and pillage."[494] The siege of Manila began on February 3rd, and it took U.S. Army units "a month of bitter building-to-building fighting to root out the Japanese" naval garrison.[495] "Due to the state of Japanese communications," however, General Yamashita did not learn of "the efforts of his subordinates in defending Manila until about 17 February, after it was too late to countermand the order."[496] General Yamashita surrendered the remnants of his army on September 3rd, nearly three weeks after to the cessation of hostilities announced by the Emperor of Japan on August 15, 1945.

On September 25th, the U.S. Army brought charges against Yamashita for violations of the laws of war. The charges claimed that the General had

> unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and… thereby violated the laws of war.[497]

---

[492] Rocco J. Tresolini, "Justice Rutledge and the Yamashita Case," *Social Science* 37, no. 3 (June 1962): 153; Richard Stewart, *American Military History: The United States in a Global Era, 1917-2008* (Washington, D.C.: Center of Military History, US Army, 2010), 186, https://history.army.mil/html/books/030/30-22/CMH_Pub_30-22.pdf.
[493] Stewart, *American Military History: The United States in a Global Era, 1917-2008*.
[494] Tresolini, "Justice Rutledge and the Yamashita Case," 153.
[495] Id.
[496] Dale Andrade, "The Campaigns of World War II: Luzon," World War II Commemorative Series, n.d., 18, https://history.army.mil/catalog/pubs/72/72-28.html.
[497] Quoted in Tresolini, "Justice Rutledge and the Yamashita Case," 153.

Yamashita's trial began on October 29th before a military commission (the Reynolds Commission) composed of five general officers, none of whom had any legal experience or legal training.[498] Six American officers were appointed to represent Yamashita; Captain of the Army's Claims Division A. Frank Reel was one of them. Procedural rules for the commission issued by General MacArthur "virtually rescinded the ordinary rules of evidence, since it allowed rumors, hearsay, and opinion [besides affidavits and depositions] to be used against Yamashita."[499] Although MacArthur claimed that the commission's proceedings were in conformity with the London Charter, which established the jurisdiction of the International Tribunal at Nuremberg, the Reynolds Commission was an American military commission operating under the precepts of the Articles of War. As such, the commission's procedural rules issued by MacArthur were in violation of article 25 of the AW, which only allowed "duly authenticated deposition… [to] be read in evidence before any military court or commission in any case *not capital*."[500] Yamashita's was a capital case. Furthermore, since President Truman had not modified the modes of proof, which article 38 of the AW expressly allowed, the rules of evidence before the Reynolds Commission were those "generally recognized in the trial of criminal cases in the district courts of the United States."[501] As trial records indicate, however, the presiding officers even limited the defense's ability to cross-examine witnesses "to essentials[, in order to] avoid" what it regarded as "useless repetition of questions and answers already before the Commissions."[502]

At the arraignment, Yamashita pleaded not guilty. The General was not charged with having ordered the atrocities. "They did not even charge General Yamashita with failure to act

---

[498] Lt. Colonel Peter J. Bein, "General MacArthur and the Yamashita Decision" (Carlisle Barracks, PA: U.S. Army War College Department of Command Leadership and Management, May 1989), 7, https://apps.dtic.mil/dtic/tr/fulltext/u2/a209673.pdf.

[499] Tresolini, "Justice Rutledge and the Yamashita Case," 153.

[500] Article 25 of The Articles of War (emphasis added).

[501] Id. Article 38 of the Articles of War stipulated that:

> The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules made in pursuance of this article shall be laid before the Congress annually.

[502] "Trial of General Tomoyuki Yamashita," Law Reports of Trials of War Criminals (The United Nations War Crimes Commission, 1948), 82, https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf.

and prevent further occurrences." Instead, the prosecution simply assumed that "by virtue of the number of crimes that took place, [] General Yamashita 'had to know' of them, or at least, 'should have known' about them and therefore was accountable."[503] The defense, on the other hand, strongly objected to the "new principle" of command responsibility that the military's charge created:[504]

> The accused is not charged with having done something or having failed to do something, but solely with having been something… that the accused was the commander… and by virtue of that fact alone, is guilty of every crime committed by every soldier assigned to his command. American Jurisprudence recognizes no such principles so far as its own military personnel is concerned. The (U.S.) Articles of War… do not hold a commanding officer responsible for the crimes committed by his subordinates. It is the best premise of all civilized criminal justice that it punishes not according to status but according to fault, and that one man is not held to answer for the crime of another.[505]

As Reel recounts, the trial was conducted in "impatient haste," with constant pressure from General MacArthur.[506] Despite the apparent urgency for a swift conclusion, three weeks into the trial, the defense was presented with "a supplemental bill [of atrocities committed by the Japanese troops] with fifty-nine more crimes."[507] When the defense moved for a continuance to review the additional charges, the commission declined the motion. Upon goading from General MacArthur, the Reynolds Commission handed down the guilty verdict a little over a month after the trial began, on the third anniversary of the Pearl Harbor attacks on December 7, 1945.

Reel's critique of the trial, which the Army fervently denigrated,[508] was not lost on contemporary journalists. As *Newsweek* reported, "in the opinion of probably every correspondent covering the trial, the military commission came into the courtroom the first day

---

[503] Bein, "General MacArthur and the Yamashita Decision," 9.
[504] Ted Peterson and Jay W. Jensen, "The Case of General Yamashita: A Study of Suppression," *Journalism Bulletin* 28, no. 2 (March 1951): 197.
[505] Bein, "General MacArthur and the Yamashita Decision," 13 (quoting the defense's opening plea).
[506] A. Frank Reel, *The Case of General Yamashita* (New York: Octagon Books, 1971), 85.
[507] Tresolini, "Justice Rutledge and the Yamashita Case," 153.
[508] Courtney Brig. Gen. Whitney, "The Case of General Yamashita: A Memorandum" (General Headquarters, Supreme Command for the Allied Powers, Government Section, November 22, 1949), https://www.loc.gov/rr/frd/Military_Law/pdf/Yamashita.pdf; *Also*: Peterson and Jensen, "The Case of General Yamashita" documented the "difficulty of spreading the minority viewpoint" expressed in Reel's account. Several publishers rejected the book before the University of Chicago Press agreed to publish.

with the decision already in it is collective pockets."[509] Confident that the Supreme Court would sustain defense counsel's objections to the unfair trial process, and hopeful that the verdict would be overturned due to the commission's failure to define a war crime and to abide by applicable domestic law and the 1929 Geneva Convention, the defense appealed the decision.[510]

Oral argument in Washington, D.C. began on January 7, 1946, and the Court's ruling was issued on February 4th. In short, a six-Justice bloc upheld the jurisdiction of the Reynolds Commission.[511] Writing for the majority, Chief Justice Stone sidestepped all procedural and 5th Amendment considerations by stating that "[c]orrection of [the military commission's] errors of decision is not for the courts, but for the military authorities, which are alone authorized to review their decisions."[512] By extension, Yamashita's guilt or innocence was also outside of the purview of civil courts. Therefore, the only question before the nations' highest tribunal was whether the MC was lawfully created to try Yamashita with the offense charged. The majority held that articles 25 and 38 of the AW did not apply to enemy combatants,[513] and that the charge of "command responsibility," though vague, "need not be stated with the precision of a common law indictment."[514] On the question of Geneva's requirements, the majority found that Article 60 applied only to trial proceedings against POWs who commit crimes while in custody of the detaining power.[515]

Although Justice Murphy's and Justice Rutledge's dissenting opinions are brilliantly argued defenses of the rule of law, it is beyond the scope of this dissertation to consider them in

---

[509] Stephen B. Ives, "Vengeance Did Not Deliver Justice," *Washington Post*, December 30, 2001, https://www.washingtonpost.com/archive/opinions/2001/12/30/vengeance-did-not-deliver-justice/072daf87-0f0b-4026-ac40-b8bd4fc2c0b9/.; *see also*: Bein, "General MacArthur and the Yamashita Decision," 20 (The correspondent for the *London Daily Express* summed up the commission's proceedings as: "The military commissions sitting in judgment continued to act as if it wasn't bound by any law or rules of evidence.").

[510] Prior to the defense's appeal to the Supreme Court, the Supreme Court of the Philippines refused to hear the case citing lack of jurisdiction.

[511] Only eight Justices heard the case as Justice Jackson was in Europe as the Chief U.S. Prosecutor at the Nuremberg Trials of Nazi war criminals.

[512] *In re Yamashita*, 327 US 1, 8 (1946).

[513] Citing article 2 of the Articles of War which defined the persons subject to military law.

[514] 327 US 1, 17.

[515] Article 60 of the 1929 Geneva Convention states that:

> At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial.

detail. Instead, I will focus on what is relevant for the Bush OLC's reliance on *Yamashita* and *Quirin*. At the end of his 40-page dissent, Justice Rutledge masterfully summed up the inevitable consequence of the Stone Court's deference to the Executive Branch's wartime decisions:

> The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.[516]

As I wrote above, the historical circumstances of the *Quirin* decision call into fundamental question the institutional independence that makes the Supreme Court a co-equal check on wartime executive authority. Unfortunately, three and a half years after *Quirin*, the Stone Court exhibited similarly absolute deference to the Executive Branch's decisions regarding military commissions. The pivotal difference between *Quirin* and *Yamashita* is that in the former the Court was forced to justify denial of *habeas corpus* in an *ex post facto* decision, while in the latter the Court had occasion not only to correct the record of the *Quirin* ruling, but also to insist on a degree of procedural fairness guaranteed by the 5th Amendment's Due Process Clause.[517] Beyond the insistence on a fair trial, and, more importantly for the precedent that *Yamashita* established, the Stone Court failed to uphold the very regulations specified in the Articles of War which the majority insisted that the Congress had authority to enact. It is for this reason, the Court's unqualified deference to the Executive Branch's wartime authority to determine the procedures of military commissions even in contravention of congressional regulation and international law, that the Bush OLC relies extensively on *Quirin* and *Yamashita*.

iii. Assessment of the long-term impact of the Quirin and Yamashita decisions

[516] *Yamashita*, 327 US 1, 81 (1946).

[517] In the intervening three and a half years since the Court's unanimous decision in *Quirin*, the Court's composition changed. Justices Roberts and Byrnes were no longer on the high court. Justice Rutledge joined the Court in 1943, Justice Burton was appointed in 1945.

Reviewing the Court's decision, A. Frank Reel describes the majority's opinion as "a patchwork of ideas and statements pieced together to satisfy the divergent views of men who were seeking to find 'good' reasons for a politically expedient result."[518] Critics of the role of law in the modern administrative state (and especially in times of war) such as Posner and Vermuele feel vindicated by such findings. To wit, they claim that the "law does little to constrain the modern executive, contrary to liberal legalism's hope."[519] While it is not entirely devoid of doubt that the WWII Executive was "modern" in Posner and Vermuele's sense in *The Executive Unbound*, the *Quirin* and *Yamashita* decisions fit the bill for judicial "deference to the executive," which the authors claim "is the rule" in foreign relations law.[520] Thus, the argument goes, the Supreme Court's flexing of its judicial muscle against wartime executive power is the rare exception. Posner and Vermuele quote *Hamdan v. Rumsfeld* as their sole example, labelling it an extreme "outlier."[521]

Contrary to the foregoing position, I argue that it is not unreasonable to see the Supreme Court's decisions in *Quirin* and *Yamashita* as instances of institutional utility maximization in less-than-ideal political circumstances. The Court spent institutional capital to uphold the status and role of the law as the ultimate legitimating authority in the American constitutional government. In turn, the rational self-preserving action on the part of the World War II-era Supreme Court allowed the *Hamdan, Hamdi, Rasul, and Boumediene* Courts a half century later to meaningfully influence the GWOT architecture that the Bush OLC had built. More importantly, in all of these cases (including *Quirin* and *Yamashita*), the Supreme Court squarely rejected the pernicious argument that questions related to the conduct of hostilities (or in the *instant* case: military trials) are wholly political matters, beyond the cognizance of Article III courts, and, by extension, the law. Justice Murphy said as much in his dissenting opinion in *Yamashita*:

> This Court, fortunately, has taken the first and most important step toward insuring the supremacy of law and justice in the treatment of an enemy belligerent accused

[518] Reel, *The Case of General Yamashita*, 216.
[519] Posner and Vermeule, *The Executive Unbound*, 15.
[520] Posner and Vermeule, 166.
[521] Id.

> of violating the laws of war. Jurisdiction properly has been asserted to inquire "into the cause of restraint of liberty" of such a person.[522]

That initial step is an instance of the Court's conscious institutional commitment to the judicialization of politics in the sense of J_C (conflict resolution with reference to law) and J_D (accretion of conflict-dispositive "judicial" authority in legal interpretive bodies). Indeed, in both *Quirin* and *Yamashita*, Chief Justice Stone insisted, albeit in language less lofty than Murphy's, that his Court had proper jurisdiction to hear *habeas* petitions, and, concomitantly, a foothold to assert that the commission's authority was based on the law as defined by the Judiciary, and not on unbridled prerogative power:[523]

> [W]e held in *Ex parte Quirin*, as we hold now, that Congress, by sanctioning trials of enemy aliens by military commission for offenses against the law of war, had recognized the right of the accused to make a defense. It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.[524]

To summarize: Although (a) the *Quirin* and *Yamashita* decisions, whether by choice or force, rested on institutional deference to the Executive Branch's wartime decisions regarding the use of military commissions,[525] (b) the Supreme Court also affirmed its jurisdiction to review whether the military commissions were lawfully created. While of little comfort to General Yamashita, who was hanged on February 23, 1946, the Court's instance on its role to determine what is "legal," even as it granted its imprimatur to an arguably illegal trial, helped lay the groundwork for the judicialization of politics. Coupled with subsequent developments that resulted in the hyper-legalization of war and national security (J_C and $J_D/_AJ_D$), the Stone Court's decisions helped establish the legitimacy (J_D) of the Rehnquist and Roberts Courts to meaningfully influence the legal framework that the Bush OLC had built.

---

[522] *Yamashita*, 327 US 1, 30 (1946).
[523] See Goldsmith, "The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation."
[524] 327 US 1, 9 (1946) (internal citations omitted).
[525] As Stone put it in *U.S. v. Butler*, 951 US 1, 57, "Courts are not the only agency of government that must be assumed to have capacity to govern."

iv. The Military Commissions Opinion in the context of JEU

While I believe that my conclusions in sub-section (d)(i) are accurate from a purely legal perspective, i.e., OLC's legal analysis is tendentious and overbroad, "correctness" in and of itself is not necessary for OLC's legal opinions to be controlling. As Justice Robert Jackson wrote in *Brown v. Allen*, although its decisions are binding and conclusive, not even the Supreme Court gets it right one hundred percent of the time:[526]

> [R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that, if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.[527]

Indeed, we need not look further than *Yamashita* or *Quirin* to see that even the Supreme Court's putatively final decisions are similarly, although not analogously, susceptible to flaws in legal logic, to overbreadth of arguments, or to deference to a coordinate branch where deference is not due. Nevertheless, in the functional constitutional system of the United States, lower courts are bound to follow the precedents set by the Supreme Court, and the coordinate branches likewise must obey their dictates. In the language of the theory that underlies this dissertation, the Court's decisions create, shape, or abolish the legal space in which legitimate political action is exercised.

Under condition of juridification, and when the President engages in a "legal strategy," OLC can similarly shape the legal space in which governmental action is exercised. It is emphatically so, because "[t]he executive branch has always interpreted the scope of its authorities in the first instance."[528] Whether OLC's legal interpretations become controlling – in other words, whether OLC's opinions create, shape, or abolish the legal space in which legitimate political action is exercised – ultimately depends not so much on their correctness, but on the ability and willingness of the coordinate branches to review and to alter or accept their

---

[526] *See also*: Richard J Lazarus, "The (Non)Finality of Supreme Court Opinions," *Harvard Law Review* 128 (2014): 540–625.
[527] 344 US 443, 541 (1953).
[528] Goldsmith, "The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation," 225.

determinations. As Jack Goldsmith put it in a 2013 essay titled "The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation:"

> [M]uch of the legitimate and now-settled growth of presidential power—under both Article II and on statutory authority—began as contested and arguably extra-legal assertions of presidential power. But through practice and acceptance—by Congress, the courts, and the public—these assertions of executive power came to be viewed as legitimate and lawful. This is true of much of the president's power under the administrative state, the president's power to make sole executive agreements, and (many believe, including myself) the president's power to use military force abroad without congressional authorization, at least for 60 to 90 days in those situations in which the War Powers Resolution applies.[529]

Although interpretive correctness is by no means immaterial, OLC's view of what is "legal" is binding on Executive Branch agencies the same way as the Supreme Court's decisions are binding on lower courts. And much the same way as the Supreme Court's decisions are the most authoritative interpretation of the law in the U.S. legal system, OLC's opinions are the "best understanding" of the law as far as the Executive Branch is concerned:

> [OLC] lawyers must render a judgment consistent with the "best understanding" of the law, one that is "honest," "accurate," and "principled." They may consider the preference of the policymaker, and they have a responsibility to "facilitate" policy-making when they can. But this facilitation can take place only within a "best understanding" of what the law allows.
>
> Whatever the circumstances, it does not matter that the legal position under consideration may be good, or strong, or plausible … None of these standards is acceptable under the OLC-centered view: *Only the "best understanding" counts, and OLC determines what that understanding is* — subject only to being overridden by the Attorney General or the President, both of whom would normally be expected to follow the advice of lawyers giving their "best" view of the law. As a result, controversial legal positions taken by the Executive are routinely met with the question: "Did you ask OLC?" If the answer is yes, the OLC is presumed to have adopted the "best view," and if not, the policymakers are assumed to have been anxious not to hear it.[530]

[529] Id. 224-225.
[530] Bauer, "Power Wars Symposium."

OLC's "best understanding" is crucially important in the day-to-day functioning of the Executive Branch, and especially in times of crisis, when potentially myriad novel legal questions regarding the boundaries of legitimate government action might arise. As the Bush OLC explained in Footnote 15 of the *ABM Treaty Memo*, "'the decisions of the Court in th[e] area [of foreign affairs and national security] have been rare, episodic, and afford little precedential value for subsequent cases.' Historical practice and the ongoing tradition of executive branch constitutional interpretation therefore play an especially important role in this area."[531]

Having established that OLC's legal opinions are "infallible only because [they] are final,"[532] I will now examine the *Military Commission Opinion* through the lese of the juridification of politics. When so viewed, it fits squarely within William Howell's definition of the politics of direct action: "the president moves policy first and thereby places upon Congress and the courts the burden of revising a new political landscape."[533] To rephrase Howell's formulation in order to better fit the context of juridified executive unilateralism: The President determines what is legal, based on OLC's best understanding of the law, and acts on that understanding; placing upon Congress and the courts the burden of revising a new political and legal landscape.

As I explained in the theory chapter, the juridification of politics creates alternative policy processes based on legal rules, rationales, and resolutions. Using such a juridified policy process, the Bush OLC (a) unilaterally expanded the purview of military commissions to include the non-traditional, neither temporally nor spatially limited, global war against terrorism, based on "the traditional use of military commissions under past practice;"[534] and (b) it also attempted to formalize military commissions in constitutional law terms and to subsume MC procedure-setting under the President's Commander in Chief authority. Thus, when the coordinate branches revised the President's military commissions, which they eventually did, they responded to a *fait accompli*.

---

[531] *ABM Treaty Memo* Footnote 15.
[532] Subject, of course, to external review by the coordinate branches.
[533] William G. Howell, *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton, N.J: Princeton University Press, 2003), 14.
[534] *Military Commission Memo* at 21.

The *Military Commissions Opinion*, along with those memoranda considered in Sections (a) and (b) above, gave rise to the President's November 13, 2001 Military Order, and it served as the basis of multiple iterations of a comprehensive Military Commission Order promulgated by the Department of Defense between 2002 and 2005. Nevertheless, in *Hamdan v. Rumsfeld* the Supreme Court struck down the military commissions as they were constituted up to 2006. Throughout this chapter, I endeavored to demonstrate the availability of a "legal strategy" to unilaterally alter the legal space within which legitimate political action is exercised (i.e., the memos' policy effect). However, as I pointed out in the theory, juridification is a system-wide transformative process. Indeed, the context within which it was first identified and studied is one related to constitutional supremacy and the vesting in constitutional courts of the ability to decide "core moral predicaments, public policy questions, and political controversies." [535] The Bush OLC's attempt to formalize MCs in constitutional law terms disregarded the competencies and legitimacy that courts gained in that process. Namely, in the years since *Quirin* and *Yamashita*, the judiciary developed a robust tradition of individual rights protection and rights-based judicial activism. As the Court's decisions in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene* demonstrate, no longer does the Supreme Court operate under the assumption of unqualified deference to the Executive Branch's wartime determinations. Therefore, while the Bush OLC's *Military Commissions Opinion* fulfilled its function as a unilateral tool, its backwards-looking legal analysis predicated on the permissive institutional conditions that obtained in World War II failed to predict the pushback from the courts.

[535] Hirschl, "New Constitutionalism and the Judicialization of Pure Politics Worldwide, The," 721; See also: (worldwide) Martin M. Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford ; New York: Oxford University Press, 2002); (Australia) Reginald S. Sheehan, *Judicialization of Politics: The Interplay of Institutional Structure, Legal Doctrine, and Politics on the High Court of Australia* (Durham, N.C: Carolina Academic Press, 2012); (Latin America) Alan Angell, Rachel Sieder, and Line Schjolden, *The Judicialization of Politics in Latin America* (Basingstoke: Palgrave Macmillan, 2009).

CHAPTER FIVE

INTERPRETING INTERNATIONAL LEGAL OBLIGATIONS

"By the decision in Goldwater v. Carter *the President is, in effect, made his own judge of the scope of his powers to the extent that he may say what the law is."*

– Terry Emerson, Treaty Termination Revisited

According to a fairly recent article published in the *Yale Law & Policy Review*, "OLC [has] traditionally been… likely to consult sources of international law to guide executive action in response to a conflict."[536] More specifically, the author argues, pre-Bush 43 OLCs tended to "prioritize[] international law over abstract constitutional powers" as sources of authority.[537] As Part 1 of this chapter showed, however, in the Bush OLC's legal opinions, executive action, when permissible, is invariably justified on the basis of strong constitutional arguments, followed by statutory authority only as a secondary or auxiliary source. In this chapter, I will demonstrate that the Bush OLC also subsumes international legal authorities to constitutional considerations. Furthermore, what clearly emerges from the data, as I pointed out in Chapter Three, is the ratio of *positive* to *negative construction* codes that attach to *International* textual segments. That ratio alone is a preliminary indicator that the Bush OLC engages in a systematic interpreting-away of the restrictions imposed by international law. Nevertheless, as my analysis below reveals, the Bush OLC's treatment of international law is more complex than the quantitative snapshot suggests.

On November 15, 2001, OLC advised President Bush that he could unilaterally suspend or terminate the Anti-Ballistic Missile (ABM) Treaty in order to allow the development and testing

---

[536] Saltzman, "Executive Power and the Office of Legal Counsel," 466.

[537] Saltzman, 465–66. Saltzman appears to find this approach normatively attractive. However, to the extent that it holds up based on the data that will be discussed in the Chapter Seven, I find this approach analytically weak. Therefore, I only rely on this finding to the extent that it helps orient my discussion of the Bush OLC's interpretation of international obligations. However, I strongly disagree with (and the data do not corroborate) the position that international law could or should be the basis of institutional authority that is not otherwise derived from constitutional precepts.

of missile defenses. The purpose of the ABM treaty, which had been in place for nearly thirty years, was to prevent the U.S. and the Soviet Union from developing a nationwide defense system against ballistic missiles. The state parties found that this self-imposed restriction would be "a substantial factor in curbing the race in strategic offensive arms and would lead to a decrease in the risk of outbreak of war involving nuclear weapons."[538] With the advent of the GWOT, arms-race considerations gave way to defensive measures against a potential missile strike by a terrorist organization or a rogue state. As President Bush stated in his public announcement of the treaty's termination on December 13, 2001, "the ABM treaty hinders our government's ways to protect our people from future terrorist or rogue state [] attacks."[539]

While I will not go into the minutiae of the *ABM Treaty Memo*'s interpretation of the bilateral agreement between the United States and Russia, I will demonstrate that the logic of the opinion with regard to the President's constitutional authority to suspend and/or terminate treaties underlies all international-law-related memoranda in the Bush corpus.[540] Therefore, it is the baseline for the Bush OLC's analysis of the United States' treaty obligations. In short, the Bush OLC concludes that the President has plenary authority to negotiate treaties and interpret treaty obligations, and inherent authority to suspend, or even unilaterally to terminate treaties.

a. OLC's constitutional analysis

OLC's constitutional analysis of the President's treaty powers goes as follows: Article II of the Constitution vests in the President the "executive Power," which the Bush OLC interprets to mean *all* the federal executive authority. Article II §§2-3 also enumerate the President's "Power, by and with the Advice and Consent of the Senate, to make treaties," to appoint ambassadors,

---

[538] "Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems," Preamble, accessed December 5, 2018, https://www.nti.org/media/documents/abm_treaty.pdf.

[539] Terence Neilan, "Bush Pulls Out of ABM Treaty; Putin Calls Move a Mistake," *The New York Times*, December 13, 2001, https://www.nytimes.com/2001/12/13/international/bush-pulls-out-of-abm-treaty-putin-calls-move-a-mistake.html.

[540] The constitutional law rationale that governs OLC's interpretation of the two most important multilateral treaties in the corpus, the Geneva Conventions and the U.N. Convention Against Torture, can be found in Parts II and III of the *ABM Treaty Memo*.

and (without advice and consent) to receive ambassadors of foreign nations. This concise language, the neo-Hamiltonian Bush OLC argues, implies vast foreign affairs powers that essentially "grant the President plenary control over the conduct of foreign relations."[541] Historical authorities cited to elucidate the constitution's terse language support the Bush OLC's conclusion: Thomas Jefferson, Alexander Hamilton, and John Marshall all agreed that the "[t]he transaction of business with foreign nations is executive altogether;"[542] that the President is the sole constitutional organ of the nation's external relations;[543] and that the "[t]he [executive] department... is entrusted with the whole foreign intercourse of the nation."[544] "Exceptions" to the President's plenary authority in this area "are to be construed strictly," Jefferson wrote.[545] Consequently, the Bush OLC maintains that the Advice and Consent role of the Senate in the Treaty and Appointments Clauses "dilute[s] the unitary nature of the executive branch only in regard to the exercise of *those* powers."[546] Thus, the treaty power is intrinsically executive and "Article II §1's general grant of the executive power… reserves to the President any remaining" corollary authorities such as treaty interpretation, suspension, or termination. The Bush OLC also emphasizes the real-world foreign policy impact of the President's treaty-related powers vested in his office by the Constitution:

> Treaties represent a central tool for the exercise of the President's plenary control over the conduct of foreign policy: in the course of protecting national security, recognizing foreign governments, or pursuing diplomatic objectives, for example,

---

[541] *ABM Treaty Memo* at 19-20. The Supreme Court has also agreed with this assessment, see, e.g., *Haig v. Agee*, 453 US 280, 293-294 (1981) (it is "the generally accepted view that foreign policy [is] the province and responsibility of the Executive."), *US v. Curtiss-Wright* 299 US 304, 320 (1936) (describing "the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress.")

[542] Id. At 20, quoting Thomas Jefferson, *Opinion on the Powers of the Senate* (1790), *reprinted in* 5 *The Writings of Thomas Jefferson* 161 (Paul Leicester Ford ed., 1895).

[543] John Marshall, *The Political and Economic Doctrines of John Marshall: Who for Thirty-Four Years Was Chief Justice of the United States. And Also His Letters, Speeches, and Hitherto Unpublished and Uncollected Writings*, ed. John E. Oster (Neale Publishing Company, 1914), 247.

[544] Id. 249 ("The department which is entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violations…")

[545] ABM Treaty Memo at 20.

[546] Id. ("those" referring to the making of treaties and the appointment of ambassadors as opposed to the suspension or termination of treaties) (emphasis added).

> the President may need to decide whether to perform, withhold, or terminate the United States' treaty obligations.

In fleshing out the powers of treaty termination and suspension, the Bush OLC relies on institutional precedent: President Carter's unilateral abrogation of the mutual defense treaty with Taiwan. In December of 1978, President Carter announced that the United States would "establish full diplomatic relations with the People's Republic of China on Jan. 1, [1979,] ending three decades of hostility between Washington and Pekin."[547] As part of the normalization of relations between the two nations, the President decided to terminate the Sino-American Mutual Defense Treaty. In response, Barry Goldwater and other Members of Congress filed a constitutional challenge against the President for terminating the treaty without the Senate's advice or consent. Upon hearing the case, the D.C. District Court found for the plaintiffs; however, on appeal, the Circuit Court for the District of Columbia reversed the decision and ruled in favor of the President's unilateral action. Finally, the Supreme Court dismissed the case on the grounds that it was a non-justiciable political question, and, without reaching the merits, remanded it to the District Court with directions to dismiss.[548]

Notwithstanding the SCOTUS's vacatur, the Bush OLC relies extensively on the D.C. Circuit's *en banc* ruling and treats Carter's termination of the Mutual Defense Treaty with Taiwan as having *de facto* precedential value in terms of the distribution of institutional powers. Furthermore, the Bush OLC lays great emphasis on two facts: First, although it has no legal significance whatsoever, Justice Brennan, the only member of the Court who reached the merits, would have affirmed the ruling of the D.C. Circuit.[549] Second, and this is highly significant in terms of OLC's legal analysis of the treaty power: The Supreme Court's dismissal of the case "indicates that any presidential termination of a treaty would be unreviewable in the courts" since Senators would have "no cognizable injury with which to demonstrate standing."[550] This latter fact is also important because, unlike the federal courts, OLC is not bound by doctrines of justiciability.

---

[547] Edward Walsh, "U.S. to Normalize Ties With Peking, End Its Defense Treaty With Taiwan," *Washington Post*, December 16, 1978, https://www.washingtonpost.com/archive/politics/1978/12/16/us-to-normalize-ties-with-peking-end-its-defense-treaty-with-taiwan/7d53f81a-865d-4a87-8c32-a0f6f343502c/.
[548] *Goldwater v. Carter*, 444 US 996 (1979).
[549] *ABM Treaty Memo* at 44.
[550] Id.

Neither does OLC operate under a fully actualized version of judicial supremacy due precisely to the same doctrines of justiciability that the Court quoted as grounds to dismiss the case. Consequently, in the *ABM Treaty Memo,* the Bush OLC essentially revives the D.C. Circuit's ruling in *Goldwater v. Carter* and treats it as the controlling judicial precedent in lieu of providing its original interpretation of institutional powers. Since the Bush OLC's view of the President's power to terminate treaties is virtually identical to the majority's opinion in *Goldwater v. Carter*, it is worth quoting the relevant parts of the D.C. Circuit's opinion at some length:

1. *The President can unilaterally terminate treaties*: "The constitutional issue we face … is … whether the President in these precise circumstances is, on behalf of the United States, empowered to terminate the Treaty in accordance with its terms. It is our view that he is[.]"
2. *The Constitution is silent on the matter*: "Certainly the Constitution is silent on the matter of treaty termination. And the fact that it speaks to the common characteristic of supremacy over state laws does not provide any basis for concluding that a treaty must be unmade either by (1) the same process by which it was made, or (2) the alternative means by which a statute is made or terminated."
3. *The Circuit Court refused to extend the Advice and Consent function beyond its textual limits*: "Expansion of the language of the Constitution by sequential projection is a tricky business at best … As the Supreme Court has recognized with respect to the clause in question, it is not abstract logic or sterile symmetry that controls, but a sensible and realistic ascertainment of the meaning of the Constitution in the context of the specific action taken." And, "[t]he constitutional institution of advice and consent of the Senate … is a special and extraordinary condition of the exercise by the President of certain specific powers under Article II. It is not lightly to be extended in instances not set forth in the Constitution."
4. *The President has inherent foreign affairs powers implied in Article II*: "The Constitution specifically confers no power of treaty termination on either the Congress or the Executive. We note, however, that the powers conferred upon Congress in Article I of the Constitution are specific, detailed, and limited, while the powers conferred upon the President by Article II are generalized in a matter that bespeaks no such limitation upon foreign affairs powers ... The President is the constitutional representative of the United States with respect to external affairs. It is significant that the treaty power appears in Article II of the Constitution, relating to the executive branch, and not in Article I, setting forth the powers of the legislative branch. It is the President as Chief Executive who is given the constitutional authority to enter into a treaty; and even after he has obtained the consent of the Senate it is for him to decide whether to ratify a treaty and put it into effect. Senatorial confirmation of a treaty concededly does not obligate the President to go forward with a treaty if he concludes that it is not the public interest to do so. Thus, in contrast to the lawmaking power, the constitutional initiative in the treaty-making field is

in the President, not Congress. It would take an unprecedented feat of judicial construction to read into the Constitution an absolute condition precedent of congressional or Senate approval for termination of all treaties, similar to the specific one relating to initial approval. And it would unalterably affect the balance of power between the two Branches laid down in Articles I and II."

5. *Domestic implementation by statute does not govern the President's Treaty Power*: "The recognized powers of Congress to implement (or fail to implement) a treaty by an appropriation or other law essential to its effectuation, or to supersede for all practical purposes the effect of a treaty on domestic law, are legislative powers, not treaty-making or treaty termination powers. The issue here, however, is not Congress' legislative powers to supersede or affect the domestic impact of a treaty; the issue is whether the Senate (or Congress) must in this case give its prior consent to discontinue a treaty which the President thinks it desirable to terminate in the national interest and pursuant to a provision in the treaty itself. The existence, in practical terms, of one power does not imply the existence, in constitutional terms, of the other."
6. *Creating a legislative hurdle would unduly interfere with the President's authority to conduct the Nation's foreign affairs*: "The creation of a constitutionally obligatory role in all cases for a two-thirds consent by the Senate would give to one-third plus one of the Senate the power to deny the President the authority necessary to conduct our foreign policy in a rational and effective manner"
7. *Historical precedent and institutional practice confirm the court's decision*: "Yet we think it is not without significance that out of all the historical precedents brought to our attention, in no situation has a treaty been continued in force over the opposition of the President. There is on the other hand widespread agreement that the President has the power as Chief Executive under many circumstances to exercise functions regarding treaties which have the effect of either terminating or continuing their vitality. Prominent among these is the authority of the President as Chief Executive (1) to determine whether a treaty has terminated because of a breach, Charlton v. Kelly, 229 US 447 […]; and (2) to determine whether a treaty is at an end due to changed circumstances. [The status of the president as the 'sole organ of the federal government in field of international relations'] is not confined to the service of the President as channel of communication […], but embraces an active policy determination as to the conduct of the United States in regard to a treaty in response to numerous problems and circumstances as they arise."
8. *It would be improper for the courts to get involved in the determination of when a treaty should be terminated*: "There is no judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance, the magnitude of the risk involved, the degree of controversy which their termination would engender, or by any other standards. We know of no standards to apply in making such distinctions … To decide whether there was a breach or changed circumstances, for example, would involve a court in making fundamental decisions of foreign policy and would create insuperable problems of evidentiary proof. This is beyond the acceptable judicial role. All we decide today is that two-thirds Senate consent or majority consent in both houses is not necessary to terminate this treaty in the circumstances before us now."

Based on the DC Circuit's decision in *Goldwater*, the Bush OLC concludes that "[i]n the international sphere, the President is the Nation's primary lawmaker, subject only to the check, in treaty making, of Senate advice and consent."[551] As OLC explains, not even the Supremacy Clause can change that institutional-powers calculus. While the Supremacy Clause elevates both federal laws *and* treaties "made under [the] authority [of the Constitution]" to the status of "supreme law of the land," it does not expand the role of the Senate beyond its advice and consent function. It is so, according to OLC's legal interpretation, because the Supremacy clause is "'a *status*-prescribing [and] not … a *procedure*-prescribing provision. That it assigns the same status – supreme law of the land – to each of the instruments denominated does not mean that it commands the same procedure to be followed in their termination.'"[552]

The Bush OLC finds further evidence of the President's power to terminate treaties in branch-internal legal precedent and in a Congressional Research Service (CRS) report dated January 2001. In 1984, President Reagan's Office of Legal Counsel issued an opinion which specifically addressed the question of treaty termination and emphasized the President's plenary constitutional authority over foreign affairs as the source of that unilateral power. "In particular," the Reagan OLC wrote, "the President's plenary authority in the field of foreign relations includes his power to terminate treaties."[553] CRS similarly concluded that "[a]s a practical matter ... the President may exercise this power [of treaty termination] since the courts have held that they are conclusively bound by an executive determination with regard to whether a treaty is still in effect.[554]

Lastly, the Bush OLC also opines on whether the President's power to terminate treaties encompasses the lesser power of treaty suspension. Again, the Bush OLC has relevant branch-

---

[551] *ABM Treaty Memo* at 47.
[552] Id., *quoting*, Michael J. Glennon, *Constitutional Diplomacy* (Princeton, N.J: Princeton University Press, 1990), 150.
[553] *Re: The President's Authority to Terminate the International Express Mail Agreement with Argentina Without the Consent of the Postal Service*, 5; see also Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Authority to Modify the Conditions under which the United States Will Recognize the Compulsory Jurisdiction of the International Court of Justice Without Prior Congressional Approval* at 11-15 (Apr. 9, 1984)
[554] Daniel Mulhollan, "Treaties and Other International Agreements: The Role of the United States Senate" (Congressional Research Service, January 2001), 201, https://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf.

internal precedent in the form of a 1996 Clinton OLC opinion, which concluded that "[a]ssuming that the President does have the power unilaterally to terminate a treaty, it appears to follow that he also has the authority to relieve the United States of the affirmative obligations imposed on it by particular treaty provision."[555] Moreover, the previously cited CRS report reached the same result: "[u]nder his authority to conduct the foreign relations of the United States, the President makes the determination that justifies suspending an agreement because of a material breach by another party. Accordingly, as a practical matter the President has the power to suspend a treaty since the courts look to executive determinations for guidance respecting the continued viability of a treaty."[556]

In sum, the Bush OLC finds both *de facto* and *de jure* precedent to conclude that (i) the President's treaty power derives from the substantive grant of authority lodged in the Chief Executive by the Vesting Clause; (ii) that the President's treaty power is only limited to the extent that it is shared with the Senate for purposes of treaty-making; (iii) that the corollary powers of treaty interpretation and treaty termination are entirely executive functions; and (iv) that "the power to extinguish obligations subsumes the lesser power to withhold performance of them."[557]

b. Application of the ABM Treaty rationale

The President's power over the termination and suspension of treaties as tools in the conduct of the nation's foreign and national security affairs is a crucial component of the Bush OLC's legal opinions regarding international law. In the remainder of this segment, I shall explore three ways in which the Bush OLC's legal opinions regard international law:

(1) International law as a source of authority;

(2) International law as a source of restrictions to be interpreted away;

---

[555] Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, from Christopher Schroeder, Acting Attorney General, Office of Legal Counsel, *Re: Validity of Congressional-Executive Agreements That Substantially Modify the United States Obligations Under an Existing Treaty* (Nov. 25, 1996).

[556] Mulhollan, "Treaties and Other International Agreements," 190. (this is not referenced in the *ABM Treaty Memo*)

[557] *ABM Treaty Memo* at 48.

(3) The intersection of categories (1) and (2).

(1) International Law as a Source of Authority

In this section I will examine in detail the *Iraq Memorandum* of October 23, 2002 in order to demonstrate the use of international law as a source of authority,.[558] The *Iraq* opinion considers the authority of the Commander in Chief under constitutional, statutory, and international law to use military force against Iraq. There are 12 textual segments in the Bush corpus coded as *UN Charter,*[559] and 9 of those codes appear in the *Iraq Memo*. There are also 40 textual segments coded as *UNSCR*[560] (United Nations Security Council Resolution), all but three of which can be found the *Iraq Memo*. Although the U.N. Charter and UNSCRs are not the only examples of international law that the Bush OLC draws on as a source of authority to act, they are most relevant to the use of military force considered in the *Iraq* opinion. Furthermore, the structure of the opinion indicates that the Bush OLC regards international law as providing complementary, tertiary authorization beyond the domestic-law-derived authority predicated on constitutional and statutory considerations: the *Iraq Memo* first considers constitutionally-based authorities, followed by statutory authorizations, and only then international law.

The Bush OLC's standard constitutional analysis of the President's war powers was outlined in Chapter Four. As I argued above, in the Bush OLC's reading of sources of institutional authority, constitutional powers take precedence over other sources. This observation is as true for international law as it was for the statutory law discussed above. Thus, the *Iraq Memo* concludes long before reaching part III of the opinion titled "Authority Under International Law to Use Force []" that the President can take military action against Iraq pursuant solely on his constitutional powers:

> [W]e believe that the President's constitutional authority to undertake military action to protect the national security interests of the United States is firmly

[558] This is pre-decisional advice because the invasion of Iraq began on March 20, 2003, nearly a half a year after OLC's legal opinion had been issued.
[559] Located in the coding structure at *Authorities/International/UN/Charter.*
[560] Located in the coding structure at *Authorities/International/UN/UNSCR.*

> established in the text and structure of the Constitution and in executive branch practice. Thus, to the extent that the President were to determine that military action against Iraq would protect our national interests, he could take such action based on his independent constitutional authority; no action by Congress would be necessary.[561]

The *Iraq Memo* stands out as one of only three legal opinions in the Bush corpus that make specific reference to Justice Jackson's *Youngstown* analysis. Based on the first category of Jackson's three-tier framework, the Bush OLC finds that at least three statutes evince "congressional support of presidential action[,] remov[ing] all doubt of the President's power to act:"[562] the 1991 Authorization for the Use of Military Force against Iraq (AUMFI) (Pub. L. No. 102-1); a 1998 Joint Resolution (Pub. L. No. 105-235) urging President Clinton to "take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance" with its international obligations of which it was in "unacceptable and material breach;" and the 2001 AUMF (Pub. L. No. 107-40). Consequently, under the *Youngstown* framework, the President's authority to use force against Iraq is "at its maximum."[563]

Although the United Nations Security Council passed numerous resolutions (UNSCRs) regarding Iraq, I will focus on three specific UNSCRs, because they figure most prominently as sources of authority for the Bush administration's contemplated invasion of Iraq:

- *UNSCR 678* (1990) demanded that Iraq comply fully with UNSCR 660 (which condemned Iraq's invasion of Kuwait and called for immediate withdrawal); and authorized all "Member States […] to use all necessary means to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area."[564]

---

[561] *Iraq Memo* at 32.

[562] The UNSCRs that OLC uses to establish President Bush's legal authority to use military force against Iraq under international law (UNSCRs 678, 687, and 688) had also been implemented in domestic legislation: Pub. L. No. 102-1 [1991 AUMFI], Pub. L. No. 105-235 [Iraqi Breach of International Obligations], Pub. L. No. 102-190 [National Defense Authorization Act for Fiscal Year 1992/1993].
At the time this opinion was drafted, Pub. L. No. 107-243 had already passed, however, the Authorization to Use Military Force Against Iraq (AUMFI) was considered by the Bush OLC in a separate opinion. OLC was specifically asked to consider the President's power to take action against Iraq without the 2002 AUMFI.

[563] *Youngstown v. Sawyer*, 343 US 579, 635

[564] "Security Council Resolution 678" (1990), http://unscr.com/en/resolutions/678.

- *UNSCR 687* (1991) established formal ceasefire, and "[r]eaffirm[ed] the need to be assured of Iraq's peaceful intentions in the light of its unlawful invasion and occupation of Kuwait."[565] It also decided that "Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:" its biological, chemical, and nuclear weapons and missile capabilities. Lastly, paragraph 34 warned that the Security Council was ready to take "such further steps as may be required for the implementation of the present resolution […] to secure peace and security in the region."[566]
- *UNSCR 688* expressed "grave[] concern by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region."[567] The Security Council demanded that Iraq "immediately end this repression," and allow access "by international humanitarian organization to all those in need of assistance in all parts of Iraq[.]"[568]

According to the Bush OLC, "if UNSCR 678 is read together with UNSCRs 687 and 688, the Security Council has authorized the use of force against Iraq to uphold and implement the conditions of the case-fire and to encourage Iraq to cease repression that threatens international peace and security in the region."[569] The question as to whether the ceasefire could "prevent such a use of force"[570] is at the core of the legal conundrum that the *Iraq Memo* undertakes to solve.

Applying the principles of the Vienna Convention,[571] the Bush OLC concludes that the President can unilaterally suspend the ceasefire based on Iraq's material breach of the terms of UNSCR 687. OLC bases the President's suspension authority on the *ABM Treaty* rationale and the Supreme Court's opinion in *Charlton v. Kelly*.[572] The Vienna Convention holds that multilateral treaties, to which the UNSCR-established ceasefire is closely analogous, can be suspended

[565] "Security Council Resolution 687" (1991), http://unscr.com/en/resolutions/687.
[566] *Id.*
[567] "Security Council Resolution 688" (1991), http://unscr.com/en/resolutions/688.
[568] Id.
[569] *Iraq Memo* at 54.
[570] Id.
[571] The United States is not party to the Vienna Convention but considers many of its provisions as part of customary international law.
[572] 229 US 447, 473 ("if a partner to a treaty commits a material breach, the President has the option whether to void the treaty or to overlook the breach and regard the treaty merely as voidable.")

completely or in part by any non-defaulting party due to a material breach. The non-defaulting party can

> cite the breach as a ground for complete or partial suspension with respect to itself "if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty."[573]

The Bush OLC references numerous UNSCRs as well as multiple statements issued by the President of the Security Council as evidence of Iraq's material breach of the ceasefire. The U.N. sources cited in the *Iraq Memo* express grave concerns with regard to Iraq's refusal to abide by the conditions set out in UNSCR 687, especially with regard to its WMD program.[574] Thus, OLC points out, unilateral suspension of the ceasefire by the United States on the basis of those U.N. sources is possible, since international law does not prohibit the suspension of a multilateral treaty by one party with respect to itself.[575]

Armistice law is another avenue that the Bush OLC explores in order to bypass the ceasefire established in UNSCR 687. The Hague Convention on the Law and Customs of War on Land holds that an armistice "unlike a peace treaty, […] does not terminate the state of war, but merely 'suspends military operations by mutual agreement between the belligerent parties.'"[576] Under the rules of the Hague Convention, "[a]ny serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in case of urgency, of recommencing hostilities immediately."[577] Based on the *ABM Treaty* rationale, OLC concludes that the President can interpret UNSCR 687 through the lens of armistice law and find Iraq's "serious violation" of the terms of 687 to be grounds for "denouncing it" and "recommencing hostilities."

In short, both the Vienna-Convention-based and the Hague-Convention-based reasonings yield the same outcome: if UNSCR 687 is suspended with respect to the United States, then the

---

[573] *Iraq Memo* at 57 (quoting Vienna Convention, art. 60(2)(c)).
[574] *See*, id at 58-59; footnote 27.
[575] *Iraq Memo* at 61 (quoting *Vienna Convention*, art. 60).
[576] *Iraq Memo* at 77 (quoting Regulations annexed to the Hague Convention on the Law and Customs of War on Land, Oct. 18, 1907, art. 36)
[577] Id. at 78 (quoting Hague Regulations, art. 40)

President can invoke the authorization in resolution 678 "to use force against Iraq to implement UNSCR 687" and other subsequent resolutions, "and to restore international peace and security to the area."[578] Under either approach, UNSCR 688 compounds with the other resolutions, providing further authority to take military action against Iraq for its repression of its civilian population if such repression is found by the President to threaten international peace and security in the region. The institutional practice of the branches under under previous administrations confirms OLC's conclusions.

On January 13, 1993, George H. W. Bush ordered U.S. warplanes to strike "[Iraqi] missiles […] which were in position to imperil allied aircraft patrolling the air-exclusion zone in southern Iraq."[579] Bush 41 cited Iraq's "'failure to live up to the resolutions'" as grounds for the attack.[580] Four days later, President Bush ordered another attack on an "Iraqi military complex in a Baghdad suburb" in response to "Iraq's decision to restrict United Nations weapons inspectors and to challenge the no-flight zones imposed by the United States and its allies."[581] Both strikes demonstrate that Iraq's violations of the terms of UNSCR 687 elicited the resumption of hostilities under existing U.N. Security Council Resolutions. In his reports to Congress, Bush 41 explained that the strikes were designed "to help achieve the goals of [UNSCR 687]," and they were carried out with "mandate from the Security Council."[582]

President Clinton ordered missile strikes against Iraq in 1996 based on authority provided by a combination of UNSCRs 688 and 678. As the *New York Times* reported on September 14, 1996, "[t]he United States launched a [] missile strike against Iraq's southern air defenses tonight, just hours after President Clinton vowed that he would make President Saddam Hussein 'pay a

---

[578] Id. at 63.
[579] R. W. Apple Jr, "Raid on Iraq; U.S. and Allied Planes Hit Iraq, Bombing Missile Sites in South in Reply to Hussein's Defiance," *The New York Times*, January 14, 1993, sec. World, https://www.nytimes.com/1993/01/14/world/raid-iraq-us-allied-planes-hit-iraq-bombing-missile-sites-south-reply-hussein-s.html.
[580] *Iraq Memo* at 67.
[581] Michael R. Gordon, "Raid on Iraq; Bush Launches Missile Attack on a Baghdad Industrial Park as Washington Greets Clinton," *The New York Times*, January 18, 1993, sec. World, https://www.nytimes.com/1993/01/18/world/raid-iraq-bush-launches-missile-attack-baghdad-industrial-park-washington-greets.html.
[582] *Iraq Memo* at 66-67.

price' for sending his troops into the Kurdish enclave in northern Iraq."[583] Deputy Spokesman for the State Department, Glyn Davis, laid out the administration's legal justification for the retaliatory action in a press briefing, describing the missile strikes as authorized under international law:

> I think you'd have to look at 688 in conjunction with, [] 687 []. There are several UN Security Council resolutions that are relevant here. [] 678, which says that all necessary means to uphold and implement Security Council resolutions should be employed to restore peace and security … But 678 and 688 together, [] form the basis for the action we took.[584]

President Clinton also suspended the armistice in December of 1998 when he launched 72 hours of "strong sustained series of air strikes" for Saddam Hussein's defiance of the on-site inspection requirements set forth in UNSCR 687.[585] As the President expressed in his public statement, "[a]s far as [he] was concerned, Saddam's days of cheat and repeat were over."[586]

In sum, institutional practice under Bush 41 and Clinton confirm that both administrations used UNSCRs as a source of authority to take action in response to Iraq's violations of the ceasefire. When Iraq was found in material breach of UNSCR 687, both the first Bush and Clinton administrations resumed hostilities, as authorized by UNSCR 678, to bring Iraq in line with the conditions of 687 and resolution 688. The Bush OLC relies on the institutional practice of those predecessor administrations as well as the authorizations contained in the UNSCRs as complementing the President's pre-existing constitutional authority to take military action against Iraq.

---

[583] Alison Mitchell, "U.S. Launches Further Strike Against Iraq After Clinton Vows He Will Extract 'Price,'" *The New York Times*, September 4, 1996, sec. World, https://www.nytimes.com/1996/09/04/world/us-launches-further-strike-against-iraq-after-clinton-vows-he-will-extract-price.html.

[584] Quoted in Gavin A Symes, "Force Without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq," *Michigan Journal of International Law* 19, no. 2 (1998): 615.

[585] Francis X. Clines and Steven Lee Myers, "Attack on Iraq: The Overview; Impeachment Vote in House Delayed as Clinton Launches Iraq Air Strike, Citing Military Need to Move Swiftly," *The New York Times*, December 17, 1998, sec. World, https://www.nytimes.com/1998/12/17/world/attack-iraq-overview-impeachment-vote-house-delayed-clinton-launches-iraq-air.html.; see also CNN, "U.S., Britain End Airstrikes in Iraq - December 19, 1998," accessed December 11, 2018, http://www.cnn.com/WORLD/meast/9812/19/iraq.strike.06/.

[586] CNN, "U.S., Britain End Airstrikes in Iraq - December 19, 1998."

Besides UNSCRs, the Bush OLC also cites Article 51 of the U.N. Charter and customary international law (CIL) as sources of authority to act militarily. Article 51 states that

> [n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

As the Bush OLC points outs, however, the traditional interpretation by the United States of the scope of the right to self-defense is broader than that included in the U.N. Charter;[587] since self-defense under the Charter is limited to responses to actual "armed attacks." Under the U.S.'s broader understanding of the *jus ad bellum*, however, states are entitled to take anticipatory action against another state "even before [they] actually come under attack."[588] As the right to anticipatory self-defense "already existed independent of the Charter," the Bush OLC argues that nothing in the U.N. Charter can "extinguish[] the pre-existing right under customary international law."[589] The legal principle of a pre-existing right to anticipatory self-defense was first articulated by the Office of Legal Counsel in a 1962 opinion titled *Legality under International Law of Remedial Action Against Use of Cuba as a Missile Base by the Soviet Union*. In that legal memorandum, the Kennedy OLC enunciated an expansive doctrine of an "inherent right" to self-defense that permits preemptive action "to prevent or forestall an attack:"[590]

> The concept of self-defense in international law of course justifies more than activity designed merely to resist an armed attack which is already in progress. Under international law every state has, in the words of Elihu Root, 'the right… to protect itself by preventing a condition of affairs in which it will be too late to protect itself.

---

[587] *See also*, *Military Interrogation Memo* at 220.

[588] *Iraq Memo* at 92.

[589] Id. at 89; The Bush OLC also quotes a still-classified memorandum *Boarding and Searching Foreign Vessels on the High Seas*, in which the Bush OLC argues that "article 51 merely reaffirms a right that already existed independent of the Charter."

[590] Id.

Under the *Caroline* test formulated by Secretary of State Daniel Webster, anticipatory self-defense must fulfill two main criteria to be legitimate: necessity, and proportionality.[591] One element of necessity is "immediacy," which, as OLC points out, denotes more than temporality: Due to advances in WMD technology and delivery as well as the rise of international terrorism, the concept of "immediacy" has become more elastic. Accordingly, the Bush OLC's updated *Caroline* test considers the following factors: "[i] the probability of an attack; [ii] the likelihood that this probability will increase, and therefore the need to take advantage of a window of opportunity; [iii] whether diplomatic alternatives are practical; [iv] and the magnitude of the harm that could result from the threat."[592] Although, strictly speaking, the *Caroline* test is not law, it has become part of international usage, or customary international law (CIL). After Israel's strike on the Osirak Reactor in 1981, for example, "[s]everal members of the Security Council quoted the *Caroline* test" and condemned Israel for failing to establish that the nuclear reactor's threat to Israel was sufficiently immediate.[593]

The Bush OLC cites four recent examples of the use of military force in self-defense to which the up-to-date formulation of the *Caroline* test is applicable. Next, I will briefly review the four historical precedents which OLC treats as having probative value for understanding both international law and U.S. institutional practice:

In 1986, President Reagan ordered a series of airstrikes against "'terrorist centers' and military bases in Libya" in retaliation for the La Belle discotheque bombing.[594] Regan claimed that the strikes were justified because "[s]elf-defense is not only our right, it is our duty."[595] He further declared that "[t]his necessary and appropriate action was a preemptive strike, directed against the Libyan terrorist infrastructure and designed to deter acts of terrorism by Libya, such as the

---

[591] Anthony Clark Arend, "International Law and the Preemptive Use of Military Force," *The Washington Quarterly* 26, no. 2 (March 2003): 91; Webster's original formulation stated that "necessity of self-defence [must be] instant, overwhelming, leaving no choice of means, and no moment of deliberation ..., [and] even supposing the necessity of the moment authorized [the act of self-defense], [the defender] did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."
[592] *Iraq Memo* at 126.
[593] Id. at 109.
[594] Weinraub, "U.S. Jets Hit 'Terrorist Centers' in Libya; Reagan Warns of New Attacks If Needed."
[595] *Iraq Memo* at 111.

Libyan-ordered bombing of a discotheque in West Berlin on April 5."[596] The President also emphasized that the strikes were proportional since the targets "were carefully chosen, for both their direct linkage to Libyan support of terrorist activities and for the purpose of minimizing collateral damage and injury to innocent civilians."[597]

President George H. W. Bush's 1989 intervention in Panama was also characterized as "an exercise of the right of self-defense recognized in Article 51 of the United Nations Charter and was necessary to protect American lives in imminent danger[.]"[598] Bush 41's Panama intervention is an important precedent for the Iraq invasion, because it established the principle that "when using force in self-defense, the removal of a world leader from power, or 'regime change,' may be a proportionate response to the threat posed by that leader."[599]

After "compelling evidence" revealed that Iraq had attempted to assassinate former President George H. W. Bush in 1993, President Clinton ordered "U.S. Navy ships [to] launch[] 23 Tomahawk missiles against the headquarters of the Iraqi Intelligence Service[.]"[600] Reflecting on those attacks, Defense Secretary Les Aspin stated that "[t]his crime [of the assassination attempt] was committed against the United States, and we elected to respond and to exercise our right of self-defense" under Article 51 of the U.N. Charter.[601] Furthermore, the President characterized the strikes as "limited and proportionate;" thus, in keeping with the requirement of the *Caroline* test.[602]

Finally, President Clinton described the 1998 attack on Afghanistan and Sudan "as retaliation for the twin bombings [] of U.S. embassies in Africa and an effort to preempt further terrorist attacks.[603] As the *Washington Post* reported, the administration notified the U.N. Security Council by letter stating that "the strikes [were executed] under Article 51 of the U.N.

---

[596] Id.
[597] Id.
[598] Id. at 112.
[599] Id. at 125.
[600] David Von Drehle and Jeffrey Smith, "U.S. Strikes Iraq for Plot to Kill Bush," *Washington Post*, June 27, 1993, https://www.washingtonpost.com/wp-srv/inatl/longterm/iraq/timeline/062793.htm.
[601] Id.
[602] *Iraq Memo* at 115.
[603] Barton Gellman and Dana Priest, "U.S. Strikes Terrorist-Linked Sites in Afghanistan, Factory in Sudan," *Washington Post*, August 21, 1998, https://www.washingtonpost.com/wp-srv/inatl/longterm/eafricabombing/stories/strikes082198.htm.

[C]harter, which permits states to act in self-defense if they fear imminent attack."[604] Furthermore, as the Justice Department's spokesperson stated, the President "was acting within his constitutional authority to protect the nation."[605]

It is under these considerations (the UNSCRs, the right of anticipatory self-defense in the context of recent uses of military force, and the *Caroline* test) that the Bush OLC decides that

> it may well be reasonable for the President to determine that the threat of a WMD attack by Iraq, either directly or through Iraq's support for terrorism, is sufficiently 'imminent' to render the use of force necessary to protect the United States, its citizens, and its allies.[606]

Based on Iraq's "long history of using weapons of mass destruction;" CIA reports that Iraq "has the capability to reinitiate its chemical weapons program within a few weeks or months;" the State Department's assessment that "a growing number of terrorist groups are interested in acquiring and using WMD to rival the attacks of September 11;" and the potential "degree of harm that could result from Iraq's use of WMD," OLC concludes that the President has sufficient factual and legal grounds to determine that the use of force in self-defense is necessary.[607] While the Bush OLC acknowledges that the President's response "should be proportional," meaning "limited to that which is needed to eliminate the threat posed by Iraq," it proposes that both the "destruction of Iraq's WMD capability" *and* the "remov[al of] Saddam Hussein from power" would be reasonable under the *Caroline* test.[608]

To summarize, the *Iraq Memo* illustrates the Bush OLC's use of international law as a source of authority: it considers a broad range of international sources as codified in UNSCRs, the Vienna Convention, the Hague Convention, and Article 51 of the U.N. Charter, and as interpreted and acted upon by previous administrations. While the Bush OLC regards domestic sources of executive authority as preeminent, it also looks to international law as supplementing the President's constitutionally and statutorily-derived power to use military force.

---

[604] *Id.*
[605] *Id*.
[606] *Iraq Memo* at 127.
[607] *Id.* at 128-131.
[608] *Id.* at 133.

JEU AND THE USE OF MILITARY FORCE ABROAD

In this sub-section, I will situate the *Iraq Memo* in the broader context of the juridification of politics. In the theory chapter, I laid out various manifestations of juridification. Some have been recorded and studied elsewhere (such as the phenomenon judicialization), others such as JEU, I have undertaken to define and endeavor to document and analyze throughout this dissertation. In what follows, I examine *why* the Bush OLC engaged, as I outlined above, in painstaking enumeration of historical practice and the reiteration of Executive Branch legal interpretation regarding the President's unilateral deployment of military force abroad going back to the Kennedy administration.

One of the earliest examples of the President's interpretation of his own powers is the dispute over Washington's issuance of the Neutrality Proclamation in 1793. Since that 18th century legal controversy, innumerable questions have arisen as to the legality of contemplated executive action. At the dawn of the 20th century, as the United States entered an era of increasingly global warfare, President Theodore Roosevelt declared the doctrine that if the U.S. were forced "in flagrant cases of … wrongdoing or impotence, to the exercise of an international police power," it would not shy away from using such power.[609] Five decades and two World Wars later, President Truman "extended the police powers [that Roosevelt claimed he had] and fused the president's powers as commander in chief with the new U.S. obligation to enforce the United Nations Charter's provisions against aggression."[610] While the President's unilateral use of military force abroad most certainly presented a novel legal question in 1950, when Truman claimed that his Commander-in-Chief power rendered a congressional authorization for the use of force unnecessary;[611] successive, and successful, uses of military force by consecutive presidents effectively cemented that authority.

---

[609] Theodore Roosevelt, "Corollary to the Monroe Doctrine," 1905, https://www.ourdocuments.gov/doc.php?flash=false&doc=56&page=transcript.

[610] Richard Ellis and Michael Nelson, eds., *Debating the Presidency: Conflicting Perspectives on the American Executive* (Washington, D.C: CQ Press, 2010), 113.

[611] In accordance with the Supreme Court's decision in *Curtiss-Wright*, the State Department argued that the President "is charged with the duty of conducting the foreign relations of the United States and in this field he 'alone has the power to speak or listen as a representative of the Nation'" quoted in "Authority for the President to Repel the Attack in Korea," *Department of State Bulletin* 23, 43-50.

As I wrote in the Theory chapter, and as the prolific opinion-writing activity of the Bush OLC itself evinces, institutional developments originating in Watergate changed the way Presidents approach contemplated (unilateral) actions. One would be hard pressed, however, to argue that the product of the Watergate Regime most relevant to the deployment of military force abroad, the War Powers Resolution, fundamentally affected the President's unilateralism in that area. In fact, as Fisher and Adler point out, it formalized a freewheeling presidential deployment authority in quasi-constitutional terms (J_A), at least for a period of 60-to-90 days;[612] barring, unlikely though it may be, a congressional reversal. Nevertheless, presidential compliance with the War Powers Resolution, however toothless the law may be, is a prime example of the juridification of executive politics, albeit a different subset than the one we saw in the pre-MO memoranda in Chapter Four above.

As the Reagan OLC stated in *Overview of the War Powers Resolution*, the Executive Branch consistently "has taken the position [] that section 2(c)[613] of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces."[614] OLC opinions of this kind, including the *Iraq Memo*, are what I referred to in the theory as a "defensive risk-management tactic," and what I will more precisely refer to here as "*status quo* maintenance." They do not change the legal landscape; instead, they insist on ceding no constitutional ground to Congress. As OLC admits, the courts have never ruled on the constitutionality of the WPR,

---

[612] Louis Fisher and David Gray Adler, "The War Powers Resolution: Time to Say Goodbye," *Political Science Quarterly* 113, no. 1 (March 1998): 1–20.

> The War Powers Resolution (WPR) of 1973 is generally considered the high-water mark of congressional reassertion in national security affairs. In fact, it was ill conceived and badly compromised from the start, replete with tortured ambiguity and self-contradiction… The resolution, however, grants to the president unbridled discretion to go to war as he deems necessary against anyone, anytime, anywhere, for at least ninety days. As Arthur Schlesinger Jr. has observed, before "the passage of the resolution, unilateral presidential war was a matter of usurpation. Now, at least for the first ninety days, it was a matter of law.

[613] Section 2(c) of the War Powers Resolution states:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

[614] Theodore B. Olson, Opinion for the Attorney General, *Overview of the War Powers Resolution: Summary of previous Office of Legal Counsel Advice Concerning the War Powers Resolution for the Purpose of Providing Guidance in Future Analyses of War Powers Resolution Problems*, 8 Op. OLC 271, 274.

which has come to symbolize the President's unilateral troop deployment authority. Nevertheless, if a court were to review the WPR for its constitutionality, it would have to take into consideration both the President's persistent objection to its legality, as well as the institutional practice that has developed around it. Footnote 15 of the *ABM Treaty Memo* bears repeating here: "'the decisions of the Court in th[e] area [of foreign affairs and national security] have been rare, episodic, and afford little precedential value for subsequent cases.' Historical practice *and the ongoing tradition of executive branch constitutional interpretation therefore play an especially important role in this area.*"[615]

From a functionalist reading of the institutional order, there is no denying that the President has a structural advantage when it comes to troop deployment. From a formalist point of view, however, it is evident that Congress also has considerable war-related powers which it can effectuate most ably by its control of the purse. Since, in the juridified context of political action, legality is tantamount to legitimacy, OLC must consistently issue opinions that stake a claim to Executive supremacy in the use of force abroad while affirming the non-binding nature of the WPR as well as the redundancy of authorizing legislation such Pub. L. No. 107-243, the 2002 Authorization for the Use of Military Force Against Iraq (AUMFI). In the *Iraq Memo*'s companion opinion, the *AUMFI Memorandum*, the Bush OLC exhibits this *status quo* maintenance behavior when it states:

> We have no constitutional objection to Congress expressing its support for the use of military force against Iraq. Indeed, the Office of Legal Counsel was an active participant in the drafting of and negotiations over [the AUMFI]. We have long maintained, however, that resolutions such as [the AUMFI] are legally unnecessary. Accordingly, last week we recommended to you and to the White House that the President take steps to ensure that his decision to approve [the AUMFI] would not be construed in the future as an indication that this resolution was legally necessary.[616]

In order to ensure that the WPR's conditions on the use of force do not become operative by implication, OLC recommends that President George W. Bush follow the tradition established by

[615] *ABM Treaty Memo* Footnote 15.
[616] *AUMFI Memo* at 6, 8.

previous administrations. Illustrating the need for a continued practice of *status quo* maintenance, upon the 102nd Congress's passage of the 1991 Authorization for Use of Military Force Against Iraq, Bush 41 issued a signing statement which affirmed the redundancy of "a specific statutory authorization" as prescribed by section 2 of the WPR:

> [M]y request for congressional support did not, and my signing [Pub. L. No. 102-1] does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.

The ongoing practice of *status quo maintenance* is also evidenced by the number of coded segments in the *Iraq* and *AUMFI Memos* indicating analogous arguments made by predecessor OLCs: four coded segments referring to memoranda from the Carter OLC,[617] three referring to the Reagan OLC's opinions,[618] two to the Bush 41 OLC,[619] and six to the Clinton OLC.[620] While, on average, each Bush OLC memorandum contains approximately 7 textual segments coded as opinions of the Office of Legal Counsel (*OLC*),[621] the *Iraq Memo* contains a grand total of 24.

***

As the *Iraq* analysis demonstrates, international legal commitments in the form of UNSCRs provide an additional layer of authorization for the President to unilaterally engage the U.S. Armed Forces in hostilities abroad. As the Carter OLC declared in 1977, the United States is obliged to implement the Security Council's Resolutions adopted under Chapter VII of the U.N.

---

[617] *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, *Supplemental Discussion of the President's Power Relating to the Seizure of the American Embassy in Iran*, *Presidential Power Relating to the Situation in Iran*, *Proposed Executive Order Entitled "Transactions Involving Southern Rhodesia*" (arguing that the United States is obliged under international law to implement a UNSCR adopted under chapter VII).

[618] *Overview of the War Powers Resolution*, *Executive Power with Regard to the Libyan Situation* (arguing that the purpose and policy statement of the WPR cannot constitutionally constrain the President's power to use force abroad).

[619] *Authority to Use United States Military Force in Somalia.*

[620] *Bosnia Opinion*, *Haiti Opinion*, *Authorization for Continuing Hostilities in Kosovo*.

[621] *See*, Chapter Four on page 81 above ("an average of 7.25 *OLC* coded segments per legal opinion).

Charter.[622] Based on that legal standard, the Executive effectively self-binds, while simultaneously also unshackling itself from competing legal considerations. Thus, international law provides supplemental authority to the President's constitutionally-derived (and often statutorily affirmed) power to use military force, even without congressional authorization.

Based on the evidence that OLC presents in the *Iraq* opinion, it is difficult to escape the conclusion that the Bush administration did in fact have the *legal* authority to use force against Iraq. Although I will not opine on the wisdom of the Iraq invasion as a policy decision, or the drawn-out, bloody and costly war that ensued with all its unintended consequences, I do want to address the "can we" vs. "should we" contrariety inherent in the juridified executive decisionmaking process exemplified by the *Iraq Memo*.[623]

The deployment of military force abroad is a policy area that shines the spotlight on the dangers of the juridification of executive politics. The Executive Branch's oft-repeated claim that the President can single-handedly deploy the U.S. Armed Forces into hostilities, coupled with the corresponding institutional practice, makes the President's unilateral deployment-of-military-force tradition virtually settled as a matter of legal authority. Thus, juridification has essentially fixed the values of policy-variables that ought to be factored into use-of-force decisions. In Silverstein's language, it has "shaped, constrained, and [effectively] killed politics." As Jack Goldsmith confirms, the Bush administration's uniquely *legal* strategy overrode competing policy considerations,[624] and, coupled with the cumulative effect of iterative legal justifications for the use of military force by previous administrations, it created a veritable "spring loaded (legal) mechanism."[625] As political scientists Clement Fatovic and Benjamin Kleinerman point out,

---

[622] *Proposed Executive Order Entitled "Transaction Involving Southern Rhodesia,"* (December 13, 1977) (under article 25, "all members of the United Nations are obliged to accept and carry out… decisions of the Security Council" acting under chapter VII.).

[623] Jack L. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: Norton, 2009), 130 ("[T]he question 'What should we do?' so often collapsed into the question 'What can we lawfully do?'… [I]t is why what lawyers said about where [the law's] edges were ended up defining the contours of the policy.").

[624] Id. ("[The administration] always asked the same [] question, 'Is the policy legal?'").

[625] My term not Goldsmith's. By using the "spring-loaded mechanism" metaphor, I am attempting to extend the idea of the one-way ratchet. The one-way ratchet metaphor is used in constitutional law to imply that presidential assertions of authority accrue power in the institution, which the officeholders are unlikely to relinquish. The "spring-loaded" nature of legal authority, in turn, implies an element of inevitability due to the accumulated legal precedent that pre-ordains certain conclusions.

"[b]ecause of the high value that [contemporary political systems] attach[] to legality, it is often assumed that an affirmative answer to a question about the legality of a measure implies an affirmative answer to [] its legitimacy or its morality."[626]

On the day he died, President Franklin D. Roosevelt had been preparing a speech occasioned by Thomas Jefferson's birthday. In that speech the President wrote "we have learned in the agony of war that great power involves great responsibility."[627] Likewise, policymakers should treat power that is *legally* available with the utmost care, always mindful of the real-world implications of legal authority, however well-established it might be.

(2) INTERPRETING AWAY INTERNATIONAL LEGAL RESTRICTIONS

In this section, I will analyze two OLC memoranda (*Treaties and Laws* and the *Article 4 Memos*) to demonstrate the legal reasoning behind one of the Bush administration's most controversial policy decisions during nearly seven and a half years of conducting a global war against terrorism: the denial of POW status to members of al Qaeda and the Taliban.[628] That policy decision, in turn, was based on a couple of legal opinions issued by the Office of Legal Counsel which argue, in brief, that neither members of al Qaeda nor Taliban militiamen qualify for prisoner of war stratus under the Third Geneva Convention (GC3); and nor is the United States obliged, according to OLC's analysis, to afford members of al Qaeda and the Taliban the minimum

[626] Clement Fatovic and Benjamin A. Kleinerman, "Extra-Legal Measures and the Problem of Legitimacy," in *Extra-Legal Power and Legitimacy: Perspectives on Prerogative* (New York: Oxford University Press, 2013), 13.

[627] Franklin D. Roosevelt, "Roosevelt's last message to the American people." n. p. 1945. https://www.loc.gov/item/rbpe.24204300/ (Which, incidentally, appears to be the basis of Uncle Ben's better-known aphorism that "with great power comes great responsibility.").

[628] See, e.g.: James P Pfiffner, Torture as Public Policy: Restoring U.S. Credibility on the World Stage (Routledge, 2010).

humanitarian protections enshrined in common article 3 (CA3).[629] The consequences of that regrettable decision are well-known and well-documents elsewhere.[630]

Much of the Bush OLC's interpretation of the applicability of the Geneva Conventions is what I call "original interpretation." It is original because no prior executive legal interpretation or judicial precedent guides the Office's decisionmaking. The tenor of OLC's construction of the Geneva Conventions can be inferred by textual analysis alone: to the 53 coded segments in the *Treaties and Law* Memo that fall under *Geneva*, *negative construction* markers attach 22 times, while *positive* ones attach only 12 times. A closer examination of the *positive construction* codes reveals that 11 of those codes describe either compliance with Geneva regulations that the Bush OLC finds inapplicable to al Qaeda or the Taliban, or past practice.[631] Only 1 coded segment refers specifically to the then-current detention conditions reported to OLC which were considered to be in harmony with CA3:

> We should make clear that as we understand the facts, the detainees currently are being treated in a manner consistent with common article 3 of Geneva III. This means that they are housed in basic humane conditions, are not being physically mistreated, and are receiving adequate medical care. They have not yet been tried or punished by any U.S. court system. As a result, the current detention conditions in GTMO do not violate common article 3, nor do they present a grave breach of Geneva III as defined in article 130. For purposes of domestic law, therefore, the GTMO conditions do not constitute a violation of the WCA, which criminalizes only violations of common article 3 or grave breaches of the Conventions.

---

[629] The relevant parts of common article 3 are 1(a),(c), and (d):

> [T]he following acts are and shall remain prohibited at any time in any place whatsoever:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

[630] Pfiffner, *Torture as Public Policy*, 2010; Christopher Graveline and Michael Clemens, *The Secrets of Abu Ghraib Revealed: American Soldiers on Trial*, 1st ed (Washington, D.C: Potomac Books, 2010); Gary S. Winkler, *Tortured: Lynndie England, Abu Ghraib, and the Photographs That Shocked the World* (Keyser, W. Va.: Bad Apple Books, 2009).

[631] Past practice: 3 coded segments, compliance with article IV because it is inapplicable: 3 coded segments, suspension of Geneva is available: 1 coded segment, deviations are allowed by the conventions: 3 coded segments, use of force for force protection is available: 1

In the *Treaties and Laws* opinion, the Bush OLC undertakes to answer the question "whether certain treaties forming part of the laws of armed conflict apply to the conditions of detention and the procedures for trial of members of al Qaeda and the Taliban militia."[632] OLC's answer also encompasses the applicability of the War Crimes Act (18 USC §2441) to the treatment of captured members of al Qaeda and the Taliban.[633] Prerequisite determinations regarding the application of the war model and the LOAC were made in the pre-MO memoranda and further elaborated on in *Padilla 1* and *2*.

Central to the Bush OLC's decision that CA3 is inapplicable to the fight against al Qaeda is the distinction between common Article 2 and common Article 3. OLC illustrates that distinction by tracing the evolution of the LOAC over time: The first, least developed, phase was "based on a stark dichotomy between 'belligerency' and 'insurgency.'"[634] Belligerency referred to international armed conflict, while insurgency referred to armed conflict within a state. As OLC points out, in this inchoate stage, there were no international rules regulating insurgency, "for states preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law, which precluded any possible intrusion by other States."[635] The second phase, by contrast, was characterized by the application of "certain general principles of humanitarian law beyond the traditional field of State-to-State conflict to 'those internal conflicts that constituted large-scale civil wars.'"[636] As OLC points out, common Article 3 was produced during this phase to govern states' behavior vis-à-vis insurgent groups. Thus, in the Bush OLC's

---

[632] *Treaties and Law Memo* at 4.

[633] 18 USC §2441(c) criminalizes conduct that

(1) Amounts to "grave breaches in any of the international conventions signed at Geneva 12 August 1949[;]"
(2) Is prohibited by "Articles 23, 25, 27, or 28 or the Annex to the Hague Convention IV"
(3) Actions that "constitute a grave breach of common Article 3 [] when committed in the context of and in association with an armed conflict not of an international character;"

Moreover, §2441(d) defines "grave breaches" of common Article 3 to include (A) torture; (B) cruel or inhuman treatment; (C) performing biological experiments; (D) murder; (E) mutilating or maiming; (F) intentionally causing serious bodily injury; (G) rape; (H) sexual assault or abuse; (I) taking hostages.

According to §2441(b), whoever commits a war crime "shall be fined under [Title 18] or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death."

[634] *Id*. at 37.

[635] *Id*. at 37.

[636] *Id.* at 38.

reading of treaty history, an international armed conflict between nation-states falls under common Article 2, while a non-international civil war falls under common Article 3.

By contrast, the third phase of the evolution of the LOAC embodies a "more complete break… with the traditional 'state-sovereignty-oriented approach'" and puts individual human rights center stage.[637] This phase is best illustrated by the International Criminal Tribunal's (ICT) ruling in *Prosecutor v. Tadic*, which held that CA3 applies to "all conflicts of *any* description other than those between state parties, and is not limited to internal conflicts between a State and an insurgent group."[638] Thus, in the ICT's formulation, CA3 "is a catch-all that establishes standards for any and all armed conflicts not included in common article 2."[639]

As I mentioned in Chapter Four, some interpretive codes in the Legal Interpretive Toolkit are only used in conjunction with international law sources. The *state/non-state* code is such. The Bush OLC's analysis of the applicability of the Geneva Conventions to members of al Qaeda is based on this crucial criterion: since al Qaeda is a non-state international terrorist organization, GC3 does not apply. As OLC reasons, "[n]ongovernmental organizations cannot be parties to any of the international agreements here governing the laws of war."[640] Since common Article 2 governs armed conflicts between nation-states, and al Qaeda is not a nation-state, OLC concludes that "provisions regulating detention conditions and procedures for trial of POWs" are not applicable to the conflict between al Qaeda and the United States.[641]

Furthermore, since the conflict is of an international character, i.e., not a civil war, "the nature of the conflict precludes application of common Article 3."[642] Moreover, given the context in which the Geneva Conventions were drafted and ratified (the 2nd phase of the evolution of the LOAC), the United States did not consent to the interpretation of CA3 that evolved after

[637] *Id.* at 41.
[638] Id.
[639] *Id.*
[640] *Id.* at 46.
[641] Id.
[642] *Id.* at 52.

ratification, therefore, it is not bound by it.[643] Consequently, "neither the detention nor trial of al Qaeda fighters is subject to Geneva III."[644]

According to the Bush OLC, even if common Article 2 were applied to the conflict between the U.S. and al Qaeda, despite it being a non-state, members of al Qaeda would still fail to satisfy the requirements set forth in Article 4 of GC3. Article 4 includes in the category of POWs irregular forces such as "members of other militias and members of other volunteer corps, including those of organized resistance movements," as well as "members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power."[645] Article 4, however, requires that militia and volunteer corps fulfill four conditions: (i) being commanded by a responsible individuals, (ii) wearing "a fixed distinctive" insignia that is "recognizable from a distance," (iii) carrying arms openly, and (iv) conducting their operations "in accordance with the laws and customs of war."[646] Based on al Qaeda's *modus operandi*, the Bush OLC's conclusion is that its members cannot fulfill Article 4's conditions. Moreover, since the conflict with al Qaeda does not fall within common Article 2, on account of it not being a nation-state, Article 4 does not apply, because it is not triggered independently of common Article 2.

The incompatibility of the Geneva Conventions, including CA3, with the armed conflict against al Qaeda also obviates application of the War Crimes Act, according to the Bush OLC. Since §2441 criminalizes (i) grave breaches of the Geneva Conventions and (ii) grave breaches of common Article 3, under the legal framework created by the Bush OLC, the prohibitions of the statute become inoperative.[647] Thus, in an overt act of quasi-judicial legislation, OLC unilaterally abrogates a statutory criminal prohibition, thereby enabling the proscribed acts including

---

[643] *Treaties and Laws Memo* at 42. ("To interpret common article 3 by expanding its scope well beyond the meaning borne by its text is effectively to amend the Geneva Conventions without the approval of the State parties to the agreements.")
[644] *Id*. at 45.
[645] Convention (III) relative to the Treatment of Prisoners of War, Article 4, International Committee of the Red Cross https://ihl-databases.icrc.org/ihl/WebART/375-590007?OpenDocument
[646] Id.
[647] The WCA also criminalizes conduct prohibited by articles 23, 25, 27, and 28 of the Hague Conventions, which regulate the attack or bombardment of undefended localities, prohibit pillaging of towns, compel sparing of targets of a non-military character, among other regulations.

torture, cruel and inhuman treatment, murder, mutilation and maiming, the causing of serious bodily injury, rape, and sexual abuse to be performed with impunity.[648]

The second legal question that the Bush OLC answers in the *Treaties and Laws* and *Article 4 Memos* is whether the Geneva Conventions apply to the members of the Taliban militia. In short, OLC's opinion is that the President can unilaterally suspend the U.S.'s treaty obligation's toward Afghanistan due to state failure.[649] Based on the State Department's four criteria of "stateness," the Bush OLC determines that Afghanistan is a "failed state:"[650]

> The President can readily find that at the outset of this conflict, when the country was largely in the hands of the Taliban militia, there was no functioning central government in Afghanistan that was capable of providing the most basic services to the Afghan population, of suppressing endemic internal violence, or of maintaining normal relations with other governments. In other words, the Taliban militia would not even qualify as the *de facto* government of Afghanistan. Rather, it would have the status only of a violent faction or movement contending with other factions for control of Afghanistan's territory, rather than the regular armed forces of an existing state.[651]

The Bush OLC's analysis of the President's treaty powers and inherent constitutional authority to suspend or terminate a treaty were outlined above in section (a). The *Treaties and Laws Memo* essentially reiterates the *ABM Treaty* rationale with one notable addition: the *International Load Line Convention Opinion*.[652] As Acting Attorney General Alexander Biddle wrote in 1941, "[i]t is a well-established principle of international law, *rebus sic stantibus*, that a treaty ceases to be binding when the basic conditions upon which it was founded have essentially changed. Suspension of the convention in such circumstances is the unquestioned right of a state

---

[648] For a list of proscribed acts, see note 95 above.

[649] Rosa Ehrenreich Brooks, "Failed States, or the State as Failure?," *The University of Chicago Law Review* 72, no. 4 (2005): 1159–96.

[650] *Treaties and Laws Memo* at 79.

> (i) whether the entity have [*sic*] effective control over a clearly defined territory or population; (ii) whether an organized governmental administration of the territory exists; (iii) whether the entity has the capacity to act effectively to conduct foreign relations and to fulfill international obligations; (iv) whether the international community recognizes the entity.

OLC's finding that, in hindsight, Afghanistan was a failed state at the time U.S. military operations commenced is corroborated by academic sources, newspaper articles, Senate testimony of Executive Branch officials, State and Defense Department reports, and statements of the Secretary of Defense.

[651] *Treaties and Laws Memo* at 109.

[652] *International Load Line Convention*, 40 Op. Att'y Gen. at 123.

adversely affected by such essential change."[653] Thus, besides marshaling a wide range of evidence to demonstrate that Afghanistan was a failed state, the Bush OLC bases its claim that the President can unilaterally suspend the U.S.'s treaty obligations toward Afghanistan on Biddle's opinion invoking the doctrine of *rebus sic stantibus*. Accordingly, the "collapse of a treaty partner, in other words the development of a failed state that could not fulfill its international obligations and was not under the control of any government," renders the U.S.'s Geneva obligations toward Afghanistan effectively annulled.[654]

The Supreme Court's ruling in *Clark v. Allen* lends further support to the notion that the President may decide whether a treaty is in effect even after the collapse of a treaty partner. In *Clark,* the Supreme Court held that the decision whether post-World War II Germany's treaty obligations survived the war was a question to be decided by the "political departments:"

> It is argued, however, that the Treaty of 1923 with Germany must be held to have failed to survive the war, since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community. *But the question whether a state is in a position to perform its treaty obligations is essentially a political question.* We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect to them.

Thus, based on the evidence of state failure and the supporting authorities cited in the memo, OLC decides that the United States owes no treaty obligations to Afghanistan, and by extension, the Taliban militia. This removes both POW protections under GC3 and the "minimal protection"[655] provided by common Article 3.

To sum up, the Bush OLC engages in extensive negative contruction of the Geneva Conventions based on the President's power to interpret and to suspend or terminate treaties. Most of OLC's legal analysis is original in that there is no branch-internal precedent on point. Based on what it claims to be "the original context" in which the Geneva Conventions were

---

[653] Herbert W. Briggs, "The Attorney General Invokes Rebus Sic Stantibus," *American Journal of International Law* 36, no. 1 (1942): 89–96, https://doi.org/10.2307/2192195.
[654] *Treaties and Laws Memo* at 71.
[655] *Hamdan v. Rumsfeld*, 548 US 557 (2006).

ratified, the Bush OLC concludes that al Qaeda members do not qualify for POW status, even under Article 4 of GC3. Furthermore, they cannot benefit from the protections of CA3 due to the conflict being of an international character. Lastly, because of the status of Afghanistan as a failed state, the United States owes no Geneva-based treaty obligations to the Taliban militia.

CUSTOMARY INTERNATIONAL LAW

Having concluded that the Geneva Conventions do not apply to the detention and trial of al Qaeda and Taliban militiamen, the Bush OLC turns to the question whether customary international law (CIL) is binding on the President. One could argue, OLC posits, that "the substance of [the Geneva Conventions has] received such universal approval that it has risen to the status of customary international law."[656] In short, OLC's answer is no, CIL is not binding on the President because it is not federal law. For CIL to be considered federal law, it would have to be "lawfully enacted under the Constitution."[657] Indeed, the Supremacy Clause enumerates only "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States" as sources of federal law.[658] Thus, CIL lacks the procedural pedigree of laws and treaties that underwent "the difficult hurdles that stand before enactment of constitutional amendments, statutes, or treaties."[659] Furthermore, since under the *ABM Treaty* rationale the President possesses plenary authority over the interpretation of treaties, importing CIL as federal law would improperly inhibit the President's control over foreign relations, while also unduly interfering with his authority as Commander in Chief.

In any case, the Bush OLC argues, CIL should not be understood as imposing static, immutable requirements; instead "it evolves through a dynamic process of State custom and practice."[660] This view is based on branch-internal *stare decisis*. As the Bush 41 OLC opined in 1989, "[s]tates necessarily must have the authority to contravene international norms… for it is

---

[656] *Treaties and Laws Memo* at 164.
[657] *Id.* at 166.
[658] *United States Constitution*, Article VI.
[659] *Id.* at 169.
[660] *Id.* at 181.

the process of changing state practice that allows customary international law to evolve."[661] Thus, "[i]f the United States is to participate in the evolution of international law, the Executive must have the power to act inconsistently with international law where necessary."[662] Therefore, the power to override CIL is "an integral part of the President's foreign affairs power."[663]

***

There is a widely-held scholarly consensus that the Bush administration created so-called "legal black holes" by interpreting away the protections of the Geneva Conventions.[664] In a theoretical discussion of such "black holes," the legal scholar Noa Ben-Asher concludes that they are inevitable products of the state of exception, and cautions against "folding every exception back into the law."[665] A recent collection of essays by prominent legal thinkers even argues for the "reintroduction" and "justif[ication]" of the exercise of prerogative "as a political power that is best judged and constrained by politics"[666] in lieu of (erroneous) legal justifications of arguably *ultra vires* executive action. However, as Jack Goldsmith's contribution to that same volume avers, prerogative power is "no longer part of a president's justificatory tool kit."[667] Indeed, as I argued in the theory chapter, prerogative is irreconcilable with the broad-based juridification of the U.S. political system, from the growth of judicial power to the juridification of executive authority.

Although as President always interprets his powers in the first instance, post-Watergate executive auto-interpretation is governed by a tradition of court-mimicry. This means that OLC's opinions are based on established (or relatively fixed) legal concepts, institutional practice of

---

[661] *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. OLC 163, 170.
[662] *Id*.
[663] *Id.* at 171.
[664] Johan Steyn, "Guantanamo Bay: The Legal Black Hole," (Twenty-Seventh F. A. Mann Lecture, November 25, 2003), http://www.statewatch.org/news/2003/nov/guantanamo.pdf; David Dyzenhaus, *The Constitution of Law Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).
[665] Noa Ben-Asher, "Legal Holes," *Unbound* 5, no. 1 (2009): 1–20.
[666] Fatovic and Kleinerman, "Extra-Legal Measures and the Problem of Legitimacy," 24.
[667] Goldsmith, "The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation," 214.

precedential value, and prior court decisions that carry an air of authority. Unlike an assertion of prerogative power (i.e., lawless action "for the publick good"[668]), executive auto-interpretation is necessarily based on legal concepts and canons of construction on which the branches at least implicitly agree and whose interpretive accuracy the coordinate branches can review and, if needed, revise. Therefore, "[e]xecutive power based on interpretation of legal authorities, even when the interpretation is tendentious, is perceived as a less momentous step than prerogative power… for the president in that case still expresses implicit fealty to law and legal constraint."[669] This is in sharp contrast to the pre-Watergate context (such as the *Yamashita* decision in WWII or Lincoln's suspension of *habeas corpus* in the Civil War), in which political legitimacy trumped legality. Based on this analysis, prerogative is not a useful construct to study post-Watergate Executive decisionmaking.

The renowned legal scholar, David Dyzenhaus, warns that "to try to maintain that the law does play a role [in legal black holes] risks legitimizing whatever steps the executive takes. Even the barest forms of rule by law seem to evoke the idea that the rule is legitimate because it is in accordance with the law, that is, the rule of law."[670] As my discussion of military commissions demonstrates, the Court's decision in *Yamashita* is a troubling example of "rule by law" as the Supreme Court effectively rubber stamped a statutorily and constitutionally suspect process prescribed by the Executive Branch. Under condition of the juridification of politics, however, when the Executive engages in some form of unilateral action, such as when President Bush issued the November 13, 2001 Military Order, the coordinate branches inevitably ask: "On what legal authority can the President do this?" This means that executive actions based on OLC's (correct or erroneous) reading of the law can be revised in the courts, debated in the court of public opinion, or altered by the passage of new laws, all of which has happened in the GWOT. In fact, we see "juridified" control mechanisms activated as early as November 2001: After President Bush's issuance of the Military Order, Congress held a series of hearings on military

[668] John Locke and Peter Laslett, *Two Treatises of Government*, Student ed, Cambridge Texts in the History of Political Thought (Cambridge [England] ; New York: Cambridge University Press, 1988), 137.
[669] Id. "The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation," 223.
[670] Dyzenhaus, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?"

commissions dissecting the President's authority to convene them,[671] and forcing the administration to reconsider its initial Military Commission Order. Ultimately, the Supreme Court also ruled on the applicability of the Geneva Conventions to enemy combatants and found the Executive Branch's legal arguments, at least regarding common Article 3, unpersuasive. Indeed, the contrast between the Stone Court's ruling in *Yamashita* and the Roberts Court's ruling in *Hamdan* could not be starker. Likewise, in *Hamdi v. Rumsfeld*, Justice O'Connor asseverated that a state of war "is not a blank check for the President,"[672] signaling that the Court was willing to take on the Executive Branch to uphold the rule *of* law rather than acquiesce to rule *by* law.[673] In hindsight, therefore, we can see that the juridification of the political has resulted in institutional responses that should counsel trust in liberal legalism rather than alarm about its insufficiency.

(3) THE INTERSECTION OF CATEGORIES (1) AND (2)

Lastly, I will demonstrate a peculiar use of international law by the Bush OLC as a source of authority to interpret away international obligations. I can identify two instances of the intersection of categories (1) and (2) in the Bush corpus: (i) the application of common Article 2 to the conflict with Afghanistan, only to decide that the Taliban militiamen would not qualify for POW status or CA3 protections; and (ii) the narrow application of CAT to enhanced interrogations in order to preclude restrictions arguably imposed by CIL.

First, as the Bush OLC declares in the *Padilla 1* and *2* memos, the capture and detention of enemy combatants is consistent with the laws of armed conflict as construed by the Supreme Court in *Quirin*. Therefore, some unilateral executive authority flows directly from the Geneva Conventions, which, beside the Hague Convention, is regarded as one of the most important collections of codified rules of armed conflict (i.e., LOAC). Based on the President's authority to interpret treaties and judge their viability, the Bush OLC decides in the *Treaties and Laws Memo*

---

[671] "Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism," Pub. L. No. J-107-50, § Committee on the Judiciary, 598 (2001).
[672] *Hamdi v. Rumsfeld*, 542 US 507 (2004).
[673] According to Thomas Keck, ever since the Rehnquist era, the Supreme Court has been much more willing to engage in (liberal and conservative) rights-based activism, *see:* Thomas M Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (The University of Chicago Press, 2010).

that the President can "decline[] to suspend our obligations under Geneva III toward Afghanistan[.]"[674] This means that common Article 2 applies to the conflict, and the rest of GC3 (including Article 4) is triggered. Having thus resolved that the third Geneva Convention *does* apply to the (international) armed conflict between the United States and Afghanistan, OLC claims that the President has authority under Article 4 of the GC3 to categorically exclude the Taliban from the protections of the LOAC. Since the Taliban are not the armed forces of a High Contracting Party, they could potentially qualify for POW status under one of three categories enumerated in GC3's Article 4(A):

> i) members of the armed forces of a party to the conflict, along with accompanying militia and volunteer forces; ii) members of militia or volunteer corps …; and iii) members of regular armed forces who profess allegiance to a government or authority that is not recognized by the detaining power.[675]

Based on the Fourth Hague Convention's definition of armed forces,[676] a definition which is also textually present in Article 4's category (ii), the Bush OLC decides that members of the Taliban could not qualify for POW status because "[they] were [not] commanded by an individual responsible to his subordinates;" they did not wear "any distinctive uniform or other insignia" recognizable from a distance; and they did not "obey the laws of war."[677] Although militiamen did carry weapons openly, "[t]his fact… is of little significance," OLC points out, "because many people in Afghanistan carry arms openly."[678]

The second example is the Bush OLC's interpretation of the U.N. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment of Punishment (CAT). Both the *Torture Memo* and the *Military Interrogation Memo* include nearly identical passages discussing CAT's text, ratification history, negotiating history, as well as construction by international tribunals. Throughout its interpretation of the Convention, the Bush OLC insists on a narrow reading of the

---

[674] *Treaties and Laws* at 152.
[675] *Treaties and Laws Memo* at 152.
[676] 1: commanded by a person responsible for his subordinates, 2: have a fixed distinctive emblem recognizable at a distance, 3: carry arms openly, 4: conduct their operations in accordance with the laws and customs of war.
[677] *Article 4 Memo* at 16-24.
(ii)'s conditions which derive from Hague Convention IV are understood to apply to both (i) and (iii), despite the textual ellipsis.
[678] Id. at 22.

treaty's definition of torture, especially in light of Article 16, which requires state parties to "undertake to prevent… other acts of cruel, inhuman, or degrading treatment or punishment [CIDTP] which *do not amount to torture as defined in article 1*."[679] Accordingly, based on the treaty's ratification history, negotiating history, and interpretation in foreign courts, the Bush OLC decides that "the definition of torture [under CAT] is limited only to the most egregious conduct."[680]

Having delimited the reach of the convention, the Bush OLC essentially engages in what amounts to "self-binding" or pre-commitment:[681] namely, CAT must control the U.S.'s treaty obligations rather than customary international law. In OLC's words, any "uniform and universal state practice concerning torture sufficient to [rise] to the level of customary international law" is superseded by the "a multilateral agreement, ultimately joined by 132 state parties, to establish a definition of torture."[682] Therefore, CIL cannot bind the Executive Branch because CAT does, to the extend delimited by the Bush OLC.

INCONSISTENCIES IN THE BUSH OLC'S INTERNATIONAL LAW JURISPRUDENCE

As the foregoing analysis shows, the *Treaties and Laws Opinion* rejects the view that common Article 3 applies to "armed conflicts of any description other than those between state parties, and is not limited to internal conflicts between a State and an insurgent group."[683] Indeed, the Bush OLC claims that such an interpretation of CA3 "ignores the text and the context

---

[679] The definition of torture in article 1 of CAT:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

[680] *Military Interrogation Memo* at 181.

[681] Hubertus Buchstein, "The Concept of 'Self-Binding' in Constitutional Theory," in *Critical Theory and Democracy* (New York: Routledge, n.d.), 56.

[682] *Id*. at 281.

[683] *Treaties and Laws Memo* at 41.

in which [common Article 3] was ratified by the United States."[684] Emphasizing the predominance of the State-centered view of international law at the time common Article 3 was ratified, OLC dismisses the "human-right-based approach"[685] expressed in the International Criminal Tribunal's ruling in *Prosecutor v. Tadic* as inconsistent with the then-prevailing consensus. More specifically, the Bush OLC maintains that "the idea of an armed conflict between a nation-State and a transnational terrorist organization (or between a nation-State and a failed State harboring and supporting a transnational terrorist organization) could not have been within the contemplation of the drafter" at the time of ratification.[686] To adopt the human-rights-based approach, in OLC's view, would amount to "amend[ing] the Geneva Conventions without the approval of the state parties to the agreement."[687]

Buried in the *Military Commissions Memo*, however, are three paragraphs that directly contradict the arguments expressed in the *Treaties and Laws Opinion*. In constructing a legal case for the war model of counterterrorism and the application of the LOAC, the Bush OLC states that "the Geneva Conventions apply by their terms solely to conflicts between states;" however, OLC points out, "that does not mean that there are not principles of the laws of armed conflict that apply in other scenarios."[688] Common Article 3, the argument continues, "was expressly designed to provide a form of safety net to establish minimal standards of humanitarian conduct that would govern in certain conflicts not covered by the Convention."[689] OLC goes on to highlight that not only did the United States recognize "that some such minimal principles could be enforced against enemies as long ago as 1945," but it has also "supported statements in the United Nations of minimal standards, reflective of the principle in common article 3, that must be observed 'by all governmental and other authorities responsible for action in armed conflict.'"[690]

---

[684] Id. at 42.
[685] Id.
[686] Id.
[687] Id.
[688] *Military Commissions Memo* at 95.
[689] Id.
[690] Id. at 96.

In *Prosecutor v. Tadic* the International Criminal Tribunal proclaimed that "armed conflict exists whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[691] The Tribunal also held that "[p]rinciples and rules of humanitarian law reflect 'elementary considerations of humanity' widely recognized as the mandatory minimum for conduct in armed conflicts *of any kind*."[692] While the Bush OLC repudiates the ICT's construction of common Article 3 as inconsistent with the ratifying parties' state-centered understanding in the *Treaties and Laws Opinion*; it embraces the Tribunal's expansive ruling in the *Military Commissions Opinion.* Thus, the Bush OLC readily accepts the "catch-all" understanding of common Article 3 as applying to "any and all conflict not included in common article 2" in order to corroborate the notion that a state of war can exist under international law between a nation-state (the United States) and a non-state terrorist organization.[693] In construing the U.S.'s international obligations to provide legal protections for enemy combatants in the Global War on Terrorism, however, it rejects that same understanding.[694]

Another inconsistency in OLC's *Treaties and Laws* analysis is in the section titled "Application of the Geneva Conventions as a Matter of Policy." The opinion correctly indicates, listing several examples, that the U.S. had traditionally applied GC3 as a matter of policy in post-World War II armed conflicts.[695] Accordingly, OLC points out that "for reasons of diplomacy or in order to encourage other States to comply with the principles of the Geneva Conventions," the President may make the policy decision that "it serves the interests of the United States to *treat* al Qaeda or Taliban detainees… as if they were prisoners of war, even though they do not have any legal entitlement to that *status*."[696] Subsequently, however, OLC claims that the President can enforce the LOAC (including Geneva Convention III) against the Taliban, even if he determines, based on the *ABM Treaty* rationale, that GC3 does not apply to the conflict with Afghanistan. This is one of the inconsistencies in the administration's legal logic that the Supreme

[691] Id. at 97.
[692] Id. (emphasis added by OLC).
[693] *Treaties and Laws Memo* at 41.
[694] Id.
[695] Id. at 124-138.
[696] Id. at 125 (emphasis original).

Court used in *Hamdan v. Rumsfeld* in 2006 to invalidate the military commissions system as it was then constituted.

***

In conclusion, the Bush OLC engages in multiple forms of quasi-judicial policy-making in its international law-related memoranda. In one policy area, the President's unilateral use of military force, OLC constructs what I call a "spring-loaded legal mechanism." In effect, the Bush OLC fuses its own strong constitutional arguments regarding the use of force abroad with a long chain of iterated *status-quo*-maintaining branch-internal legal precedents and the accompanying institutional practice. The result is that OLC essentially pre-determines the administration's policy decision regarding the Iraq invasion. The legal mechanism created by OLC quite literally turns Kant's ethical formulation that "ought implies can" on its head, effectively making it into "can implies ought."

In other policy areas, the Bush OLC engages in extensive interpreting-away of international legal obligations based on the *ABM Treaty* rationale which holds that the President is the nation's primary lawmaker in the field of international relations. As a result, based on the President's inherent power to suspend and/or terminate treaties, OLC decides that the United States owes no Geneva-based treaty obligations to either members of al Qaeda or Taliban militiamen. A byproduct of that determination is the invalidation of the War Crimes Act, allowing previously forbidden conduct to be performed with impunity on captured enemy combatants.

CHAPTER SIX

DEFINING INSTITUTIONAL POWER RELATIONS

The institutional paradigm delineated in the Bush OLC's legal memos dovetails with the parameters of the war model outlined at the beginning of Chapter Four: in brief, it seeks to enforce a separation-of-powers scheme that limits interference by the coordinate branches in conducting the war effort and unilateralizes power in the Executive. Prominent features of the Bush OLC's distribution-of-powers jurisprudence include (1) a heavy emphasis on the role of historical practice as a "gloss" on the proper allocation of institutional authorities; (2) reliance on the President's plenary, inherent, and unilateral powers; (3) a narrow interpretation of *Youngstown*; (4) the subordination of congressional wartime authority to the President's unilateral power to deal with the emergency at hand; (5) and insistence on judicial deference to the Executive Branch's wartime decisions.

The Bush OLC's auto-interpretation of the President's institutional powers and the strict separation of institutional mandates and competencies that emerge from the Bush corpus (also for legal interpretive purposes) is most akin to what legal scholars refer to as "departmentalism." Departmentalism holds that each branch of the government has "an equal and independent authority to interpret the Constitution for purposes of guiding its own actions."[697] To be sure, as I stated above, OLC operates under a version of judicial supremacy; however, judicial supremacy is limited precisely in the areas where OLC fills in the blanks. Due to the political questions doctrine (PQD), courts have traditionally steered clear of some of the most vexing questions of foreign affairs and national security, and, instead, have deferred to the judgment of the "political departments."[698] As OLC is part of such a department, and it is not barred from entertaining

---

[697] Keith Whittington, "Departmentalism, Judicial Supremacy and DACA," Lawfare, February 26, 2018, https://www.lawfareblog.com/departmentalism-judicial-supremacy-and-daca.

[698] In *Dames & Moore*, the Supreme Court acknowledged the epistemic limitations of the courts in "the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive" (453 US 661) with respect to foreign affairs and national security. Consequently, should the they find such cases justiciable, the judiciary should

political questions, its opinions can freely define institutional power relations and interpret the President's powers in the first instance. However, since OLC's jurisprudence is not a self-legitimating system, its departmentalist interpretive activity necessarily depends on three pillars: historical practice, court precedent, and statutory authorizations. In this chapter, I will provide a detailed examination of the Bush OLC's separation-of-powers jurisprudence. I will rely primarily on the data obtained from the textual analysis not only to produce what I expect to be the most comprehensive study of the Bush OLC's claims regarding institutional power relations, but also to be able to systematically compare corresponding datapoints in subsequent chapters. At the end of Part 3, I will also evaluate whether the Executive Branch's legal opinions can effectively define the distribution of institutional authorities.

During the coding process of the Bush OLC's legal opinions, I created a set of codes located under *Interpretive Arguments* that denote various types of *Institutional Power Relations*. Whenever I found specific references to the distribution of institutional authorities and competencies, I added an apposite code.[699] This process yielded 21 sub-codes which attach to a total of 553 textual segments. In this chapter, I will describe the data based on those findings.

Institutional Practice	84	Cong. Acquiescence	28	Departmentalism	2
Unilateral Power	68	Judicial Underenforcement	26	Congressional Control	2
Inherent Power	53	Executive Supremacy	26	Foreign-to-domestic-boots.	2
Endorsement of Action	47	Separation of Powers	23	Limits of Executive Power	1
Limits of Cong. Power	43	Deference	18		
Recognition of Power(s)	40	Political Question Doctrine	13		
Plenary Power	38	Formalization of Inform. Powers	5		
Undue Interference	30	Incompetence	2		

Table 6: Distribution of Institutional Power Relations coded segments

be "acutely aware of the necessity to rest decision[s] on the narrowest possible ground capable of deciding the case." (453 US 660)

[699] During the coding process, I endeavored to create codes, to the extent possible, that reflected the plain language of OLC's opinions.

(1) HISTORICAL PRACTICE AND SOURCES OF INSTITUTIONAL POWER

The most populous sub-code under *Institutional Power Relations* is *Institutional Practice.* This code attaches to textual segments that describe a pattern of institutional behavior, predominantly by the Executive, over a long enough period that can be considered "customary;" or to put another way: a "gloss" on the Constitution. In Justice Frankfurter's words:

> It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.[700]

The Bush OLC cites this Frankfurterian formulation in 5 of the 20 OLC opinions considered in this chapter, indicating the salience of historical (institutional) practice in Executive Branch constitutional construction.[701] Legal scholars, by contrast, split on the admissibility of institutional practice in legal interpretation. Some have argued that reference to previous patterns of governmental behavior promotes "consistency and predictability" in the law, increases "decisional efficiency" in legal conflict-dispositive bodies, and "enhance[s] the credibility of the decisionmaker."[702] According to Bradley and Morrison, "[t]o the extent past practice predicts the future actions of the branches, it should arguably inform legal analysis because descriptions of what the law is should have some correspondence to *operational reality*."[703] Since Article II is "the most loosely drawn chapter of the Constitution,"[704] Bradley and Morrison argue that the historical gloss approach is most useful in questions related to executive power:

---

[700] *Youngstown v. Sawyer*, 343 US 579, 611 (1952) (Frankfurter, J. concurring).
[701] Moreover, a similar formulation in *Mistretta v. U.S.* ("'the Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government.") is cited three times in the corpus, bringing the total of institutional-practice-as-gloss references to eight.
[702] Bradley and Morrison, "Historical Gloss and the Separation of Powers," 427.
[703] Id. 456 (emphasis added).
[704] Corwin et al., *The President: Office and Powers*, 5.

> Precisely because the Constitution's textual references to executive power are so spare and because there are relatively few judicial precedents in the area, historical practice may provide the most objective basis for decision. Eschewing reliance on historical practice, in contrast, may leave the decisionmaker with little basis for resolving the matter at all. This does not necessarily mean that historical practice will yield normatively desirable outcomes. The point is simply that on at least some issues of executive power, it might be exceptionally difficult to reach any reasoned decision without relying on historical practice.[705]

However, given the plasticity of the concept of "relevant" or "actionable" historical practice, one might wonder what qualifies as sufficiently "customary" to be considered as having legally determinative weight. As LaCroix points out, there are no monolithic or universally accepted criteria that determine when historical practice is dispositive or which actions amount to a basis for deference: "To pose the question, 'What is the historical practice?,' is to presume an artificial degree of unity and coherence within institutions, and from one action to another."[706] Therefore, approaches to legal interpretation that rely on the hermeneutic value of institutional practice necessarily involve subjective determinations of "[w]hose historical practice matters, and which moment encompasses the relevant distillation of that practice."[707]

Notwithstanding the theoretical debate over the tenability of historical practice as a gloss on institutional power relations, and based directly on Frankfurter's concurrence in *Youngstown*, the Bush OLC claims that "'the Constitution... contemplates that *practice* will integrate the dispersed powers into a workable government.'"[708] A survey of the 84 *Institutional Practice* codes in the Bush corpus highlights OLC's emphasis on the role of "operational reality:" The Office finds relevant historical precedent for each of the legal-policy areas considered in the GWOT opinions: troop deployment;[709] domestic use of the military;[710] military commissions;[711] treaty suspension

---

[705] Bradley and Morrison, "Historical Gloss and the Separation of Powers," 428.
[706] Alison L LaCroix, "Historical Gloss: A Primer," *Harvard Law Review* 126 (2013): 78.
[707] Id.
[708] *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (emphasis added), *cited* in the *War Powers Memo* at 56; *also*, identical language in *ABM Treaty Opinion* at 54; *Transfer Memo* at 31.
[709] *War Powers Memo* at 42-43, 45-46, 50, 51, 56, 57, 58, 59; *AUMFI Memo* at 8, 15, 16, 19, 24; *Iraq Memo* at 31, 39, 40, 62, 66, 67, 68-70, 73, 74, 75, 76, 103, 104, 119; *Military Interrogation Memo* at 20.
[710] *Domestic Military Memo* at 34, 38.
[711] *Military Commissions Memo* at 29, 48; *SJAA Memo* at 26, 27, 28, 29, 34,

and termination;[712] POW policy;[713] seizure, detention, and interrogation of enemy combatants;[714] and intelligence gathering for foreign intelligence purposes.[715] Therefore, while Frankfurter's controlling language does not appear in each memo comprising the construction of the GWOT legal architecture,[716] the hermeneutical approach that it endorses is a crucial component of the Bush OLC's interpretive methodology.

With no regard to the equivocal status of institutional action (and inaction) as precedent, the Bush OLC claims that "[t]he normative role of historical practice in constitutional law, and especially with regard to separation of powers, is *well settled*."[717] In fact, pre-9/11 OLC opinions indicate that historical practice had traditionally been an integral element of the interpretive methodology of the Office of Legal Counsel as an institution. As the Clinton OLC put it in 1994, not only has the Supreme Court been "particularly willing to rely on the practical statesmanship of the political branches" in deciding constitutional (separation of powers) questions "that involve foreign relations," but reference to institutional practice has also been a mainstay of the analytical *modus operandi* of OLC itself.[718] As the *Uruguay Round Agreements Memo* goes on to say, "the nearly complete absence of judicial decisions resolving" fundamental questions related to foreign affairs and national security, "underscores the necessity of relying on… *precedent* to interpret… relevant constitutional provisions."[719] Accordingly, the Bush OLC concludes, "we give considerable weight to the practice of the political branches in trying to determine the constitutional allocation" of institutional authorities.[720] Since the Executive is in a propitious structural position to act first, effectively relegating the coordinate branches to a reactive stance,

---

[712] *ABM Treaty Memo* at 18, 26, 57, 58; *Treaties and Laws Memo* at 65;
[713] *Transfer Memo* at 13, 16, 32, 33, 45, 46, 47, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 69.
[714] *Padilla 1 Memo* at 21; *Military Interrogation Memo* at 22;
[715] *NSA Memo* at 42-44, 61, 66-69.
[716] *War Powers Memo*, *ABM Treaty Memo*, *Transfer Memo*, *SJAA Memo*, *AUMFI Memo*
[717] *ABM Treaty Memo* at 54; *also*, there is identical language in the *War Powers Memo* at 56 (emphasis added); *see also* Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (New Haven: Yale University Press, 1990), 70–71 (institutional practice is "quasi-constituitonal custom" in the realm of foreign affairs).
[718] Clinton OLC, "Whether Uruguay Round Agreements Required Ratification as a Treaty," 18 Op. O.L.C. 232, 234 (1994); *see also "Proposed Deployment of United States Armed Forces Into Bosnia*," 19 Op. OLC 327 ("The Supreme Court has often shown itself willing to rely on the evolved practice and custom of the political branches.").
[719] Id. (emphasis original).
[720] *War Powers Memo* at 57.

the appeal of institutional practice as "a corollary aid[] to interpret[ing]" the relative powers of the branches is evident.[721]

Notably, the Bush OLC's definition of "practice" is much broader than the Frankfurterian formulation quoted above contemplates. Namely, it includes "not only the acts and decisions of governmental decisionmakers," but also "their considered statements and judgements as to what they *could* do."[722] This encompasses, of course, the OLC's legal opinions.[723] Thus, "the ongoing tradition of Executive Branch constitutional interpretation," due to the dearth of SCOTUS opinions on point, plays "an especially important role in" the areas of "foreign affairs and national security," and the corresponding questions of institutional power relations.[724] The value of OLC's interpretive tradition is perhaps most readily seen in policy areas where "the President acts in absence of either a congressional grant or denial of authority;" in other words, when "he can only rely upon his own independent powers."[725] In such "zone[s] of twilight," to quote Justice Roberts, a showing of "congressional inertia, indifference or quiescence" could tip the balance toward "independent presidential responsibility."[726]

As a practical matter, however, most, if not all, of the legal-policy areas covered in Parts 1 and 2 of this chapter have, at least, some corresponding provisions in the U.S. Code. Therefore, it would be misguided to uncritically accept the Bush OLC's extensive catalogue of the Executive Branch's "operational reality" as demonstrating a "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned."[727] The Watergate congressional resurgence is a case in point, as it regulated in a targeted fashion many of the legal-policy areas considered in the construction-of-the-GWOT-legal-architecture opinions (e.g.: WPR, FISA, Case Act). Consequently, based on Justice Jackson's *Youngstown* framework, the President's powers in those areas, if any, should arguably sink to their nadir. In fact, the House

[721] *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *see also* Howell, *Power without Persuasion*, 2003.
[722] *ABM Treaty Memo* at 54 (emphasis original).
[723] And before the OLC, AG opinions.
[724] *AUMFI Memo*, FN 3.
[725] *Youngstown v. Sawyer*, 343 US 579, 637 (1952) (Jackson, J. concurring).
[726] Id.
[727] *Youngstown v. Sawyer*, 343 US 579, 611 (1952) (Frankfurter, J. concurring).

Conference Report on FISA negotiations reveals that the intent of the Watergate Congress was to accomplish just that:

> to apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure Case: "When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional power of Congress over the matter."[728]

Thus, from Congress's point of view, the Watergate-era statutory regulations were intended to subvert both the showings of "systematic, unbroken, executive practice" and the sufficiency of the President's "inherent authority in the absence of legislation"[729] to act unilaterally. The dichotomy between the (stated) intent of the Watergate Regime and the Bush OLC's hermeneutical approach puts the need for executive legal interpretation into sharp relief: In order to counteract the subordinating narrative of Watergate and *Youngstown*, OLC's auto-interpretive separation-of-powers analysis must legitimate the President's independent institutional powers. The Office's logic is the following: If the President is possessed of self-contained constitutional authority in the areas listed above, then the Watergate strictures lack the ability to delegitimate or thwart executive action. OLC's counter-narrative is based on two crucial elements: (1) asserting presidential foreign affairs powers independent of congressional authorization and untrammeled by restrictive legislation; (2) and self-binding to a narrow interpretation of *Youngstown*.

In order to understand the Bush OLC's institutional-powers jurisprudence in general, we must first look to the *SJAA Memo*. Short for "Swift Justice Authorization Act," the *SJAA Memo* is a Bill Comment. According to Pillard, Bill Comments are legal opinions in which "OLC lawyers review bills introduced in Congress for constitutional problem areas:"[730]

> If the assigned OLC Attorney Advisor identifies provisions of proposed legislation that either present constitutional concerns facially or that create risks of unconstitutional application, the lawyer will draft a Bill Comment identifying the constitutional problems. Those comments are then reviewed and approved by an

[728] Joint Explanatory Statement of the Committee of the Conference, House Conference Rep. No. 95-1720, 35 (1978).
[729] H.R. Rep. No. 95-1283, pt. 1, 24 (1978).
[730] Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands," 2005, 711.

> OLC deputy and sent to the Office of Management and Budget, which compiles the administration's overall views on the proposed legislation, and forwards the constitutional objections to Congress together with policy concerns and suggestions originating elsewhere in government. If Congress does not change a bill to eliminate a constitutional defect, it runs the risk of a presidential veto.[731]

As the Bush OLC unfolds its separation-of-powers arguments against the proposed Swift Justice Authorization Act, it also elaborates on its view of the Constitution's allocation of institutional powers and the attendant division of duties and responsibilities between the Legislative and Executive Branches:

> The constitutional principle of separation of powers forbids one branch of government from usurping or controlling the exercise of powers assigned by the Constitution to another branch. As the Supreme Court has explained, the "Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). The structural separation of roles in the Constitution means that Congress may not "intrude[] into the executive function" by arrogating to itself control over duties assigned to the Executive. *Bowsher v. Synar*, 478 U.S. 714, 734 (1986).[732]

This reading of the separation-of-powers scheme emphasizes "separateness" and "autonomy" rather than "interdependence" and reciprocity."[733] Consequently, the Bush OLC rejects Justice Jackson's view in *Youngstown* that "[p]residential powers are not fixed but fluctuate:"[734]

> These principles apply with equal if not greater force with regard to the President's *express* constitutional war powers as Commander in Chief. As the Supreme Court has made clear, by virtue of the Commander-in-Chief Clause, it is "the President alone[] who is constitutionally invested with the entire charge of hostile operations." Hamilton, 88 U.S. at 87.[735]

Therefore, at the core of the Bush OLC's institutional powers paradigm is the notion that the Constitution vests in each branch of government "defined categories" of power which they

---

[731] Pillard, 711–12.
[732] *SJAA Memo* at 46.
[733] *Youngstown v. Sawyer*, 343 US 579, 635.
[734] Id.
[735] *SJAA Memo* at 49 (emphasis added).

exercise independently of each other. This gives rise to separate spheres of authority, which, in turn, allows for different procedural standards to be followed in domestic *versus* foreign affairs decisionmaking:

> In foreign affairs, however, the Constitution does not establish a mandatory, detailed, Congress-driven procedure for taking action. Rather, the Constitution vests the two branches with different powers - the President as Commander in Chief, Congress with control over funding and declaring war - without requiring that they follow a specific process in making war. By establishing this framework, the Framers expected that the process for warmaking would be far more flexible, and capable of quicker, more decisive action, than the legislative process. Thus, the President may use his Commander-in-Chief and executive powers to use military force to protect the Nation, subject to congressional appropriations and control over domestic legislation.[736]

In sum, under OLC's construction of institutional powers (which I will refer to as the "Separate Sources" model or SSM), the President has broad constitutionally-derived foreign affairs powers which do "not require for [their] exercise an act of Congress."[737] Moreover, the Bush OLC's *SJAA* analysis provides textually-identifiable legal justification for presidential direct action as observed by William Howell and others.

The Bush OLC's institutional-powers paradigm is in stark contrast with the congressional primacy model (CPM).[738] Essentially, the CPM rejects the notion that the Constitution vests substantive authorities in the President to act independently of authorizing legislation. The CPM, which underlies the Watergate Regime's statutorily imposed constitutional corrective, conceptualizes presidential foreign affairs (and national security) powers as deriving from acts of

---

[736] *War Powers Memo* at 20.

[737] *US v. Curtiss-Wright* 299 US 304, 320 (1936).

[738] David Gray Adler and Larry Nelson George, eds., *The Constitution and the Conduct of American Foreign Policy* (Lawrence, Kan: University Press of Kansas, 1996), 19 ("The unmistakable trend toward executive domination of U.S. foreign affairs in the past sixty years represents a dramatic departure from the basic scheme of the Constitution."); Louis Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed (New York: Oxford University Press, 1996), 43; Adler and George, *The Constitution and the Conduct of American Foreign Policy*, 3. ("The Constitution exclusively assigns only two foreign affairs powers to the president. He is designated commander-in-chief of the nation's armed forces, although, as we shall see, he acts in this capacity by and under the authority of Congress. The president also has the power to receive ambassadors, but the Framers viewed this as a routine, administrative function, devoid of discretionary authority.").

the Legislature, rejects the existence of plenary presidential authority, and narrowly construes Article II's "executive Power," the Commander in Chief power, and the Treaty Power.[739]

I will not attempt here to settle the ongoing debate regarding the proper interpretation of institutional power relations, neither would such a discussion be germane to my inquiry. Nevertheless, Justice Robert Jackson's portrayal of the indeterminacy of the President's Article II powers is illustrative of the need for OLC's separation-of-powers auto-interpretation as a form of institutional counteraction of legislative restrictions:

> A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question.

As I noted above, the Watergate congressional resurgence was based on a view of the institutional hierarchy that is best described by the CPM. Moreover, whether originally so intended or not, Justice Jackson's tripartite *Youngstown* framework has become synonymous with congressional primacy not only in the domestic realm but also in foreign affairs.[740] As one scholar has observed:

> Jackson's concurring opinion in *Youngstown* continues to retain great prominence in debates on the President's power in wartime. The opinion is so deeply ensconced in the canon that its omission from debate is a sign of malfeasance, if not outright malpractice.[741]

Prominent commentators agree. In the words of Attorney General Eric Holder, the Jackson concurrence has become "the gold standard to this day for defining the extent to which the

---

[739] For an extensive discussion of the congressional primacy model, *see* Patricia L Bellia, "Executive Power in Youngstown's Shadows," *Constitutional Commentary* 19 (2002): 117–21.
[740] *Hamdan v. Rumsfeld*, 548 US 557 (2006) (Kennedy, J. concurring) ("The proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in Youngstown").
[741] Adam J. White, "Justice Jackson's Draft Opinions in the Steel Seizure Cases," *Albany Law Review* 69 (2006): 1133.

president can operate consistent with the rule of law."[742] As Professor Joseph Bessette reports, others have called it "widely accepted," "deservedly famous," and "ubiquitous in legal discourse," concluding that it has so "transcended consensus to become conventional wisdom."[743]

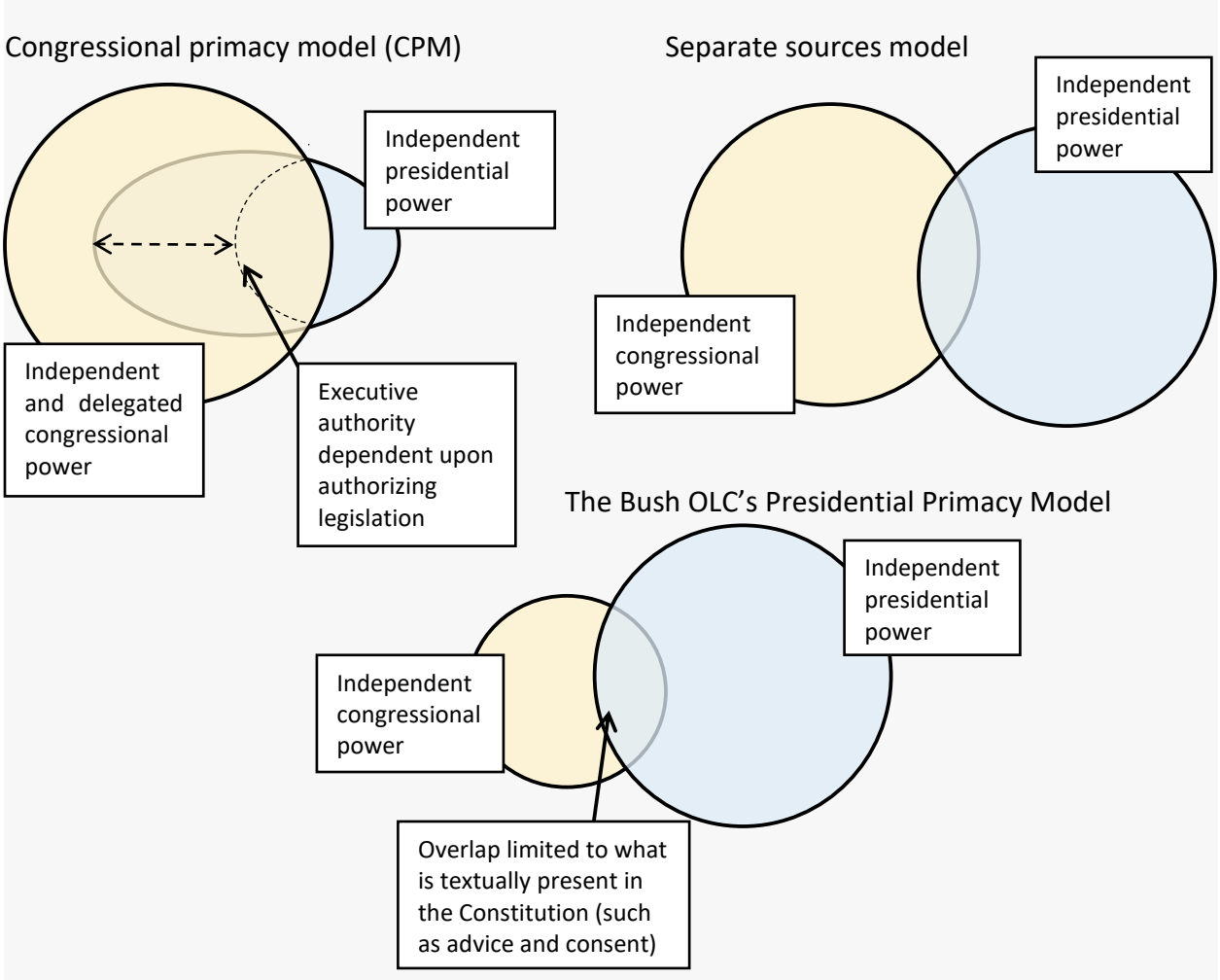


Diagram 3: Congressional Primacy vs. Separate Sources vs. the Bush OLC's Model

[742] Eric Holder, "Remarks as Prepared for Delivery" (April 15, 2009), https://www.justice.gov/opa/speech/attorney-general-eric-holder-west-points-center-rule-law-grand-opening-conference.

[743] Joseph M Bessette, "Rethinking Justice Jackson's Concurrence in Youngstown v. Sawyer," in *The Limits of Constitutional Democracy*, ed. Jeffery K. Tulis and Stephen Macedo (Princeton University Press, 2010), 196 (quoting Mark Rosen and Vicki Jackson).

Some critics of the Bush administration's legal opinions have pointed out that a major shortcoming of the memos is that they "do[] not even mention *Youngstown* or attempt to distinguish it."[744] Although this particular criticism is accurate as far as the interrogation-related memoranda are concerned, and the lack of *Youngstown*'s moderating effect undoubtedly contributes to their extreme conclusions, the Bush OLC does, in fact, distinguish *Youngstown* in the *NSA Memo*.[745] As the white paper prepared for congressional leaders explains, OLC does not accept the broad reading of the steel-seizure case as pertaining to *all* presidential powers whether foreign or domestic.

Indeed, it should be quite clear from the foregoing analysis that the OLC considers institutional authorities to bifurcate in the domestic *versus* foreign spheres.[746] Hence, the Bush OLC's institutional-power-relations approach is predicated on the notion that while Congress enjoys primacy in the domestic realm, the "President [is in a] dominant constitutional position [in matters of foreign affairs and national security] due to his authority as Commander in Chief and Chief Executive and his plenary control over diplomatic relations."[747] In fact, even the Attorney-General-turned-Supreme-Court-Justice Robert Jackson acknowledged "internal and external affairs as being in separate categories" and recognized the President's broad power to protect the nation from the "outside world."[748]

Therefore, OLC insists that the *Youngstown* decision leaves the President's foreign affairs powers unaffected since the case involved an attempt by President Truman at a "dramatic

---

[744] Jack Balkin, "Youngstown and The President's Power to Torture," Balkinization, July 16, 2004, https://balkin.blogspot.com/2004/07/youngstown-and-presidents-power-to.html (it is important to point out that Balkin refers specifically to the Torture Memo in his piece).

[745] However, since I was not able to locate any evidence of similar distinguishing of *Youngstown* elsewhere in the Bush corpus or in predecessor OLCs' opinions, it appears that this line of argument against the application of *Youngstown* is novel and was not considered in previous memoranda. (Although I only searched Clinton and Carter OLC memos, I assume that had a similar argument been made by the Reagan or Bush 43 OLCs, it would have been referenced in the Clinton memos.) One noteworthy distinguishing argument was made by the Clinton OLC. In the memo titled *Presidential Authority to Decline to Execute Unconstitutional Statues*, the Clinton OLC claims that even within Jackson's third category, the President has authority to "act contrary to a statutory command" if OLC considers the statute to be unconstitutional. This override argument is used extensively by the Bush OLC.

[746] *See*, e.g., *War Powers Memo* at 20 (quoted above at 37).

[747] *Military Interrogation Memo* at 48.

[748] *Youngstown v. Sawyer*, 343 US 579, FN 2 (1952); *and* Id. 645 ("I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.")

extension of the President's authority over military operations to exercise control over" domestic matters.[749] Consequently, the Supreme Court addressed "an assertion of executive power that not only stretched far beyond the President's core Commander in Chief function, but that did so by intruding into areas where Congress had been given an express, and apparently dominant, role by the Constitution."[750] As a result, the Bush OLC concludes, "*Youngstown* does not support the view that Congress may constitutionally prohibit the President" from exercising authority in foreign affairs in which the Constitution grants the dominant role to the Executive Branch.[751]

The ongoing rivalry between Congress and the President over the correct allocation of the Constitution's grants of institutional powers in the field of foreign relations and national security as well as the proper scope of *Youngstown* is illustrative of Justice Potter Stewart's famous aphorism that "the Constitution establishes the contest, not its resolution."[752] Michael Mukasey's hearing before the Senate Judiciary Committee in 2007 demonstrates that the matter is far from settled:

> SEN. FEINGOLD: I know there's been a great deal of discussion this morning which actually followed our conversation yesterday about the effect of the FISA law and the president -- whether the president has the authority to violate that law.
> And I would just like to associate myself with Senator Feinstein's excellent description of congressional intent when passing FISA. And I must say that your answer to her appeared to be directly contrary to the *Youngstown* approach to executive power, which you and I discussed in detail yesterday and you appeared to accept as important and valid law.
> The Supreme Court has held that executive power is affected very significantly by what Congress does. So, it sounds like, overnight, you've gone from being agnostic, as you and I have gone back and forth since our first meeting on this question, to holding what is a rather disturbing view.
> You have said today that you believe the president may violate a stature if he is acting within his Article II authority. Now, that position, which I find alarming, makes it extremely important to know what you believe the exact scope of the president's Article II authority to be.
> So, are you telling the committee, Judge, that any time the president is acting to safeguard the national security against a terrorist threat, it does not have to comply with statutes?

---

[749] *NSA Memo* at 117.
[750] Id. at 118.
[751] *NSA Memo* at 120.
[752] Potter Stewart, "Or of the Press," *Hastings Law Journal* 26, no. 3 (1975): 636.

> MUKASEY: I think -- all I'm saying is that I -- obviously, I recognize the force of Justice Jackson's three-step approach. *But I recognize, also, that each branch has its own sphere of authority that is exclusive to it*.
> For example -- just to take an example that has nothing to do with the subject under discussion immediately -- you have the exclusive authority to vote me up or vote me down for any reason or no reason.
> If I am displeased with the result and displeased with the reason, I could not, validly, go down the street to the court house and file a lawsuit and claim that I had been denied a right. Even if I got some judge who was willing to entertain the lawsuit and even if I prevailed, there are a lot of ways you could describe that outcome.
> But the rule of law isn't one of them, because the authority belongs only to you.
> There are areas of presidential authority.
> I also said that we are not dealing here, necessarily, with areas of black and white.
> I understand that. Which is why it's very important that push not come to shove on these questions, because the result can be not simply discord, but disaster.[753]

Having examined the Bush OLC's auto-interpretation of the sources of presidential power and spheres of institutional dominance, we can now return to the question of the continuity of historical practice. In light of OLC's bifurcated analysis of institutional powers and spheres of authority, the President's Article II powers over foreign affairs and national security are sufficiently great to overcome statutorily imposed restrictions; assuming that they are constitutionally permissible. Since Congress may not, in keeping with the Separate Sources and Presidential Primacy Models (PPM), inhibit the President's authority in foreign affairs and national security,[754] just like the President may not encroach on the domestic powers of Congress,[755] the Watergate Regime's statutory constraints are either unconstitutional restrictions on the power of the Executive to conduct the Nation's foreign relations (e.g., OLC's strict reading of FISA), or mere legislative recognitions of its pre-existing constitutional authority (e.g., the WPR). Therefore, the Bush OLC stakes out the position that institutional practice,

---

[753] "Confirmation Hearing on the Nomination of Michael B. Mukasey to Be Attorney General of the United States," Pub. L. No. S. Hrg. 110-478, § Committee on the Judiciary (2007), https://fas.org/irp/congress/2007_hr/mukasey.html (emphasis added).

[754] *AUMFI Memo* at 11 ("Indeed, the textual provisions in Article 11, combined with considerations of constitutional structure and the fundamental principles of the separation of powers, *forbid* Congress from interfering with the President's exercise of his core constitutionally assigned duties, absent those 'exceptions and qualifications ... expressed' in the Constitution.")

[755] Although, as I will point out below, the President does, in fact, engage in "foreign-to-domestic bootstrapping."

despite the quasi-constitutional corrective imposed during the Watergate congressional resurgence, can be viewed as a continuum and dipositive of constitutional meaning. Indeed, since statutory regulation of the President's foreign affairs powers is antithetical to the PPM and the SSM, a straightforward enumeration of historical practice would undercut the institutional interests of the Presidency. Moreover, it would compromise the *status quo* maintenance function of OLC and expose the Executive Branch to legal challenges.

(2) INDEPENDENT PRESIDENTIAL AUTHORITY

Separation-of-powers arguments in support of the President's ability to act on his own authority, without sanction from the other branches, are crucial elements of the Bush OLC's legal opinions. As Table 6 above demonstrates, three codes emerged during the coding process that fit the broad category of "independent executive authority:" *Unilateral Power*, *Inherent Power*, and *Plenary Power*.[756] Together they amount to 159 coded segments, far outstripping other aspects of the Bush OLC's separation-of-powers jurisprudence. This quantitative measure is in agreement with the "unilateralizing" effect of the memos considered in Parts 1 and 2 of this chapter. Moreover, this empirical finding also lends support to claims made by constitutional scholars that "at no time in America's history have inherent powers been claimed with as much frequency and breadth as [during] the presidency of George W. Bush."[757] These specific and textually identifiable arguments compound with the *Institutional Practice* codes discussed above to form the legal basis of claims of exclusive presidential authority to prosecute the GWOT.

Labels such as "unilateral," "inherent," and "plenary" are part and parcel of the vocabulary of presidential direct action. While it is evident that each term signifies independent institutional power, their precise meaning is seldom clearly defined. Justice Robert Jackson pointed out as much when he excoriated the Truman administration for its use of terminology related to independent presidential authority:

---

[756] During the coding process, I endeavored to create codes, to the extent possible, that reflected the plain language of OLC's opinions.

[757] Louis Fisher, "Invoking Inherent Powers: A Primer," *Presidential Studies Quarterly* 37, no. 1 (March 2007): 1.

> Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. "Inherent" powers, "implied" powers, "plenary" powers, "war" powers, "emergency" powers, are used, often interchangeably and without fixed or ascertainable meanings.[758]

In analyzing the textual data related to OLC's claims of *Unilateral*, *Plenary*, and *Inherent Authority*, I sought to determine whether there is any internal consistency in the distribution of those three codes, "or fixed or ascertainable meanings" in the Bush OLC's usage.

a) UNILATERAL POWERS

Unilateral power denotes autonomy to act without sanction from the other branches. It signifies a mode of operation rather than provenance of power (*i.e.*, inherent) or complete, undivided control (*i.e.*, plenary). According to Howell, unilateral action allows the President to "move policy first," and to "act alone."[759] Table 7 summarizes the 68 coded segments that describe unilateral actions taken by the President on his own authority. The textual data is grouped into four categories: the President's use of military force, unilateral action related to treaties, executive determinations regarding POW policy, and unilateral action related to military commissions.

Cross-tabulation reveals that *Unilateral Power* codes frequently overlap with textual segments describing *Historical* events and *Institutional Practice*; therefore, OLC appears to reserve this label for action that has been validated by historical practice.

Unilateral Power ∩ *Historical* (& sub-codes) → ∑ = 21

Unilateral Power ∩ *Institutional Practice* → ∑ = 19

Since textual segments coded as *Unilateral Power* invariably describe actions taken on the basis of some form of pre-existing authority (express or inherent), in the rest of this section I will focus my attention on the underlying constitutional powers.

---

[758] *Youngstown v. Sawyer*, 343 US 579, 647 (1952) (Jackson, J. concurring)
[759] Howell, *Power without Persuasion*, 2003, 14–15.

Use of military force	Deployment of military force	***War Powers Memo* at 59** (Yugoslavia), **63** (Yugoslavia), **64** (Bosnia), **65** (Haiti), **65** (Kuwait), **66** (Op. Desert Storm), **66** (Blockade of Cuba), **75** (bombing of IIS in Bagdad), **78** (Lybia, 1986), **83** (Lybia, 1986), **91** (unilateral action authorized by WPR); ***AUMFI Memo* at 15** (Op. Desert Storm), **15** (1992 no-fly zone, Iraq), **15** (1993, 1996, 1998 missile strikes against Iraq), **15** (Yugoslavia), **16** (Commander in Chief power), **16** (Korea, Vietnam, Grenada, Lebanon, Panama, Somalia, Kosovo); ***Iraq Memo* at 30** (Const. basis), **31** (Korea), **34** (Iraq), **34** (Bosnia), **34** (Haiti)
	Determination that a state of emergency exists	***War Powers Memo* at 96** (based on power to respond to attack on U.S.)
	Determination reg. the amount of force to use in response to an attack	***War Powers Memo* at 99** (P alone can decide what response to take); ***SJAA Memo* at 23** (P decides on measures taken in a mil. campaign)
	Determination that war exists	***Military Commissions Memo* at 69** (*Prize Cases*), 74 (*Prize Cases*)
Action related to treaties	Treaty termination	***ABM Treaty Memo* at 35** (*Goldwater*), **44** (*Goldwater*), **58** (former P's unilateral termination of treaties), **68** (*Charlton v. Kelly*); ***Treaties and Laws* at 65** (Hamilton's arguments); ***Military Interrogation Memo* at 178** (termination/suspension of CAT)
	Treaty suspension	***ABM Treaty Memo* at 50** (secondary authorities), **51** (discretionary), **51**, **52** (foreign affairs function), **62** (1778 treaties w France), **62**, **67** (ANZUS) ***Treaties and Laws* at 71**, **188** (suspend treaty obligations)
	Decide whether a treaty was suspended because treaty partner cannot fulfill treaty obligations	***Treaties and Laws* at 73** (post-WW2 Germany)
	Interpreting treaties	***ABM Treaty Memo* at 74** (interpret treaties by exchange of dipl. notes)
	Acquiescence to treaty partner's violation of a treaty	***ABM Treaty Memo* at 75** (ANZUS)
	Determination that a treaty has lapsed	***Treaties and Laws* at 67** (1941, in response to hostilities in Europe)
	Suspension of ceasefire	***Iraq Memo* at 61**, **62** (no need for new UNSCR), **64** (due to WMD prog.)
	Decision to deviate from customary int'l law (CIL)	***Treaties and Laws* at 178** (Executive act overrides CIL)
Action regarding POWs	Creation of Commissary General to deal with POWs	***Transfer Memo* at 46** (by Lincoln in the Civil War)
	Decide POW policy	***Transfer Memo* at 47** (recruit Confed. soldiers), **58** (WW2 POW transfer to foreign nations), **59** (WW2 Middle East POW transfer), **63** (POW status as U.S. policy in Panama)
	Decide who receives POW status	***Transfer Memo* at 74** (interpret GC3, decide who receives POW status)
	Transfer of POWs	***Transfer Memo* at 103** (no transfer if "more likely than not" to torture
Military commissions	Convene military commissions	***SJAA Memo* at 27** (1818 war with Creek Indians), 27 (Mexican-American War), **30** (international criminal tribunal), **32** (*Yamashita*)
	Set the procedure of MCs	***SJAA Memo* at 31** (Congress cannot impose procedures)

Table 7 – Unilateral presidential action

b) PLENARY POWERS

According to legal dictionaries, *plenary power* denotes complete control. It is a descriptor of quality, signifying wholeness or indivisibility. According to the Wex Legal Dictionary, a plenary power is a "complete power over a particular area with no limitations."[760] TransLegal defines plenary power as "the absolute power of an authority or governing body."[761] Citing intra-branch precedent, the Bush OLC asserts that the Vesting Clause endows the President with plenary authority over the conduct of foreign relations:

> [The Vesting Clause] has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers.[762]

The Bush OLC's claim of a "very delicate, plenary, and exclusive" presidential power in foreign affairs is corroborated by Justice Southerland's majority opinion in *U.S. v. Curtiss-Wright*. As Justice Southerland wrote, in *dicta*,[763] the President is the "sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress."[764] The salience of Southerland's rationale in the Bush OLC's opinions is indicated by the ubiquity of the SCOTUS code: *U.S. v. Curtiss-Wright*; with 15 coded segments in the corpus, it is the 8th most-often-coded Supreme Court case, textually present in 10 of the 20 construction-of-the-GWOT-legal-architecture opinions. 11 of the 15 *US v. Curtiss-Wright* codes refer to Southerland's definition of plenary presidential authority in external affairs.

---

[760] "Plenary Power," in *Wex Legal Dictionary* (Legal Information Institute, n.d.), https://www.law.cornell.edu/wex/plenary_power.

[761] "Plenary Power," in *TransLegal*, n.d., https://www.translegal.com/legal-english-dictionary/plenary-power.

[762] Reagan OLC, *The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act*, 10 Op. OLC 159, 160-161 (1986). It is likely indicative of the Bush administration's obsession with legality that the Bush OLC chose not to cite the undoubtedly more powerful passage in the same memo "The President's authority in the field of international relations is plenary, exclusive, and subject to no legal limitations save those derived from the applicable provisions of the Constitution itself." It is due, I conjecture, to the "no legal limitations" language.

[763] See Charles A. Lofgren, "United States v. Curtiss-Wright Export Corporation: An Historical Reassessment," *The Yale Law Journal* 83, no. 1 (November 1973): 1–32.

[764] *U.S. v. Curtiss-Wright*, 299 US 304, 320 (1936).

The parsing of the 20 legal opinions on which this case study is based produced 38 coded segments that refer to the President's plenary authority over matters related to national security and foreign affairs.[765] By contrast, only one segment (coded as *Congressional Control*) directly acknowledges Congress's plenary foreign affairs powers, which include "declaring war, raising and funding the military, and regulating international commerce."[766] That acknowledgement, in context, also implies limitation (*Limits of Congressional Power*), as OLC asserts that the President and Congress have no concurrent authorities in the realm of external affairs. Consequently, Congress cannot interfere with areas over which the President has complete control. In the *Military Interrogation Memo*, OLC explicitly states that the Executive is in a dominant institutional position in two policy areas: war and foreign policy.

> In contrast to the domestic realm, foreign affairs and war clearly place the President in the dominant constitutional position due to his authority as Commander in Chief and Chief Executive and his plenary control over diplomatic relations. There can be little doubt that the conduct of war is a matter that is fundamentally executive in nature, the power over which the Framers vested in a unitary executive.[767]

Relying on branch-internal *stare decisis*, the Bush Office of Legal Counsel claims that the President's plenary foreign affairs powers are beyond Congress's regulatory reach;[768] even if the legislative will is exercised in the form of appropriations. As the Regan OLC put it in 1986, "[w]hile Congress unquestionably possesses the power to make decisions as to the appropriation of public funds, it may not attach conditions to Executive Branch appropriations that requires the President to relinquish any of his constitutional discretion in foreign affairs."[769] Building on the precedential value of the 1986 opinion, the Clinton OLC used analogous arguments to reject a

---

[765] *Treaties and Laws* Memo at 181 ("As we have noted, the President under the Constitution is given plenary authority over the conduct of the Nation's foreign relations and over the use of the military."); *ABM Treaty Memo* at 20 ("From the beginning of the Republic, this constitutional arrangement has been understood to grant the President plenary control over the conduct of foreign relations.")

[766] ABM Treaty Memo at 19 ("Congress possesses its own plenary foreign affairs powers, primarily those of declaring war, raising and funding the military, and regulating international commerce.").

[767] *Military Interrogation Memo* at 48.

[768] *Stellar Wind Memo*, 45, although the memo is heavily redacted, it includes an extensive separation-of-powers analysis ("certain presidential authorities in that realm [of foreign affairs and national security] are wholly beyond the power of Congress to interfere with by legislation.").

[769] 10 op. OLC 159, 169-170 (1986) (Ass't Atty. Gen. Cooper) (not referenced in the Bush corpus but quoted as precedent in the Clinton memo at note 15)

proposed defense appropriations bill that would have required the President to move the United States embassy from Tel Aviv to Jerusalem:

> It is well settled that the Constitution vests the President with exclusive authority to conduct the Nation's diplomatic relations with other States. […] The proposed bill would severely impair the President's constitutional authority to determine the form and manner of the Nation's diplomatic relations. […] [I]t does not matter in this instance that Congress has sought to achieve its objectives through the exercise of its spending power, because the condition it would impose on obtaining appropriations is unconstitutional.[770]

Within the broad category of "foreign affairs,"[771] the Bush OLC asserts plenary executive authority in all aspects of treaty making and treaty termination. As I pointed out in Part 2 of my empirical analysis, the Bush OLC claims that "[i]n the international sphere, the President is the Nation's primary lawmaker."[772] Since the Executive effectuates that lawmaking potential in foreign affairs through the making and unmaking of treaties, they "represent a central tool for the exercise of the President's plenary control over the conduct of foreign policy."[773] Table 8 comprises all of the Bush OLC's claims of plenary authority related to the President's power over treaties. The coded segments in Table 8, on page 226, appear in the order that the following narrative description addresses various aspects of the treaty power.

Based on Hamilton, Jefferson, and Marshall's contemporary statements, the Bush OLC asserts that "it has not been difficult for the executive branch consistently to assert the President's plenary authority in foreign affairs[.]"[774] Plenary authority means that the President controls all aspects of the treaty-making process, including when to negotiate, "the subject, course, and scope of negotiations,"[775] when to withdraw from negotiations, and whether to sign or not to sign a treaty. According to the Bush OLC, the Senate's advice and consent function does not dilute the President's plenary authority, but "merely acts as a check;" therefore, all

---

[770] Memorandum Opinion for the Counsel to the President from Walter Dellinger, *Re: Bill to Relocate United States Embassy from Tel Aviv to Jerusalem*, 1995 OLC Lexis 81 (referenced in the *Transfer Memo*).
[771] Including the power to recognize foreign governments, *see ABM Treaty Memo* at 74 ("the President's constitutional powers to apply and execute treaties and to recognize foreign government.").
[772] *ABM Treaty Opinion* at 47; see page 176 above.
[773] Id. at 25.
[774] Id. at 23.
[775] Id. at 28.

unenumerated treaty powers must be construed to reside in the President. By extension, post-ratification treaty matters (including termination and the lesser power of suspension) are also within the President's plenary authority.

In Tables 9 and 10 (pp. 226-229), I compiled all the coded segments that refer to OLC's claims of plenary presidential authority over matters of national security. Table 9 is a collection of *Plenary Authority* codes that refer to the use of military force, while Table 10 groups together assertions of exclusive executive power over the conduct of hostilities. Just like before, both Tables 9 and 10 are sorted according to the corresponding narrative descriptions below.

Textual analysis reveals that the Bush OLC makes 11 plenary power claims regarding the use of military force. The broadest assertion is in the *War Powers Memo*, where OLC states that "the Constitution vests the President with plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad – especially in response to grave national emergencies[.]"[776] This plenary authority, the Bush OLC maintains, is supported by "the text, plan, and history of the Constitution, its interpretation by both past Administrations and the courts, the longstanding practice of the executive branch, and the express affirmation of the President's constitutional authorities by Congress."[777] The Office cites the same historical authorities (Jefferson, Hamilton, and Marshall) as it did in corroboration of the President's exclusive treaty powers to argue that their views are dispositive of the Framer's understanding that plenary control over foreign relations includes the power to decide when to use military force. Thus, the use of military force is a factor of the President's plenary authority over foreign affairs and "helps… to achieve [the Nation's] foreign policy goals."[778] The President's power is especially strong when he deploys troops "in the case of a direct attack on the United States."[779] Furthermore, since Congress has chosen to create a "standing army and navy," it is "necessarily authorizing him to deploy those forces."[780] As the Bush OLC explains, "the clauses of Article I… flow together with Article II's Commander in Chief and Executive Power Clauses[.]"[781] Despite the

[776] *War Powers Memo* at 9.
[777] Id. at 99.
[778] Id. at 25.
[779] *Domestic Military Memo* at 37.
[780] Id.
[781] Id.

claim of convergence of some of Article I and II's powers over foreign affairs, in the Bush OLC's reading of the text, structure, and history of the Constitution, the President's "independent and plenary constitutional authority over the use of military force" is not constrained by Congress's power to declare war.[782] Nevertheless, Congress's recognition of the President's plenary power to use military force is useful in that it removes "all doubt of the President's power to act" militarily.[783] As OLC points out, Congress did just that in the War Powers Resolution and the 2001 AUMF, although both pieces of legislation were constitutionally unnecessary.[784] Neither is the use of military force limited to deployments abroad: "the dispositive question is whether the President is deploying troops pursuant to a plenary constitutional authority."[785] Since the war against terrorism brought the battlefield to the soil of the United States, "[t]he President has ample authority as Commander-in-Chief and Chief Executive to employ the military to protect the nation from further attack and to conduct operations against al Qaeda both home and abroad."[786]

The final group of *Plenary Authority* codes is related to the conduct of hostilities. The lynchpin of the Bush OLC's assertions of plenary presidential power as Commander in Chief to conduct military operations is the Supreme Court's characterization of that authority in *Hamilton v. Dillin*. In that Civil War-era case, the Court recognized that due to "[t]he executive power and the command of the military and naval forces [having been] vested in the President," it is he "who is constitutionally vested with the *entire* charge of hostile operations."[787] Although *Dillin* appears only 8 times in the Bush corpus, coming in as the 13th most-often-coded Supreme Court

---

[782] *War Powers Memo* at 18.
[783] *Iraq Memo* at 34.
[784] *SJAA Memo* at 11 ("Legislation expressly granting the President such powers is constitutionally unnecessary.").
[785] *Padilla 1 Memo* at 45; *also* identical language in *Domestic Military Memo* at 79.
[786] Id. at 44.
[787] *Hamilton v. Dillin*, 88 US (21 Wall.) 73, 87 (1874) (emphasis added in the *Torture Memo* at 121 and the *Military Interrogation Memo* at 46). The entire quote is: "It *seems* that the President alone, who is constitutionally invested with the entire charge of hostile operations, may exercise this power, but whether so or not, there is no doubt that with the concurrent authority of the Congress, he may exercise it according to his discretion." Although the Bush OLC quotes this passage as "it is 'the President alone [] who is constitutionally invested with the entire charge of hostile operations," the word "alone" should be omitted. "Alone" refers to the President's putative unilateral authority to exercise the power "to permit limited commercial intercourse with an enemy in time of war and to impose such conditions as it sees fit," and, therefore, it is not an intensifier that augments the President's already plenary control of hostile operations.

case, its interpretive weight cannot be overstated. In the 12 conduct-of-hostilities coded segments in Table 8, *Dillin* appears 6 times, making it the controlling interpretation of the extent of the President's Commander in Chief authority. Nor is *Dillin* a singular outlier. The SCOTUS also observed elsewhere that "[a]s commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at him command, and to employ them in a manner he may deem most effectual to harass and conquer and subdue the enemy."[788] Therefore, Congress may not, as the Court explained in *Milligan* "interfere[] with the command of the forces and the conduct of campaigns.[789] That power and duty belong to the President as commander-in-chief."[790] Lastly, indicating the breadth of the President's power in this area, the *Eisentrager* Court proclaimed that the President's constitutional "grant of war power includes all that is necessary and proper for carrying these powers into execution."[791]

It is based on these SCOTUS precedents that the Bush OLC infers "plenary [power] over enemy belligerents in an armed conflict."[792] Accordingly, OLC asserts that the President "enjoy[s] exclusive authority… to handle captured enemy soldiers," which includes the "plenary constitutional power to detain and transfer prisoners captured in war."[793] As the Bush OLC explains, the capture, detention, and transfer of enemy belligerents is not only a factor of the President's power to direct military operations, but it is also a crucial component of his broader authority over the conduct of the Nation's foreign affairs.[794] Other elements of the president's plenary power over the conduct of hostilities will be addressed under inherent powers below. Tables 8, 9, and 10 on pages 226-229 present my itemized findings.

---

[788] *Fleming v. Page,* 50 US (9 How.) 603, 615 (1850).
[789] *Torture Memo* at 124, ("Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."); *Military Interrogation Memo* at 52 (same); *Padilla 2* at 54 (same without interrogation); *SJAA Memo* at 12 (same without interrogation).
[790] *Ex parte Milligan*, 71 US (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring); this language is quoted in *SJAA Memo* at 56, *NSA Memo* at 110.
[791] *Johnson v. Eisentrager*, 339 US 763, 788 (1950); this language is quoted in *Military Commissions Opinion* at 28, *SJAA Memo* at 23, *Padilla 2 Memo* at 19, *NSA Memo* at 41, *Military Interrogation Memo* at 21, *Torture Memo* at 135.
[792] *SJAA Memo* at 31.
[793] *Transfer Memo* at 24.
[794] Id. at 23.

Aspect of the treaty power	Memo	Loc	Coded segment
Historical authorities support plenary treaty power	*ABM Treaty*	20	"From the very beginnings of the Republic, the vesting of the executive, Commander-in-Chief, and treaty powers in the executive branch has been understood to grant the President plenary control over the conduct of foreign relations… Given the agreement of Jefferson, Hamilton, and Marshall, it has not been difficult for the executive branch to consistently assert the President's plenary authority in foreign affairs ever since."
President controls all aspects of the treaty-making process	*ABM Treaty*	28	"Other treaty powers similarly have been understood to rest within plenary presidential authority. Thus, it is the President alone who decides whether to negotiate an international agreement, and it is the President alone who controls the subject, course, and scope of negotiations;"
Control over the entirety of the treaty-making process	*ABM Treaty*	52	"Thus, the President can choose to enter or withdraw from treaty negotiations; he can choose not to sign a treaty; he can choose not to submit it to the Senate; he can choose not to ratify the treaty even after senatorial consent[.]"
Senate's advice and consent role	*ABM Treaty*	47	"the Senate's advice and consent role merely acts as a check on the President's otherwise plenary power."
Unenumerated powers must remain with the President	*ABM Treaty*	25	"the location of the treaty power in Article II, the general vesting of all of the federal executive power in the President, and the President's plenary authority over foreign affairs have led to a framework in which the executive exercises all unenumerated powers related to treaty making;"
Post-ratification treaty matters	*Treaties and Laws*	65	"The treaty power is fundamentally an executive power established in Article II of the Constitution, and power over treaty matters post-ratification are within the President's plenary authority."

Table 8: Plenary Powers – Treaty Powers

Aspect of power to use mil force	Memo	Loc	Coded segment
Constitution vests the President with the power to use force abroad	*War Powers*	9	"We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad - especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States."
President's power to take military action in response to 9/11 is settled	*War Powers*	99	"In light of the text, plan, and history of the Constitution, its interpretation by both past Administrations and the courts, the longstanding practice of the executive branch, and the express affirmation of the President's constitutional authorities by Congress, we think it beyond question that the President has the plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001."
Historical authorities support plenary control over foreign relations incl. when to use force	*War Powers*	23	"From the very beginnings of the Republic, the vesting of the executive, Commander-in-Chief, and treaty powers in the executive branch has been understood to grant the President plenary control over the conduct of foreign relations… Given the agreement of Jefferson, Hamilton, and Marshall,

			it has not been difficult for the executive branch to consistently assert the President's plenary authority in foreign affairs ever since."
Use of mil. force is part of the President's plenary power over the conduct of foreign relations	*War Powers*	25	"Conducting military hostilities is a central tool for the exercise of the President's plenary control over the conduct of foreign policy. There can be no doubt that the use of force protects the Nation's security and helps it achieve its foreign policy goals."
Creation of a standing army and navy necessarily empowers the President to deploy those forces both domestically and abroad to protect the nation form attack	*Domestic Military*	37	"If a standing army and navy are required to repel or deter sudden attacks, then by creating such forces and placing them under the President's command. Congress is necessarily authorizing him to deploy those forces. As the argument of The Federalist shows, a fundamental purpose of a standing army and a permanent navy was that they be used in such emergencies. Moreover, Congress could not possibly anticipate every contingency in which those forces might be used. As Commander in Chief, the President necessarily possesses ample discretion to decide how to deploy the forces committed to him. Thus, he could decide it was safer to pre-empt an imminent attack rather than to wait for a hostile power to strike first. In sum, the clauses of Article 1 relating to a standing army and a navy flow together with Article II's Commander in Chief and Executive Power Clauses to empower the President to use the armed forces to protect the nation from attack, whether domestically or abroad."
WPR recognizes the President's plenary power to use military force, especially when the U.S. has been directly attacked	*Domestic Military*	51	As we have shown in this and other memoranda, the constitutional text and structure vest the President with the plenary power to use military force, especially in the case of a direct attack on the United States. Section 2(c)(3) recognizes the President's broad authority and discretion to deploy the military, either domestically or abroad, to respond to an attack;
Declaration of war is not necessary	*War Powers*	18	"Given this context, it is clear that Congress's power to declare war does not constrain the President's independent and plenary constitutional authority over the use of military force."
Joint Resolution is not legally necessary for the President to exercise his plenary power to use military force	*AUMFI*	8	"Accordingly, last week we recommended to you and to the White House that the President take steps to ensure that his decision to approve H. J. Res. 114 would not be construed in the future as an indication that this resolution was legally necessary. Specifically, we recommended that the President's signing statement include an explicit reservation stating that his signing of the resolution did not reflect any change in his position, and the long-standing position of the Executive Branch, that the President already possesses ample legal authority under the Constitution to order the use of force against Iraq. We further recommended that the President's signing statement expressly state that his signing of H. J. Res. 114 also did not change the established position of the Executive Branch that the War Powers Resolution cannot, consistent with the Constitution, restrict the President's authority as Chief Executive and Commander in Chief to order the use of military force."
President can use military force in response to an attack and to preempt an attack	*War Powers*	95	"In including this statement, Congress has provided its explicit agreement with the executive branch's consistent position… that the President has the plenary power to use force even before an attack upon the United States actually occurs, against targets and using methods of his own choosing."

Executive Branch has plenary authority to respond to an armed attack even domestically	*Domestic Military Memo*	38	"President Lincoln's actions at the start of the Civil War more fully bear out the executive branch's plenary authority to respond swiftly with military force to an armed attack, even if the operations were to occur domestically."
PCA is overridden when the President deploys troops pursuant to a plenary constitutional authority	*Padilla 2 /Domestic Military*	45/ 79	"Thus, the dispositive question is whether the President is deploying troops pursuant to a plenary constitutional authority. Here, that is clearly the case. The President is deploying the military pursuant to his powers as Chief Executive and Commander in Chief in response to a direct attack on the United States. Detention of al Qaeda operatives within the United State s is undertaken pursuant to this constitutional authority. Thus, the PCA by its own terms does not apply to the domestic use of the military as contemplated in this case."

Table 9: Plenary Powers – Use of Military Force

Aspect of the conduct of hostilities	**Memo**	**Loc**	**Coded segment**
The President is constitutionally invested with the entire charge of hostile operations	*Torture / Military Interrog .*	121 /46	"As the Supreme Court has recognized, and as we will explain further below, the President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces. Because both "[t]he executive power and the command of the military and naval forces is vested in the President," the Supreme Court has unanimously stated that it is "the President alone [] who is constitutionally invested with the *entire* charge of hostile operations." *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (emphasis added). That authority is at its height in the middle of a war."
The President directs the troops "in a manner he may deem most effectual" – Congress may not "interfere[] with the command of the forces and the conduct of campaigns." OLC bases the Executive Branch's broad surveillance authority on the President's plenary power to conduct hostilities.	*NSA*	110	The core of the Commander in Chief power is the authority to direct the Armed Forces in conducting a military campaign. Thus, the Supreme Court has made clear that the "President alone" is "constitutionally invested with the entire charge of hostile operations." *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874); … "As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850). As Chief Justice Chase explained in 1866, although Congress has authority to legislate to support the prosecution of a war, Congress may not "interfere[] with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment).
The President possess all powers "necessary to prosecute successfully a military campaign."	*Padilla 2*	19	Article II of the Constitution vests the entirety of the "executive power" of the United States government "in a President of the United States of America," and expressly provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." U.S. Const. art. II, § 1, cl. 1; *id.*, § 2, cl. 1. Because both "[t]he executive power and the command of the military and naval forces is vested in the President," the Supreme Court has unanimously stated that it is "*the President alone* [] who is constitutionally invested with the *entire charge of hostile operations."* *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (emphasis added). *As Commander in Chief, the President possesses the full powers necessary to prosecute successfully a military campaign. As the Supreme Court has recognized, "[t]he*

			first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution." Johnson v. Eisentrager, 339 U.S. 763, 788 (1950) *(citation omitted).*
The President has plenary authority to order the capture and detention of enemy belligerents	*Padilla 2*	21	"Numerous Presidents, for example, have ordered the capture and detention of enemy combatants during virtually every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. Recognizing this authority, Congress never has attempted to restrict or interfere with the President's authority on this score. It is obvious that the current President plainly has authority to detain enemy combatants in connection with the present conflict, just as he has in every previous armed conflict."
The President has plenary authority over enemy belligerents in an armed conflict	*SJAA*	31	"Indeed, the President's plenary authority over enemy belligerents in an armed conflict is sufficiently great that the Court even reserved the question 'whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to disciplinary measures.'"
The treatment of captured belligerents is to be decided by the President	*Transfer*	24	"The treatment of captured enemy soldiers is but one of the many facets of the conduct of war, entrusted by the Constitution in plenary fashion to the President by virtue of the Commander-in-Chief Clause. Moreover, it is an area in which the President appears to enjoy exclusive authority, as the power to handle captured enemy soldiers is not reserved by the Constitution in whole or in part to any other branch of the government."
Captured enemy belligerents are under the President's plenary control	*Transfer*	27	"the historical context in which the Constitution was ratified supplies additional support for our view that the constitutional structure allocates to the President the plenary power to dispose of the liberty of military detainees."
The President has plenary authority to capture and transfer enemy belligerent	*Transfer*	128	"the President has the plenary constitutional power to detain and transfer prisoners captured in war."
Capture and detention of enemy belligerents is part of the President's plenary power to conduct foreign affairs	*Transfer*	23	"Even if the Constitution's entrustment of the Commander-in-Chief power to the President did not bestow upon him the authority to make unilateral determinations regarding the disposition of captured enemies, the President would nevertheless enjoy such a power by virtue of the broad sweep of the Vesting Clause. Thus, the power to dispose of the liberty of individuals captured and brought under the control of United States armed forces during military operations remains in the hands of the President alone unless the Constitution specifically commits the power to Congress."

Table 10: Plenary Powers – Conduct of Hostilities (including authority over enemy belligerents)

c) INHERENT Powers

In contrast to the scope-describing label, "plenary," "inherent" signifies provenance. According to Black's Law Dictionary, "it is [a] power that necessarily derives from an office, position or status."[795] The Wex Legal Dictionary defines inherent power as "an agent's power to act on behalf of a principal, even though not expressly… granted. This power arises only if required for the agent to exercise some actual authority granted by the same principal."[796] As Justice Jackson stated in his critique of the Truman administration's arguments in the *Youngstown* case, inherent powers are rarely well-defined, and, indeed, have evaded a systematic examination in the relevant literature. In this sub-section, I will tease out a definition of "inherent powers" from OLC's opinions, and point out the legal policy areas where the Bush administration claims that the President possesses extratextual or implied powers. Lastly, I will also evaluate whether it was the assertions of inherent power *per se* that led to gross overreaches in the exercise of executive wartime authority. My textual analysis of the Bush memos yielded 53 *Inherent Power* codes, which fall into 10 categories. Below I will briefly outline each category with some corresponding coded segments included in the footnotes.

The legitimacy of the Bush administration's claims of inherent powers in numerous aspects of the President's conduct of the GWOT ignited a spirited debate among scholars of the Constitution. In March of 2007, the Presidential Studies Quarterly even dedicated a special issue to the examination of the matter. Throughout the volume, a group of distinguished scholars "of different disciplines and persuasions… analyze[d] the nature and scope of the president's power to exercise inherent authorities."[797]In his introduction of the special issue, Louis Fisher proposes a taxonomy of inherent powers. He classifies one type as "implied," referring to a category "that can be reasonably drawn from express powers."[798] In the same paragraph, however, the renowned constitutional scholar declares the Executive Branch's assertions of inherent power

---

[795] Id.

[796] "Inherent Authority," in *Wex Legal Dictionary* (Legal Information Institute, n.d.), https://www.law.cornell.edu/wex/inherent_authority.

[797] Fisher, "Invoking Inherent Powers: A Primer," 1.

[798] Id. 1–2.

ineligible to be included in that category on the grounds that they are "'over and beyond those explicitly granted in the Constitution or reasonably to be implied from express powers.'"[799] Writing in the same volume, Neil Kinkopf similarly argues that presidential claims of "inherent power – [] in the strong sense that *power does not derive from a specific provision of the Constitution and is not subject to limitations enacted in statutes passed pursuant to the Constitution*" – are necessarily *ultra vires*. This latter definition pinpoints the contributors' main concern with what Fisher describes as "open-ended authorities that are not easily defined or circumscribed;"[800] namely, if inherent presidential powers are accepted as emanating from express ones, then they are arguably beyond Congress's authority to regulate by statute. Such unregulable presidential powers, according to Fisher, "move a nation from one of limited powers to boundless and ill-defined authority."[801]

Although I do not disagree with Fisher, the critique of inherent presidential powers is complicated by the fact that the Executive Branch is not alone in claiming to possess such powers.[802] To wit, the unenumerated power of judicial review was recognized by the Supreme Court as early as 1803 in an exercise of auto-interpretation of the federal judiciary's institutional powers.[803] Since then, courts have employed numerous implied powers not textually committed in the Constitution but "necessary to the exercise" of the judicial power.[804] Although the relevant case law is not entirely consistent on this point, in several instances "the Court has adopted a []

---

[799] Id. (quoting the sixth edition of *Black's Law Dictionary*, the "inherent power" entry I quoted above is from the 8th edition).

[800] Fisher, "Invoking Inherent Powers: A Primer," 2.

[801] Id.

[802] Joseph J Anclien, "Broader Is Better: The Inherent Powers of Federal Courts," *NYU Annual Survey of American Law* 64 (2008): 41 ("These inherent powers are unquestionably critical to the federal judicial system. Courts rely heavily on them to manage litigation and to sanction refractory parties. Despite the significance of these powers, and despite the fact that the Supreme Court has recognized their existence since at least 1812, they have been described as 'nebulous' and possessing 'shadowy' bounds.") (internal citations omitted).

[803] *Marbury v. Madison*, 5 US 137 (1803) ("It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each.")

[804] *United States v. Hudson*, 11 US (7 Cranch) 32, 34; *see also* Anclien, "Broader Is Better: The Inherent Powers of Federal Courts." ("The inherent powers jurisprudence is rich and varied. While courts typically use their inherent powers to manage litigation and to sanction parties, these categories are so amorphous that they underscore a cardinal truth: courts have relied on their inherent powers at every stage of trial. Above all, inherent powers cases reflect justice's 'suppleness of adaptation to varying conditions.'")

muscular stance in favor of inherent judicial power,"[805] claiming that they can "neither be abrogated nor rendered practically inoperative" by legislation.[806] Elsewhere, the Court held that it will not "lightly assume" that statutory law can dispose of the inherent powers of the federal courts.[807] Thus, if nothing else, the Judiciary has substantiated the existence of inherent institutional powers, which are beyond the reach of statutory law to regulate or extinguish.

Proponents of the separate sources model (SSM), and, by extension, implied Article II powers, use similar arguments to defend the constitutional powers of the President, whether express or implied. They contend that under the Constitution "the powers of the office [of the President], especially the enumerated powers… [are] … not derived from or limited by the legislative powers granted Congress in Article I. The powers of the president [are] not those of Congress to confer upon the executive, nor could they be modified or rescinded by congressional action."[808] According to Professor Bessette, a vocal critic of Justice Jackson's *Youngstown* concurrence and proponent of the SSM of institutional powers, "[t]he presidency is a constitutional office, not an agency of the Congress, and receives its powers directly from the Constitution."[809]

The denomination of the grants of presidential powers in "loose and general expressions," as Abel Upshur wrote long ago, has left ample room for interpretation as to the specific bounds of executive authority. According to Abraham Sofaer, "[t]he Framers did not adopt any specific model of executive power in shaping the presidency. They created an office with many though not all the powers considered 'executive' [], including the powers to interpret and execute laws and treaties, handle the country's international relations, and act as

---

[805] Benjamin H. Barton, "An Article I Theory of the Inherent Powers of the Federal Courts," *Catholic University Law Review* 61 (2011): 3.

[806] *Michaelson v. United States*, 266 US 41, 67 (1942); *see also* Id. 65 ("it is contended that the statute materially interferes with the inherent power of the courts, and is therefore invalid.").

[807] *Chambers v. Nasco* 501 US 32 (1911) ("'we do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power.").

[808] Richard M. Pious, *The American Presidency* (New York: Basic Books, 1979), 29.

[809] Joseph M Bessette, "Rethinking Justice Jackson's Concurrence in Youngstown v. Sawyer," in *The Limits of Constitutional Democracy*, ed. Jeffery K. Tulis and Stephen Macedo (Princeton University Press, 2010), 202; *also quoting* Richard Pious, *The American Presidency*, (New York: Basic Books, 1979), 29 ("[Article II] made it clear that the powers of the office, especially the enumerated powers that followed, were derived from the Constitution, not derived from or limited by the legislative powers granted Congress in Article I. The powers of the president were not those of Congress to confer upon the executive, nor could they be modified or rescinded by congressional action.").

commander in chief." As I argue in this dissertation, the systemic influences that have shaped the behavior of the Executive Branch, including the critical juncture, forced it not only to interpret laws for their constitutionality, but also its own powers vis-à-vis the coordinate branches. Ultimately, the Executive Branch's structural position and the "growth potential" of inherent powers,[810] coupled with the juridification of politics, have borne out Woodrow Wilson's observation that the President "has the right, both in law and conscience, to be as big a man as he can… [O]nly his capacity will set the limit[.]"[811]

My aim here is not to decide the debate over the Framers' original intent regarding the Constitution's separation of powers scheme. Other scholars have done that *ad infinitum*. My point is also not to suggest that endeavors to ascertain the Framers' intent regarding institutional power relations is in vain or impractical given the real-world functioning of the separation of powers system. Instead, as I set out to do from the beginning, I want to highlight the Executive Branch's original jurisprudence and evaluate whether its legal interpretations amount to alternative policy instruments enabled by the juridification of politics. Part of that endeavor is to examine the Bush memoranda's separation-of-powers arguments, their logic, and internal consistency (or lack thereof). Ultimately, my investigation of the Bush OLC's institutional powers jurisprudence should elucidate the coordinate branches' functional departmentalism and shed light on the legal arguments used to counteract the Watergate Regime's statutorily imposed constitutional corrective. Coupled with the comparative material in Chapters Seven and Eight, this study will also reveal whether the Bush administration's inherent power claims were *sui generis*, and, consequently, an aberration. Finally, my findings in this chapter and in the corresponding comparative material should demonstrate whether there is a need for a more robust and principled defense of institutional checks and balances, especially in times of national security crisis.

---

[810] Pious, *The American Presidency*, 30 ("when [James Wilson] and Gouverneur Morris use the term 'The Executive Power' they were seeking deliberately to build into the Constitution an open-ended clause useful to expand the powers of the presidency. Indeed, the common rules of construction that then prevailed assumed that general terms might imply more than the enumerated powers that followed.").

[811] Woodrow Wilson, *Constitutional Government in the United States*, Kindle Edition (Wilson Press, 2013), 39.

THE BUSH OLC'S DEFINITION OF INHERENT POWERS

Before I delve into specific legal policy areas, I will first examine the Office's definition of inherent powers as well as its identification of constitutional sources that emerge from the textual data. According to the Bush OLC, "the Framers unbundled some plenary powers [of the King] that had traditionally been regarded as 'executive,' assigning elements of those powers to Congress in Article I, while expressly reserving other elements as enumerated executive powers in Article II."[812] Apart from those textually committed, OLC explains, the Vesting Clause also "conveyed to the President" "unenumerated executive powers,"[813] which are not a feature of Article I. The difference lies in the limiting scope of the Vesting Clauses in Article I, which "gives Congress only the powers 'herein granted,'"[814] while its counterpart in Article II confers on the President a "sweeping grant"[815] of executive powers, including extratextual ones. "This understanding of the constitutional text and structure has led," according to OLC, "to the recognition that the President enjoys powers, such as the removal of executive branch officials," which, though they may not be textually present in Article II, "are an essential part of the executive power."[816] In the rest of this sub-section, I will look at specific inherent power claims.

INHERENT TREATY POWERS

As we saw above, the Bush OLC's construction of the president's foreign affairs powers as being in a "dominant constitutional position," coupled with the location of the Treaty Clause in Article II (subject only to the Senate's advice and consent) results in "plenary presidential

---

[812] *War Powers Memo* at 21.
[813] Id; *see also Treaties and Laws Memo* at 65; *Torture Memo* at 134; *Domestic Military Memo* at 31; *ABM Treaty Memo* at 22.
[814] Id. At 22; *see also* identical or near-identical language in *AUMFI Memo* at 11; *Domestic Military Memo* at 29; *Transfer Memo* at 23; *SJAA Memo* at 43; *War Powers Memo* at 21.
[815] *Torture Memo* at 134.
[816] *ABM Treaty Memo* at 25.

authority" over treaty making.[817] According to the *ABM Treaty Memo,* based to the Vesting Clause logic, other ancillary treaty powers must also be construed to remain with the President:

> Article II's structure confirms that executive power in this area is broader than the authorities listed in Article II, § 2. Simply because Article II, § 2's Treaty Clause does not specifically detail the location of relevant corollary powers does not mean that such powers be in the hands of the Senate. Rather, these powers must remain within the President's general executive power.[818]

Consequently, post-ratification powers such as treaty interpretation, treaty suspension, and treaty termination "must reside in the President as a necessary corollary to the exercise of the President's other foreign affairs powers."[819] As OLC explains, these inherent and exclusive treaty powers are crucial tools in the President's conduct of the nation's foreign relations.[820]

INHERENT POWER TO USE MILITARY FORCE IN DEFENSE OF THE NATION

According to the Bush OLC, the President has inherent power implied in the Commander in Chief Clause to respond to sudden attacks. This is perhaps the least controversial of the President's inherent powers, supported by the Supreme Court's opinions in the *Prize Cases*, *The Apollon*, and *Martin v. Mott*,[821] as well as the D.C. Circuit's more recent ruling in *Campbell v.*

---

[817] Id. at 28; *see also*, Id. at 52.
[818] Id. at 24.
[819] Id. at 31.
[820] Id. ("As noted before, the President is the sole organ of the nation in regard to foreign nations. A President, therefore, may need to terminate a treaty in order to implement his decision to recognize a foreign government. Or, for example, the President may wish to terminate a treaty in order to reflect the fact that the treaty has become obsolete, to sanction a treaty partner for violations, to protect the United States from commitments that would threaten its national security, to condemn human rights violations, or to negotiate a better agreement.")
[821] *War Powers Memo* at 53, quoting *The Apollon*, 22 US 362, 366 ("As Justice Joseph Story said long ago, '[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws.'"); *Prize Cases*, 67 US 635, 668 (If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."); *Martin v. Mott*, 25 US (12 Wheat.) 19 (1827) ("the [domestic] power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion.")

Clinton,[822] and specifically recognized in the 1973 War Powers Resolution.[823] OLC also argues, however, that the President can use military force not only in response to an actual attack,[824] but generally to "defend that national security of the United States."[825] In fact, both the Clinton and Bush 41 administrations justified their military actions against Iraq as based on the President's inherent constitutional power[826] to "use force even before an attack on the United States [or its interests] actually occurs, against targets and using methods of his own choosing."[827] The Congress acknowledged as much in the 2001 AUMF by stating that "the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States."[828] According to OLC's opinion expressed in the *Military Interrogation Memo*, this inherent power enables the President to "direct a military campaign against al Qaeda and its allies."[829]

As a general matter, overlaps between inherent powers and plenary powers are not remarkable, given that one label signifies scope while the other signifies provenance. However, OLC's plenary power rationale regarding the President's use of military force makes the inherent

---

[822] 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J. concurring) ("[T]he President, as commander in chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval.").

[823] 50 USC §1541(c)(3) ("The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.").

[824] I referred to this in Part 1 as conceptual stretching and the recalibration of Supreme Court precedent.

[825] *AUMFI Memo* at 10; this conclusion appears to be supported by Justice Kennedy's opinion in *U.S. v. Verdugo-Urquidez*, 494 US 259, 273 (1990) ("The United States frequently employs armed forces outside the country – over 200 times in our history - for the protection of American citizens or national security.")

[826] *AUMFI Memo* at 15 ("President Clinton directed the extensive and sustained 1999 air campaign in the Former Republic of Yugoslavia, he relied entirely on his 'constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.'").

[827] *War Powers Memo* at 95; see *also*, *Domestic Military Memo* at 32 ("to the extent that the constitutional text does not explicitly allocate to a particular branch the power to respond to critical threats to the nation's security and civil order, the Vesting Clause provides that it remains among the President's unenumerated executive powers."); *NSA Memo* at 49 ("Among the President's most basic constitutional duties is the duty to protect the Nation from armed attack. The Constitution gives him all necessary authority to fulfill that responsibility."), 40; *AUMFI Memo* at 6 ("As Chief Executive and Commander in Chief of the Armed Forces of the United States, the President possesses ample authority under the Constitution to direct the use of military force in defense of the national security of the United States…"), 15.

[828] Pub. L. No. 107-40, policy statement; *see also*, *Martin v. Mott*, *Martin v. Mott*, 25 US (12 Wheat.) 19 (1827) ("the [domestic] power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion.").

[829] *Military Interrogation Memo* at 52.

power analysis appear, at least at first glance, redundant. Although the legal opinions are not entirely consistent on this point, it seems that the distinction is due to OLC's bifurcated characterization of institutional powers and spheres of authority. Accordingly, OLC claims plenary authority to use military force in the realm of external affairs (as a means to achieve foreign policy goals), while it asserts inherent presidential power to take military action in response to a threat to the domestic security of the United States. In terms of regulability, however, OLC argues that, due to both of them stemming from express constitutional powers, neither the President's plenary authority to use military force abroad, nor the inherent authority to defend the national security of the United States is subject to statutory restrictions. As Robert Jackson wrote during his short stint as FDR's Attorney General, "in virtue of his rank and head of the forces, [the President] has certain powers and duties with which Congress cannot interfere."[830]

DETERMINATION THAT AN ATTACK HAS TAKEN PLACE AND THE TAKING OF REQUISITE ACTION

As a prerequisite to the President's ability to use military force to defend the Nation, OLC also asserts inherent constitutional authority to "determin[e] whether an attack has occurred and what response to take."[831] As the Supreme Court explained in the *Prize Cases*, if the Nation is invaded, the President "is bound to resist force by force;" moreover, "he must determine what degree of force the crisis demands."[832] More recent precedent indicates that the President's determinations in this area are unlikely to be reviewed by the courts.[833] Some non-legal factors that OLC suggests the President may consider in deciding whether an attack has happened (which triggers his inherent constitutional power to respond) are "the nature of the attack, its magnitude, the number of casualties, the effect on the nation, and whether the attacks are part of a broader conflict with the enemy."[834]

---

[830] *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61 (1941).
[831] *Domestic Military Memo* at 52.
[832] *Prize Cases*
[833] *Campbell v. Clinton* 203 F.3d 19, 27 (Silberman, J. concurring) ("the President has independent authority to repel aggressive acts by third parties even without congressional authorization, and courts may not review the level of force selected.").
[834] *Domestic Military Memo* at 52.

THE POWER TO CONVENE MILITARY COMMISSIONS

According to OLC's interpretation, the President also has "inherent authority as Commander in Chief to convene military commissions" without authorization from Congress.[835] The power to convene military commissions is a corollary of the President's plenary authority to conduct military operations. Although MCs have also been authorized by legislation,[836] statutory permission is unnecessary given the pre-existing constitutional authority.[837] Since "military commissions are an instrumentality of the commander used in carrying out military operations against enemy forces," congressional regulation of MCs is only permissible if it does not "interfere with the President's authority as Commander in Chief."[838] Given that unilateralizing language, one might wonder whether OLC deems any degree of procedure-setting by the legislature to be allowable. While the *Military Commissions Opinion* does not answer that question, the *SJAA Memo* does. In OLC's reading, military commissions cannot be treated "as anything other than creatures of the President's authority as Commander in Chief," therefore, "imposing procedures for military commissions" by statute would raise "serious [constitutional] question."[839] As I pointed out in Part {d) of Chapter Four on military commissions, this line of excusive authority reasoning harkens back to WWII-era institutional practice that was out of step with the intervening judicialization of politics, and it was repudiated by the Supreme Court in *Hamdan*. Nevertheless, it bears repeating here that the most momentous policy-setting effect of OLC's MC-related opinions is not the attempt at the formalization of military commissions

[835] *Military Commissions Opinion* at 9 ("The President both has inherent authority as Commander in Chief to convene military commissions and has received authorization from Congress for their use to the full extent permitted by past executive practice."), 27, 72 ("By making the President Commander in Chief of the armed forces, the Constitution must be understood to grant him the full authorities required for him to effectively defend the Nation in the event of an armed attack. Necessarily included among those powers must be the ability to determine whether persons responsible for an attack should be subject to punishment under the laws of war."); *see* also *SJAA Memo* at 27, 33 ("If the President's inherent power as Commander in Chief extends to the creation of military commissions as occupation courts, there is no logical reason to conclude that it does not equally extend to the creation of military commissions as courts for enforcing the laws of war. If anything, the latter function is more inextricably involved in the President's role as military commander in supervising the actual conduct of hostilities."), 49.
[836] 10 USC §821.
[837] *Military Commissions Opinion* at 9, 27.
[838] *Military Commissions Opinion* at 25.
[839] *SJAA Memo* at 31.

(including the power of MCs' procedure-setting) in constitutional law terms, but their successful importation of a fixture of classical battlefield warfare into the legal framework of the non-traditional GWOT. Although OLC's opinions assert more unilateral power over MCs than the Supreme Court was willing to give, *Hamdan* deferred to the Executive Branch's judgment that military commissions were the proper forum for litigation over punishment of suspected terrorists. Thus, OLC's inherent power claim was tacitly upheld, and jurisdiction transferred from Article III courts to Article II courts, subject to the procedural rules articulated in the subsequently-enacted Military Commissions Act.

INHERENT POWER OVER ENEMY BELLIGERENTS

As I pointed out above, the Bush OLC's legal position is that the President has "plenary authority over enemy belligerents in an armed conflict."[840] OLC locates the more specific "inherent authority to dispose of the liberty of prisoners of war" in the President's "constitutional position as Commander in Chief."[841] Accordingly, The *Padilla Memos* find that the President can militarily detain an enemy combatant located within the United States due to his inherent constitutional authority.[842] In OLC's review of historical practice, the power to "handle and control prisoners of war" was first exercised by George Washington, as a function of his authority as Commander in Chief of the Continental Army.[843] The broad power to "handle and control prisoners of war" subsumes the authority to "establish [] living conditions,"[844] to "effect retaliatory measures,"[845] and to engage in "prisoner of war transfers."[846] Furthermore, as we learn from *Transfer Memo*, the Bush OLC identifies the source of the President's power to "make

[840] *SJAA Memo* at 31.
[841] *Transfer Memo* at 51.
[842] Not only because of the constitutional override clause in the PCA, but also because the battlefield had been brought to the United States.
[843] Id. at 33. ("neither the Continental Congress (which itself was more of an executive branch than a legislature that could tax or legislate) nor the state assemblies questioned his authority to handle and control prisoners of war. In this respect, General Washington exercised his authority in line with the traditional Anglo-American understanding of the scope of the Commander-in-Chief power.")
[844] Id. at 44.
[845] Id. at 41, 49.
[846] Id. at 66.

unilateral determinations regarding the disposition of captured enemies" as either implied in the "entrustment of the Commander-in-Chief power" or inherent in the executive power "by virtue of the broad sweep of the Vesting Clause."[847] As I noted above, the Bush OLC regards the capture, detention, and transfer of enemy belligerents as a crucial component of the President's conduct of the Nation's foreign affairs.

INHERENT POWER OF FOREIGN INTELLIGENCE GATHERING

According to the Bush OLC's institutional powers analysis, the President has plenary authority as Commander in Chief to conduct hostilities. Given the "long-established understanding that [intelligence gathering] is a fundamental incident of the use of military force," OLC infers that the power to undertake foreign intelligence activities is inherent in the Commander-in-Chief Clause.[848] Since it is the President alone who has authority to conduct a military campaign, he must be able "to make tactical military decision" regarding intelligence gathering.[849] This, in turn, includes the authority to interrogate captured enemy combatants.[850] As OLC explains in the *Torture Memo*, the President's plenary power over the conduct of hostilities depends on his ability to gather human intelligence "that only successful interrogations can provide."[851] This power is an exclusive one, as "Congress can no more interfere" with the President's authority over the conduct of interrogations "than it can dictate strategic or tactical decisions on the battlefield."[852]

---

[847] *Transfer Memo* at 23.
[848] *NSA Memo* at 72.
[849] Id. at 102.
[850] *Miranda Opinion* at 63 ("[I]nterrogation of prisoners seized in battle is undertaken as a matter of course to determine information such as what units of the enemy forces are operating in the area, their position, strength, supply status, etc., as well as information of broader use for intelligence concerning enemy plans and capabilities for launching strikes against U.S. positions. In the context of an armed conflict, it seems readily apparent that *all* such information relates directly to the safety and protection of American troops, who are constantly exposed to the dangers of combat. In addition, in this conflict, given the demonstrated ability of the enemy to attack military and civilian targets around the globe, including within the United States (and given the repeated vows to continue such attacks), interrogations for intelligence and national security purposes may additionally develop information critical for thwarting further imminent loss of American lives far from the immediate scene of battle in Afghanistan.").
[851] *Torture Memo* at 137.
[852] *Military Interrogation Memo* at 75.

In the *NSA Memo*, the Bush OLC makes the case for the President's inherent authority to gather intelligence through warrantless foreign intelligence surveillance. According to OLC's institutional powers analysis, this is not "simply [an] exercise[] of the President's general foreign affairs powers; rather, "[it is] primarily an exercise of the President's authority as Commander in Chief during an armed conflict that Congress has authorized the President to pursue."[853] Warrantless electronic surveillance is also justified as an aspect of the President's inherent power to "prevent a renewed attack" against the United States.[854] Based on historical practice, OLC claims that the President has "well-recognized inherent constitutional authority as Commander in Chief and sole organ of the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States."[855] As Attorney General Griffin Bell's testimony before the House Intelligence Committee in 1978 demonstrates, the Executive Branch has consistently held the position that the Foreign Intelligence Surveillance Act cannot curtail the President's inherent power in this area. According to Bell, "the current bill [FISA] recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that this does not take away the power [of] the President under the Constitution."[856] Here, too, the foreign vs. domestic dichotomy plays an important role in the extent of the President's ability to act unilaterally, even against statutory rules governing electronic surveillance.[857]

---

[853] *NSA Memo* at 110.
[854] Id. at 142.
[855] *NSA Memo* at 19; *see also NSA Memo* at 72, 107.
[856] *NSA Memo* at 44.
[857] Id at 102 ("any doubt as to whether the AUMF and FISA should be understood to allow the President to make tactical military decisions to authorize surveillance outside the parameters of FISA must be resolved to avoid the serious constitutional questions that a contrary interpretation would raise."); *NSA* Memo at 46 ("After *Keith*, each of the three courts of appeals that have squarely considered the question have concluded—expressly taking the Supreme Court's decision into account—that the President has inherent authority to conduct warrantless surveillance in the foreign intelligence context."); see also, US v. Truong Ding Hung, 629 F.2d 908, 915 (4th Cir., 1980) ("We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis of a criminal prosecution.) (emphasis added).

JUDICIAL RECOGNITION OF INHERENT POWERS

Writing in the special issue of the PSQ on inherent presidential powers, the political scientist and constitutional scholar Richard Pious concludes that "[s]cholars won the battle of constitutional analysis [of separation of powers], but they have lost the war over executive power."[858] If advocates of the CPM did lose the war, it is due, in large part, to the federal courts' recognition of broad executive authority in foreign affairs, and their validation of the existence of inherent powers, including presidential ones. As I noted above, the federal courts specifically recognized the President's power to respond to a sudden attack as well as to decide when an attack has happened. According to D.C. Circuit Judge Silberman's concurring opinion in the *Clinton* case, that power is unreviewable by the courts.[859]

The federal judiciary has also been solicitous of the President's inherent power to gather foreign intelligence, recognizing the Executive Branch's "pre-eminent authority in foreign affairs."[860] In 1979 the Fourth Circuit Court of Appeals undertook to decide *U.S. v. Truong Dinh Hung*, a case that arose prior to the passage of FISA and, therefore, posed the question whether warrantless electronic surveillance could be authorized based on the President's independent constitutional authority. The appellees, David Truong and Ronald Humphrey, had been charged and convicted of espionage, conspiracy to commit espionage, and other espionage-related crimes for transmitting classified government information to the Socialist Republic of Vietnam. Appellees argued that the government had violated the 4th Amendment because the FBI failed to secure a warrant for electronic surveillance of Truong's phone and residence. The government's defense rested on a special exception to the 4th Amendment, arguing that the President's approval of the operation was sufficient to obviate the warrant requirement.[861] Upon hearing the case, the 4th Circuit agreed with the government's position. Writing for the majority,

---

[858] Pious, "Inherent War and Executive Powers and Prerogative Politics."
[859] *Campbell v. Clinton* 203 F.3d 19, 27 (Silberman, J. concurring) ("the President has independent authority to repel aggressive acts by third parties even without congressional authorization, and courts may not review the level of force selected.").
[860] *US v. Truong Ding Hung*, 629 F.2d 908 (4th Cir., 1980)
[861] Id. ("In the area of foreign intelligence, the government contends, the President may authorize surveillance without seeking a judicial warrant because of his constitutional prerogatives in the area of foreign affairs.").

Circuit Judge Winter formally acknowledged the Executive as the dominant branch in foreign affairs and national security, and recognized that institutional authorities bifurcate in the domestic *versus* foreign spheres:

> [T]he executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs… so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance. [Consequently,] the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would... "unduly frustrate" the President in carrying out his foreign affairs responsibilities[862]

Nearly a quarter century later, examining the constitutional question of the President's power vis-à-vis FISA's statutory constraints, the Foreign Intelligence Surveillance Court of Review (FISCR),[863] firmly established the existence of independent, inherent executive authority to conduct warrantless electronic surveillance for foreign intelligence purposes. In doing so, the FISCR did not only affirm the principle established by the Supreme Court in *Michaelson* that inherent powers can "neither be abrogated nor rendered practically inoperative"[864] by legislation, but it also indirectly endorsed the separate sources model:

> The *Truong* Court, as did all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. It was incumbent upon the [*Truong*] court, therefore, to determine the boundaries of that constitutional authority in the case before it. We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.[865]

Lastly, as I pointed out in Chapter Five, the Bush OLC's construction of the President's treaty powers rests on the D.C. Circuit's decision in *Goldwater v. Carter*, the only judicial precedent that explicitly endorsed the President's inherent power of unilateral treaty

---

[862] Id.
[863] The sole purpose of the FISCR is to review denials of FISA warrants by the Foreign Intelligence Surveillance Court (FISC).
[864] *Michaelson v. U.S.*, 266 US 41, 67 (1942).
[865] *In re Sealed Case*, 310 F.3d 717, 742 (FISC of Review, 2002).

termination.[866] Although the majority in *Goldwater* did not use the term "inherent power," the opinion's language makes the inference (that the unilateral termination authority is inherent in the President's power over treaties) inevitable. The relevant section of the *per curiam* opinion reads as follows:

> The Constitution specifically confers no power of treaty termination on either the Congress or the Executive. We note, however, that the powers conferred upon Congress in Article I of the Constitution are specific, detailed, and limited, while the powers conferred upon the President by Article II are generalized in a manner that bespeaks no such limitation upon foreign affairs powers. "Section 1. The executive Power shall be vested in a President…" Although specific powers are listed in Section 2 and Section 3, these are in many instances not powers necessary to an Executive, while "The executive Power" referred to in Section 1 is nowhere defined. There is no required two-thirds vote of the Senate conditioning the exercise of any power in Section 1… The President is the constitutional representative of the United States with respect to external affairs. It is significant that the treaty power appears in Article II of the Constitution, relating to the executive branch, and not in Article I, setting forth the powers of the legislative branch… It would take an unprecedented feat of judicial construction to read into the Constitution an absolute condition precedent of congressional or Senate approval for termination of all treaties, similar to the specific one relating to initial approval. And it would unalterably affect the balance of power between the two Branches laid down in Article I and II.[867]

In sum, not only have the federal courts helped normalize inherent institutional powers in general, but they have also validated many of the Executive Branch's inherent power claims. Unsurprisingly, *Truong*, *Goldwater*, and *In re: Sealed Case* are the most often cited Circuit Court cases in the Bush corpus with 6 coded segments each.[868]

***

[866] I also pointed out that the Supreme Court vacated the D.C. Circuit's ruling; nevertheless, the Bush OLC relied on both the *de facto* precedent set by President Carter's unilateral termination of the Sino-American Mutual Defense Treaty and the *de jure* precedent articulated by the D.C. Circuit.

[867] *Goldwater v. Cater*, 617 F.2d 697 (D.C. Cir., 1979).

[868] The FISCR only reviews rejected FISA applications and has appellate jurisdiction. Therefore, it is hierarchically on a par with a U.S. Circuit Court; its decisions are only subject to Supreme Court review.

When federal judges interpret Acts of Congress and examine executive actions for their constitutionality, they must decide what the nation's founding document requires. As Chief Justice John Marshall famously wrote in *McCulloch v. Maryland*, "we must never forget that it is a constitution we are expounding."[869] Where the Constitution is clear, the judge's job is relatively straightforward. According to Justice Kennedy, [w]here a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself. It is improper for this Court to arrogate to itself the power to adjust a balance settled by the explicit terms of the Constitution."[870]

However, presidential powers are notoriously ill-defined. While the federal courts have recognized the existence of inherent presidential powers, opening the proverbial door to assertions of Executive legal authority emanating from textual provisions of the Constitution, some of the relevant case law (*Youngstown*) and institutional practice (Watergate) leave the Executive Branch in a juridical limbo. Therefore, it is the job of the Office of Legal Counsel to "interpret statutes and treaties so as to protect the President's constitutional powers from impermissible encroachment and thereby to avoid any potential constitutional problems."[871] OLC's separation of powers opinions and its claims of inherent presidential powers are crucial weapons in this endeavor.

In conclusion, it appears that the critics of the Bush administration's inherent powers claims are correct to point out that the Office of Legal Counsel found inherent powers to justify unilateral presidential action rather than commit to "balanced institutional participation in [] national security [] policy."[872] However, textual analysis reveals that those powers are not completely beyond reasonable inference from express ones. Rather, historical practice and inherent powers flow together – in order to corroborate assertions of inherent powers, OLC must show institutional practice that indicates substantive authority rather than feckless illation. The coalescence of historical practice with inherent power claims serves as a check on potentially

---

[869] 17 US 316, 407 (1819).
[870] *Public Citizen v. Department of Justice*, 491 US 440, 486 (1989).
[871] *Transfer Memo* at 82.
[872] Harold Hongju Koh and John Choon Yoo, "Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law," *The International Lawyer* 26, no. 3 (1992): 732.

unrestrained executive legal interpretive authority. Although it is not tantamount to congressional government (CPM), "quasi-constitutional custom"[873] is a powerful legitimating authority, and, as I will argue below, a conservative force that wards against politically expedient and legally tenuous results.

THE BUSH OLC'S ABANDONMENT OF THE FRANKFURTARIAN INTERPRETIVE TRADITION

Before moving on to other elements of the Bush OLC's institutional powers jurisprudence, I would like to take this opportunity to conclude the sections on institutional practice and independent presidential powers. It is a good place to conclude, because the foregoing discussion provides a good vantage point to see how a combination of the SSM, inherent powers, and OLC's abandonment of established institutional practice led to extreme conclusions with lamentable policy outcomes. At the beginning of this section (1), I quoted Bradley and Morrison who argue that historical practice may not always yield normatively desirable outcomes when it comes to presidential power. However, from my extensive content analysis of the GWOT memos, it appears that the Bush OLC reached the most egregious conclusions, plainly violative of individual rights and international commitments, when it chose to disregard, rather than follow, institutional practice. Below, I shall describe the domino effect that led to OLC's rationalization of enhanced interrogation techniques as an acceptable exercise of the President's inherent power to gather intelligence by means of interrogation of captured enemy belligerents.

The Bush OLC's legal opinions are tightly interwoven, and interdependent to a fault. The degree of interconnectedness that one can observe in the GWOT memos is *prima facie* evidence of the legal strategy, indeed, a veritable legal construction project, that was underway in the early years of the War on Terror. If we examine the building blocks of the GWOT legal architecture, we can find stepping stones that led from the *ABM* rationale of unilateral treaty termination, through the suspension of the Geneva Conventions, to the enhanced interrogation techniques that were authorized in the *Torture*, *Zubaydah*, and *Military Interrogation Memos*. In

[873] Id. 733.

what follows, I will briefly revisit the arguments presented in Chapter Five in order to contextualize my conclusion regarding OLC's jettisoning of historical practice.

As we saw in Part 2, the Bush OLC argues that the President has plenary authority over treaties. That plenary authority arises, in part, from express constitutional provisions, complemented by the inherent powers of treaty termination and suspension. The *ABM Treaty Memo* uses broad and unqualified language in its conclusion regarding the ambit of the President's authority on this score:

> The President's power to suspend treaties is wholly discretionary, and may be exercised whenever he determines that it is in the national interest to do so. While the President will ordinarily take international law into account when deciding whether to suspend a treaty in whole or in part, his constitutional authority to suspend a treaty provision does not hinge on whether such suspension is or is not consistent with international law… Whether the considerations in favor of suspending, breaching or terminating a treaty are sufficient to outweigh the countervailing risks of sanctions or liability for those actions is for the President, as the Nation's constitutional representative in its foreign affairs, to decide.[874]

Predictably, the "*ABM* rationale" is ubiquitous in the international law-related portions of the Bush corpus. It is also the dispositive legal argument for the suspension of the Geneva Conventions vis-à-vis al Qaeda and the Taliban in the *Treaties and Laws Memo*.[875] It is important to remember, however, that OLC never interprets the legality of contemplated action in a vacuum, relying, instead, on historical practice. Indeed, evidence shows that institutional practice and long-established international norms counseled against suspension.

First, according to the Vienna Convention,[876] general rules of international law authorizing treaty suspension "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."[877] Since the Vienna Convention has

---

[874] *ABM Treaty Memo* at 51.
[875] This is a bit of a generalization. In fact, in the Bush OLC's legal analysis, the Geneva Conventions simply do not apply to al Qaeda due to it being a non-governmental organization.
[876] The U.S. is not party to the Vienna Convention, however, according to the U.S. Department of State, the United States has considered "many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law" (U.S. Department of State, https://www.state.gov/s/l/treaty/faqs/70139.htm).
[877] Vienna Convention on the Law of Treaties, art. 60(5).

been languishing in the Senate since 1970, awaiting "advice and consent," the United States is merely a signatory rather than a party to that treaty. Consequently, the Vienna Convention is not legally binding. Nevertheless, it has been the policy of the U.S. government to regard the Convention as customary international law and abide by its precepts as a matter of policy. Second, the Geneva Conventions themselves appear to preclude suspension. As common Article 1 stipulates, "[t]he High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances."[878] Taken together, it appears that there were well-established customs and international law constraints in place that counseled against the suspension of the Geneva Conventions. However, even if we posit that the President does possess unqualified unilateral suspension authority, we should still see due weight being given to (historical) institutional practice in keeping with the Bush OLC's stated interpretive approach.

In the *Treaties and Law Memo*, the Bush OLC catalogues a long list of armed hostilities as examples of "United States practice in post-1949 conflicts" from the Korean War to the NATO intervention in Bosnia in which the Executive Branch chose, as a "matter of policy, without acknowledging any legal obligation" to afford captured enemy combatants the protections of the Third Geneva Convention (GC3).[879] According to the 2001 edition of the United States Army Operational Handbook, even in situations where common Article 2 conditions are not met,[880] "it is nonetheless, the position of the US, UN, and NATO that their forces will apply the 'principles and spirit' of the [LOAC, including GC3] in [their] operations."[881] That position is in keeping with Department of Defense policy first established in 1979 and repeatedly reissued since to "comply with the [LOAC] in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized."[882] Despite the longstanding rights-protective

---

[878] Laurence Boisson de Chazournes and Luigi Condorelli, "Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests," *International Review of the Red Cross* 837 (March 31, 2000), /eng/resources/documents/article/other/57jqcp.htm.

[879] *Treaties and Laws Memo* at 119.

[880] Meaning that a situation does not rise to the level of an international armed conflict.

[881] Mike O. Lacey and Brian J. Bill, eds., *Operational Law Handbook* (Charlottesville, VA: The Judge Advocate General's School, Int'l and Operational Law Dept., 2001).

[882] "Department of Defense Directive," 5100.77 AD-A272 470 § (1979), para. E(1)(a).; canceled and reissued as "Department of Defense Directive," 5100.77 § (1998), para. 5.3 ("Ensure that members of their DoD Components comply the [LOAC] during all armed conflicts, however such conflicts are characterized, and with the principles and

institutional practice of the Executive Branch, the Bush OLC's methodical dismantling of the United States' Geneva-based treaty obligations based on the *ABM* rationale indicates a clear break with past practice. Approximately midway through the *Treaties and Laws Memo*, OLC states that

> the President may determine that for reasons of diplomacy or in order to encourage other States to comply with the principles of the Geneva Conventions or other laws of armed conflict, it serves the interests of the United States to *treat* al Qaeda or Taliban detainees (or some class of them) as if they were prisoners of war, even though they do not have any legal entitlement to that *status.*[883]

In hindsight, we know that the Bush administration chose not to extend the protections of common Article 3 to members of al Qaeda and the Taliban as a matter of policy. As a matter of legal status, however, the *Treaties and Laws Memo* effectively stripped captured enemy combatants of the protections afforded by Geneva Conventions. By doing so, to quote Professor Pfiffner, it "ma[de] public policy in the sense that [it] allow[ed] [] certain actions."[884] Namely, it allowed "executive branch officials [] to take [] actions that [were otherwise] against the law," such as the War Crimes Act (WCA, 18 USC §2441) that specifically prohibits grave breaches of the Geneva Conventions and any conduct that constitutes a violation of common Article 3.[885]

To reiterate, even if we accept that the President can unilaterally suspend international treaties (even those of a humanitarian character), institutional practice as it existed before 9/11 should have swayed OLC's legal analysis away from the suspension of GC3. As I documented in section (1), the Bush OLC's opinions assert the salience of historical practice as a gloss on the executive power and a guiding star for institutional-powers interpretation. In light of the Bush OLC's particular emphasis on "the normative role of historical practice," that encompasses "not only the acts and decision of governmental decisionmakers," but also "their considered statements and judgments as to what they *could* do;" and its stated hermeneutical approach to "give considerable weight to the practice of the political branches in trying to determine the

---

spirit of the law of war during all other operations."); see also, Jack L. Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11*, 1st ed (New York: W. W. Norton & Co, 2012), 126.

[883] *Treaties and Law Memo* at 125.

[884] Pfiffner, *Torture as Public Policy*, 2010, 14.

[885] Id.

constitutional allocation" of institutional authorities; hewing to established historical practice should have been a foregone conclusion. Instead, the Office brakes with decades of institutional precedent, and advises the President that he could, and, indeed, should, suspend the Geneva Conventions with respect to members of al Qaeda and the Taliban.

Having stripped captured enemy combatants of the protections of the Third Geneva Convention[886] and having also disposed of the WCA as inapplicable, the Bush OLC also undertakes to decide what kind of conduct, in the course of interrogations, would constitute a violation of 18 U.S.C §2340, the Torture Statute. After a painstaking, narrowing interpretation of §2340 in the *Torture Memo*, roughly two-thirds of the way into the legal analysis, OLC turns to the question of the President's inherent power to interrogate captured enemy combatants. In line with the Office's stated interpretive methodology, the legitimating force of historical practice is brought to bear:

> It is well settled that the President may seize and detain enemy combatants, at least for the duration of the conflict, and the laws of war make clear that prisoners may be *interrogated* for information concerning the enemy, its strength, and its plans. Numerous Presidents have ordered the capture, detention, and questioning of enemy combatants during virtually every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars.[887]

In the normal course of the Bush OLC's opinion-writing schema, such a statement would be followed by a long list of historical instances of institutional behavior corroborating the existence of an inherent presidential power to interrogate captured enemy combatants, presumably also by resorting to extreme measures. Despite the claim that relevant historical practice exists "in virtually every major conflict in the Nation's history," neither the *Torture Memo* nor the *Military Interrogation Memo* offers any examples. Instead, in its feigned reliance on institutional practice, the *Torture Memo* goes on to say that "[r]ecognizing this authority [to interrogate], Congress has never attempted to restrict or interfere with the President's authority on this score."[888] Affirming

---

[886] Such as the prohibitions against "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" (Article 3(1)(a)); "outrages upon personal dignity, in particular, humiliation and degrading treatment" (Article 3(1)(c)).
[887] *Torture Memo* at 136 (emphasis added).
[888] Id.

an over-inflated inherent power to interrogate, untethered to any "operational reality," and untrammeled by the Geneva Conventions, the WCA, or the Torture Statute, OLC invokes the SSM and denies that statutory law could regulate the President's constitutional power over the conduct of hostilities: "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."[889]

In conclusion, it appears that Bradley and Morrison's contention that historical practice promotes "consistency and predictability" in separation of powers analyses is especially true in the Executive Branch's auto-interpretation of its own powers. In OLC's jurisprudence, reliance on historical/institutional practice accomplishes two things: (i) it is first and foremost a legitimating tool as it allows the Executive Branch to self-bind to Frankfurter's glows theory; (i) but, crucially, it is also a conservative force making the Office less likely to reach politically expedient results. As Justice Murphy wrote in dissent in *Yamashita*, "[i]f we are ever to develop an orderly international community based upon a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion, rather than by vengeance."[890] The Bush administration's desire for revenge, its vindictiveness against suspected terrorists, and its programmatic unilateralism dedicated to enhancing the powers of the presidency led to the abandonment of decades of accumulated institutional practice and produced free-wheeling authorizations of enhanced interrogation techniques divorced from the long-standing interpretive traditions of the Office of Legal Counsel.[891]

---

[889] Id at 137.

[890] *In re Yamashita*, 327 US 1, 29 (1946) (Murphy, J. dissenting).

[891] Walter E. Dellinger, "Principles to Guide the Office of Legal Counsel," December 21, 2004 (par. 4, "OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but also should reflect *the institutional traditions and competencies of the executive branch*[.]"

(3) APPLICATION(S) OF *YOUNGSTOWN* IN THE BUSH OLC'S LEGAL OPINIONS

Despite the status that *Youngstown* enjoys as a landmark Supreme Court precedent in questions involving the scope of presidential powers vis-à-vis those of Congress, legal scholars have pointed out that the Bush OLC "does not even mention *Youngstown* [in its separation-of-powers analysis] or attempt to distinguish it."[892] In section (1) above, I examined in detail the Bush OLC's institutional powers analysis and concluded that the omission (in parts of the corpus, at least) is a conscious choice rather than remissness; one that is based on the Executive Branch's departmentalist construction of the separation of powers that emphasizes the sufficiency of the President's constitutionally-derived authority in foreign affairs and national security. I also pointed out above that the Office does, in fact, distinguish *Youngstown* in the *NSA Memo* along the lines of spheres of institutional authority. Nevertheless, the Bush OLC's legal opinions do not disregard *Youngstown* altogether: Throughout Chapters Four and Five, I pinpointed instances where they acknowledge Justice Robert Jackson's three-tier framework either explicitly[893] or implicitly.[894] Four codes emerged during the parsing of the memoranda that help illuminate the Bush OLC's use of Jackson's tripartite scheme: *Endorsement of Action* (47 coded segments), *Recognition of Power(s)* (41), *Formalization of Informal Power(s)* (5), and *Congressional Acquiescence* (29). As I already explained why the Bush OLC distinguishes *Youngstown*, in this section I will elaborate on OLC's reliance on the steel-seizure case in some of its opinions, drawing primarily on the four pertinent codes.

Before I delve into the textual analysis, a brief recapitulation of Justice Jackson's three-part framework is in order. According to Jackson,

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate…

---

[892] Balkin, "Youngstown and The President's Power to Torture"; Clark, "Ethical Issues Raised by the OLC Torture Memorandum."
[893] In the *NSA Memo*, *Iraq Memo*, and the *War Powers Memo*.
[894] In the *Military Commissions Memo*, *AUMFI Memo,* and the *Padilla 2 Memo*.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain…
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter…

Under the CPM, most instances of legitimate presidential action (both in the domestic and foreign spheres) fall within category one: the President acting pursuant to congressional (statutory) authorization. If depicted as a Venn diagram, categories two and three would be represented by significantly smaller circles, one indicating independent (non-statutory), the other presumptively illegal (or extra-legal) presidential action. In my representation of the Bush OLC's separation of powers model on page 213, I created two sets of Venn diagrams: the first representing the SSM, i.e., separate/independent sources of constitutionally-derived institutional powers, with the second set (PPM), in which the President's circle is significantly larger, showing institutional authorities in foreign affairs. Given that they start from fundamentally different premises, as the diagrams on page 213 indicate, the CPM and the PPM are not mutually compatible. It begs the question, then, why the Bush OLC cites Jackson's *Youngstown* concurrence as a supporting authority at all. The *AUMFI Memo*, examining the legal and non-legal significance of the 2002 Joint Resolution authorizing the use of military force against Iraq (Pub. L. No. 107-234), is an ideal case study to answer that question.

OLC'S USE OF JACKSON'S CONCURRENCE

In the Bush OLC's auto-interpretation of the President's institutional authorities, executive action in the sphere of foreign affairs and national security is always legitimate if it is taken on the basis of some underlying express or implied (inherent) constitutional power. Therefore, OLC emphasizes that President Bush did not seek the Authorization for Use of Military Force against Iraq (AUMFI) "out of need for legal authority," he already possessed that by dint of his Article II powers, instead he did so in order to

> demonstrate, to the United Nations and to the current regime in Iraq, that the American people, as represented by both their President and their representatives in both Houses of Congress, fully support taking all action necessary and appropriate to enforce all relevant United Nations Security Council resolutions involving Iraq and to defend the United States against Iraq, including the use of force if necessary. *We recognize that, notwithstanding the President's pre-existing constitutional and statutory authorities to use force, there are significant non-legal reasons for the President and Congress jointly to state their renewed commitment, particularly in light of the terrorist attacks of September 11, 2001, to use force if necessary to deal with the threat posed by Iraq to the national security of the United States and to international peace and security in the Persian Gulf region.*[895]

In the *NSA Memo* OLC states that "[a] decision to seek congressional support can be prompted by many motivations, including a desire for political support."[896] Indeed, Presidents are likely to capitalize on the "rally-'round-the-flag" phenomenon[897] at the onset of crisis situations in order to extract generous grants of congressional authorization to respond to the emergency at hand.[898] Although the *AUMFI Memo* emphasizes the Joint Resolution's non-legal significance, it is quite evident that the Office of Legal Counsel "was an active participant in the drafting of and negotiations over the [2002 AUMFI]" due to its far-reaching *legal* consequences.[899]

First, in several places in the corpus (see Table 9: Endorsement of Action) the Bush OLC welcomes "statutory support" as buttressing "the President's [otherwise] independent [and sufficient] constitutional authority"[900] while conterminously rejecting congressional authorization as a precondition for presidential action:

> [w]e [the OLC] have no constitutional objection to Congress expressing its support for the use of military force against Iraq). Indeed, the Office of Legal Counsel was an active participant in the drafting of and negotiations over [the AUMFI]. We have long maintained, however, that resolutions such as [the AUMFI] are legally unnecessary […] [Since] [a]s Chief Executive and Commander

---

[895] *AUMFI Memo* at 7 (emphasis added).
[896] *NSA Memo* Footnote 15.
[897] John E. Mueller, *War, Presidents, and Public Opinion* (Lanham, MD: University Press of America, 1985), 21 ("[S]pecific, dramatic, and sharply focused international events directly involving the United States do indeed redound to the benefit, albeit short-lived, of an incumbent president's public approval rating.").
[898] Tushnet, "Controlling Executive Power in the War on Terrorism," 2678.
[899] *AUMFI Memo* at 6.
[900] *Iraq Memo* at 34.

> in Chief of the Armed Forces of the United States, the *President possesses ample authority under the Constitution to direct the use of military force in defense of the national security of the United States*[.][901]

In any event, given the ubiquity and status of *Youngstown* in separation-of-powers analyses, statutory support serves to legitimate executive action by elevating it into Jackson's first category.[902] According to the tripartite framework, the President's authority in category 1 is at its maximum because "it includes all that he possesses in his own right plus all that Congress can delegate."[903] Thus, while under the Bush OLC's institutional powers analysis "congressional support"[904] is not "legally necessary,"[905] it, nonetheless, "removes all doubt of the President's power to act."[906] In the *War Powers Memo*, one of only three legal opinions that specifically refers to Jackson's concurrence, OLC states that due to the enactment of the AUMF, "the President can be said to be acting at the apogee of his powers… for he is operating both under his own Article II authority and with the legislative support of Congress."[907] While this language suggests fidelity to Jackson's design, the next sentence reveals OLC's utilitarian approach to the application of Jackson's first category: "He would thus be clothed with 'all [authority] that he possesses in his own right plus all that Congress can delegate,' *Id.*, *in addition to his own broad powers in foreign affairs under Article II of the Constitution*."[908] Similarly, in the *NSA Memo*, OLC claims that supporting legislation has "confirmed and supplemented" the President's recognized authority under Article II… to conduct [] warrantless electronic surveillance."[909] The rest of the *Endorsement of Action* codes are summarized in Table 11 on pages 259-260 below.

Second, supportive legislation also functions as a defensive risk management tool – a shield from potential litigation against executive unilateralism: Were some executive actions

---

[901] *AUMFI Memo* at 6 (emphasis added).
[902] Indeed, the Bush OLC makes no reference to the other categories in its opinions, suggesting that they are not relevant to its institutional powers analysis.
[903] *Youngstown*, 343 US 579, 635 (1952) (Jackson, J. concurring).
[904] *War Powers Memo* at 66.
[905] *AUMFI Memo* at 6; *see also*, *Iraq Memo* at 34 ("Such statutory support is not necessary in light of the President's independent constitutional authority…")
[906] Id.
[907] *War Powers Memo* at 86.
[908] Id. (emphasis added).
[909] *NSA Memo* at 20.

found by a reviewing court to be in discord with any of Congress's co-equal powers (and laws passed pursuant to those powers), the President essentially has a free pass in the form of authorizing legislation. One example is the internment of individuals in the Padilla class, who, despite §4001(a)'s prohibition, are subject to capture and detention based on the the President's broad constitutional power as endorsed by the AUMF.[910] Since courts are generally reluctant to decide the legality of executive actions on constitutional grounds,[911] the acknowledgement of Jackson's first category indicates OLC's awareness that a ruling against constitutionally-based presidential authority would weaken the powers of the presidency. Therefore, the Bush OLC is willing to hold up statutory authorization as dispositive, even if supporting legislation is not legally necessary based on its reading of institutional powers.[912] This indicates OLC's commitment to the "President's 'duty to pass the executive authority to his successor, unimpaired by the adoption of dangerous precedents.'"[913] I will discuss the risk management function of OLC's opinions further in Chapter Seven.

Third, although it may not be *legally* required as a prerequisite for presidential action, supporting legislation has far-reaching legal consequences. In brief, it bolsters the Executive Branch's position in unilateralizing emergency authority by allowing greater latitude for branch-internal decisionmaking. To illustrate this point, let us map the phenomenon of political juridification, of which the 2002 AUMFI is an example. In the theory chapter, I defined J_B (legal proliferation) as an increase in formal rules and individual rights resulting in greater predictability as far as legal claims that can be made and outcomes that can be expected. This principle is as true for individual rights as it is for institutional powers. Thus, the 2002 AUMFI, combined with

---

[910] *Padilla 2 Memo*.

[911] *See* Neal Kumar Katyal and Thomas P Schmidt, "Active Avoidance: The Modern Supreme Court and Legal Change," *Harvard Law Review* 128, no. 8 (2015): 2117 ("to avoid a direct constitutional ruling appears to be in harmony with the general attitude of reticence toward constitutional adjudication exemplified most notably by Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*.").

[912] The use of military force in the *War Powers Memo*, *Iraq Memo*, *Domestic Military Memo, Padilla 2 Memo*; warrantless electronic surveillance in the *NSA Memo*; convening of military commissions in the *Military Commissions Memo*. As I pointed out in Part 1(c), the Supreme Court decided *Hamdi v. Rumsfeld* based on OLC's AUMF rationale rather than the constitutional argument that the government also offered.

[913] Memorandum for the General Counsel of the Federal Government from Assistant Att'y Gen. Walter Dellinger, *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. OLC 124 (quoting *Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. at 65).

prior legislation such as the 2001 AUMF, the WPR,[914] and the 1991 AUMFI (all of which recognized executive authority in an emergency or in response to a threat to U.S. national security), helped fix the values of certain policy variables by increasingly removing them from the political arena. In turn, this depoliticization has allowed decisionmaking regarding contemplated presidential action to be made in the "world of legal concepts and procedures"[915] (J_C, i.e., conflict resolution with reference to law). In other words, the president's use of military force abroad, as recognized in the WPR and subsequent legislation, has been so greatly affected by de-politicization that the Bush OLC treats it as having been formalized or quasi-constitutionalized.[916] As OLC argues in the *War Power Memo*, the WPR "makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress."[917] This subset of OLC's use of *Youngstown* is best described by textual segments coded as *Recognition of Power(s)* and *Formalization of Informal Power(s)*. The distribution of the *Recognition* codes is summarized in Table 12.[918]

Lastly, one could argue that *Congressional Acquiescence* coded segments indicate that the Bush OLC implicitly acknowledges Jackson's second, "zone of twilight," category as a source of authority. According to Jackson, in areas where Congress has exhibited "inertia, indifference or quiescence," the President can make a case for "independent presidential responsibility."[919] While it is evident that OLC interprets the 29 *Congressional Acquiescence* textual segments compiled in Table 13 as acknowledgements of the President's independent constitutional authority in a given legal-policy area, the twenty GWOT memos make but one reference to

---

[914] 50 USC §1541(c) authorizes the President to "introduce U.S. Armed Forces into hostilities" on the basis of his "constitutional powers… as Commander-in-Chief" in the context of a "national emergency."

[915] Gunther Teubner, ed., *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*, European University Institute Ser. A 6 (Berlin: de Gruyter, 1987), 8.

[916] *Domestic Military Memo* at 48 ("the statute signifies Congress' recognition that the President's constitutional authority alone enables him to take military measures to combat the organizations or groups responsible for the September 11 incidents, together with any governments that may have harbored or supported them, if such actions are, in his judgment, a necessary and appropriate response to the national emergency created by those incidents. It is also important to recognize that section 2(c)(3) is not limited, either expressly or by implication, to military actions overseas, but instead recognizes the power to use force without regard to location.").

[917] *War Powers Memo* at 42.

[918] There are only five *Formalization* codes in the Bush corpus, and they all refer to the WPR, one of them is quoted above, another is in footnote 916, the remaining *Formalization* codes are located at *War Powers Memo* at 51, 90, and 91.

[919] *Youngstown*, 343 US 579, 637 (Jackson, J. concurring).

Jackson's 2nd category.[920] Indeed, the "zone of twilight" would be a rather unstable foundation on which to erect strong constitutional claims. Jackson describes this category as "uncertain," in which the political branches "*may* have concurrent authority."[921] By contrast, the Frankfurtarian gloss approach appears to produce stronger and more immutable legal claims by establishing the existence of what Koh and Yoo refer to as "quasi-constitutional custom."[922] Indeed, for OLC "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress" indicates an entrenched, exclusive presidential domain rather than potentially shared or divided authority. It is for this reason, the foursquare denial of concurrent powers, that the Bush OLC denounces the proposed Swift Justice Authorization Act in which Congress would have provided "a clear and unambiguous legal foundation" for the President to establish military commissions and to detain enemy combatants.[923]

[920] In the *NSA Memo*, OLC argues that the "zone of twilight" is inapplicable to the President's use of warrantless electronic surveillance, because the AUMF's broad language recognizing "fundamental incidents of the use of military force" necessarily elevates the Executive Branch's content collection activities into Jackson's 1st category.
[921] Id.
[922] In footnote 1 of the *AUMFI Memo*, OLC provides a list of supporting legislation for the use of military force including the 2001 AUMF; the 1991 AUMFI (Pub L. No. 102-1); 78 Stat. 384 (the Gulf of Tonkin Resolution (1964)); 71 Stat. 5 (Joint Resolution to promote peace and security in the Middle East (1964)); 69 Stat. 7 (Formosa (1955)); 38 Stat. 770 (Mexico (1914)); 30 Stat. 738 (Spanish-American War (1898)); 11 Stat. 370 (Paraguay)); 3 Stat. 510 (African Slave Trade (1819)); 3 Stat. 230 (Second Barbary War (1815)); 2 Stat. 129 (First Barbary War (1802)); 1 Stat. 561 (Quasi War with France (1798)).
[923] *SJAA Memo* at 13.

Endorsement of…	**Coded Segment(s) (with examples)**
Military action in general	***War Powers Memo* @42** ("in establishing and funding a military force that is capable of being projected anywhere around the world, Congress has given the President… considerable discretion in deciding how that force is to deployed."); **66** ("President Kennedy asserted that he had ordered the blockade 'under the authority entrusted to me by the Constitution as endorsed by the resolution of the Congress.'").
Military action after 9/11	***War Powers Memo* @96** ("[the AUMF]'s findings would support any presidential determination that the September 11 attacks justified the use of military force in response."); **96** ("congressional concurrence [that a national emergency exists] is welcome in making clear that the branches agree on the seriousness of the terrorist threat… and on the justifiability of a military response."); ***Torture Memo* @163** ("the President has authorized the use of military force with the support of Congress."); ***Military Interrogation Memo* @315**
Domestic military action	***Domestic Military Memo* @57** ("[the AUMF's] broad statement reinforces the War Powers Resolution's acknowledgement of the President's constitutional powers in a state of emergency… [it] contemplates that the domestic use of force may well be necessary and appropriate.")
President's POW policy	***Transfer Memo* @41** (a statute in the Quasi-War with France "designed to encourage the President to take [retaliatory] action [against Frenchmen]."); **43** (Congress blessed the President's "exclusive control over prisoner-of-war policy" usually "in the form of supporting appropriations."); **44** ("Congress never asserted that it possessed any constitutional authority to regulate prisoner treatment… [it] merely sought to encourage the President to take a more aggressive approach toward Britain."); **48** (a joint resolution urged President Lincoln "to take retaliatory measures" against Confederate soldiers "in the fact of mounting evidence that the Confederacy was starving and [] mistreating Union soldiers."); **65** (Congress did not regulate "the disposition of POWs, but rather, without providing binding rules or standards, authorized and provided financial support for vigorous Presidential action.")
Military commissions	***Military Commissions Memo* @ 27** ("The congressional authorization for military commissions in 10 USC §821 endorses sufficiently broad jurisdiction for the commissions that there likely will be no need to rely solely on the President's inherent authority."); **31**("[§821] was adopted to preserve the jurisdiction of what was recognized as a pre-existing tribunal."); **87** ("Days after the attacks, Congress swiftly exercised its war powers to pass a joint resolution authorizing the President to 'use all necessary and appropriate force'" including the use of military commissions.).
Detention of enemy combatants	***Padilla 2* @17** ("[the AUMFI] has specifically authorized the President to use force against enemy combatants."); **40** ("Thus, [in the AUMF] Congress has specifically endorsed the use not only of deadly force, but also of the lesser-included authority to detain enemy combatants to prevent them from furthering hostilities against the United States."); **50** ("Nothing in [the AUMF] contemplates that the President's authority to detain enemy combatants is limited to non-U.S. citizens").

Military action against Iraq	***Iraq Memo* @8** ("[President's] independent authority is *supplemented* by congressional authorization in the form of" Pub. L. No 102-1 (1991)); **8** (AUMF supplements authority "if the President determines Iraq provided assistance to the perpetrators of [9/11]"); **34** ("[a]t times throughout history, the President's constitutional authority to use force has been buttressed by statute."); **34** ("[w]ere the President to direct military action against Iraq, he would be acting at the apex of his power because… his constitutional authority… supplemented by congressional authorization."); **36** ("Pub. L. No. 102-1 sanctions not only the employment of methods approved in [UNSCR 678] but also two objectives outlined [in it: to implement UNSRC 660 and all subsequent resolutions]."); **37** (Pub. L. No. 102-1 combines with UNSCR 687 and 688 so the President "would be acting at the zenith of his authority."); **41** (Pub. L. No. 102-1 survived the ceasefire); **42** (Pub. L. No. 105-243 "urg[ed] [President Clinton] to take appropriate action" to bring Iraq into compliance with UNSCRs); **43**; **45**; **63**; **82**; **83**; **135**; ***AUMFI Memo* @7**; **14** (in Pub. L. No. 106-31 [Emergency Supplemental Appropriations] "Congress had approved of President Clinton's unilateral decision to use military force in Kosovo."); **21** (Pub. L. No. 102-1 supplemental authorization); **22**; **25**; **26** (AUMF supplemental authorization).
Warrantless surveillance	***NSA Memo* @20** (the AUMF "gave [] express approval to the military conflict against al Qaeda... and thereby to the President's use of all and accepted incidents of force in this current conflict – including warrantless electronic surveillance."); **28**; **54** ("the AUMF indicates Congress's endorsement of the President's use of his constitutional war powers."); **58**; **59** ("the AUMF authorizes what the laws of war permit.").

Table 11: Endorsement of Action

Recognition of the President's constitutional power(s) by			
WPR (50 USC § 1541-48)	10 USC §821/A. 15 of AW	AUMF (Pub.L. No. 107-40)	1991 AUMFI (Pub.L 102-1)
War Powers Memo* @90** ("section 2(c)(3)… signifies Congress's recognition of the President's constitutional authority alone [] enable[s] him to take military measures"); **91** (§2(c)(3) "leaves undisturbed the President's constitutional authority to determine both when [a national emergency exists] and the level of force [] necessary [] to respond."); **99** (the WPR and AUMF "recognize the President's authority to use force in circumstances such as those crated by the September 11 incidents); ***Domestic Military Memo	***SJAA Memo* @34** (Article 15 was "a savings clause. It did not create military commissions… it assumed their existence [] apart from any statute"); ***Military Commissions Memo* @20** ("§821 acknowledges and endorses the jurisdiction… [and] existing use of military commissions under military practice."); **23** (§821 "must be read as	***War Powers Memo* @99**; **56** ("The WPR does not stand alone as an acknowledgement by Congress of the President's emergency powers."); **94** ("Congress… has confirmed that the President has broad constitutional authority to respond, by military means or otherwise, to the incidents of 9/11."); **95** (AUMF "includes an express statement that 'the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the" U.S."); ***Padilla 2* @40** (the President's "constitutional authority to detain enemy combatants… is bolstered by [the AUMF because it] recognizes that [the President has such authority] 'under the Constitution.'"); ***SJAA* @10**; ***Iraq* @8** (the AUMF supports military action against Iraq by	***Iraq Memo* @8** (The President's "independent authority is supplemented by congressional authorization [Pub. L. No. 102-1 (1991)] which supports the use of force to secure Iraq's compliance with its international obligations."); **34** ("congressional support removes all doubt of the President's power to act. According to the analysis set forth by Justice Jackson…").

@48 ("Congress has explicitly recognized the President's constitutional authority to deploy military force to counter a national emergency caused by an attack."); **50** (the WPR "signifies Congress's recognition that the President's constitutional authority alone enables him to take military measures.")	preserving the broadest possible sweep for the traditional jurisdiction exercised by military commissions.")	recognizing the President's authority to take action); ***Domestic Military* @57** (the AUMF "contemplates that domestic use of force may well be necessary and appropriate."); ***AUMFI* @14** ("Congress recently recognized the President's constitutional authority to use military force" in the AUMF.); ***NSA* @20** ("Congress by statute has confirmed and supplemented the President's recognized authority [to conduct warrantless surveillance]."); **28**; **40**; **53** (the AUMF "acknowledged the President's inherent constitutional authority to defend the U.S."); **54** (the AUMF "indicates Congress's endorsement of the President's use of his war powers."); 57; 59; 92	

Table 12: Recognition of the President's power by statute

Congress acquiesced to…	**Coded segments**
Capture and detention	***Torture Memo* @136** ("Congress has never attempted to restrict or interfere with the President's power on this score.")
Warrantless surveillance (as a fundamental incident of war)	***NSA* @59** ("Congress is presumed to be aware of [*Hamdi v. Rumsfeld*]… however, [it] has not express any disapproval of the… interpretation of the AUMF [as authorizing actions in the GWOT that amount to fundamental incidents of war].")
Use of force against Iraq	***AUMFI Memo* @15** ("in none of these interventions did Congress interfere with or regulate the President's exercise of his Commander-in-Chief powers."); **24** ("practice of the Executive Branch," in which Congress has acquiesced" shows Pub. L. No. 102-1 continues to be in effect."); **24** (uses of force under Pub. L. No. 102-1); *Iraq* @40 (Bush 41, Clinton authorized use of force under 102-1 even after Op. Desert Storm.); **39** (executive branch practice confirms that 102-1 is still in effect, to which Congress has acquiesced).
Use of military force	***AUMFI* @14** ("Congress has acquiesced in the unilateral use of force by Presidents during the course of numerous armed conflicts."); **16** (Korea, Vietnam, Grenada, Lebanon, Panama, Somalia, Kosovo "without congressional authorization."); ***WPM* @9** (WPR, AUMF "acknowledge the P.'s plenary authority to use force."); **50** ("pattern of presidential initiative and congressional acquiescence… reflect the implicit advantage held by the executive."); **58** (SCOTUS recognized that "the President acted without prior express authorization from Congress.").
President's POW policy	***Transfer Memo* @ 43** (Congress has acquiesced to P.'s POW policy "in the form of supporting appropriations."), **44**, **45** (President Polk made POW policy without "Congress[ional] challenge."), **52**, **53** (WWI POW transfer policy without congressional action), **64** (POW transfer from Iraq to Saudi Arabi, "Congress took no action."), **65**, **66**.
Military Commissions	***SJAA Memo* @27** (established MCs "without [] authorization from Congress."), **27**, **50** (Cong. did not "attempt to dictate procedures" of MCs.")

Table 13: Congressional acquiescence

JUSTICE CLARK'S CONCURRING OPINION IN *YOUNGSTOWN*

While the *Youngstown* case is best known for Robert Jackson's functionalist analysis, President Truman's erstwhile Attorney General, Justice Thomas Clark, also issued a concurrence whose logic appears to have gained traction in the Bush OLC's opinions. Clark's lesser-known concurrence holds that "the President's independent power to act depends upon the gravity of the situation confronting the nation."[924] This representation of the President's constitutional powers as waxing and waning according to the seriousness of national security emergencies is closely analogous to Attorney General Frank Murphy's formulation in his 1939 *Powers of the President "in Emergency or State of War"* opinion.[925] As Murphy, who himself would later be appointed to the Supreme Court, wrote in 1939: "The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action."[926]

The sole reference to Clark's opinion in the Bush corpus is in the *War Powers Memorandum* and it is used to justify the militarization of counterterrorism activities under OLC's war paradigm: Drawing on the strong language of the AUMF,[927] OLC finds that Clark's sliding-scale formula of presidential power "would support any [Executive Branch] determination that the September 11 attacks justified the use of military force in response."[928] While Clark's concurrence is only textually present in the *War Powers Memo*, its logic is most palpable in the interrogation-related memoranda in which OLC argues that the President's Commander-in-Chief power can vindicate the resort to torture. Both the *Torture Memo* and the *Military Interrogation Memo* have been described elsewhere as applying a "Commander in Chief override"[929] to trump statutory restrictions, and they undeniably do that. The President's Commander-in-Chief authority, however, appears to be

---

[924] *Youngstown*, 343 US 579, 662 (1952) (Clark, J. concurring).

[925] *Request of the Senate for an Opinion as to the Powers of the President "In Emergency or State of War,"* 39 Op. Att'y Gen. 343, 347-348 (1939); quoted above on page 116.

[926] Id.

[927] "acts of treacherous violence," "grave acts of violence," "such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States."

[928] *War Powers Memo* at 96.

[929] Senator Patrick Leahy, "Confirmation Hearing on The Nomination of Alberto R. Gonzales To Be Attorney General of The United States," Hrg. 109-4, Committee on the Judiciary (2005), https://www.congress.gov/109/chrg/shrg99932/CHRG-109shrg99932.htm.

amplified in those memoranda by "grav[e] situations confronting the nation" as indicated by the code *Future Threat*. As OLC reports in the *Military Interrogation Memo*,

> Leaders of al Qaeda and the Taliban, with access to active terrorist cells and other resources, remain at large. It has been reported that they have regrouped and are communicating with their members… In his recent testimony to the Senate Select Committee on Intelligence on February 11, 2003, the Director of the Central Intelligence Agency, testified that another al Qaeda attack was anticipated as early as mid-February… It appears that al Qaeda continues to enjoy information and resources that allow it to organize and direct active hostile forces against this country, both domestically and abroad.[930]

As a result, OLC claims that "there can be no more compelling government interest than that which is presented here."[931] Hence, the Executive must be "given discretion in its decisions to respond to the grave threat to national security posed by the current conflict."[932] Since OLC presents the prospect of another terrorist attack as virtually inevitable,[933] it finds it imperative that the President continue to "capture and interrogat[e] [] al Qaeda operatives."[934] Due to the asymmetric nature of terrorist operations, OLC concludes that "[i]t may be the case that *only* successful interrogations can provide the information necessary to prevent the success of covert terrorist attacks upon the United States and its citizens."[935] In the face of such a "grav[e] situation confronting the nation," OLC urges that the President's power to detain and interrogate enemy combatants "may be of more importance" than ever before.[936]

In sum, while Clark's sliding-scale formulation may only be present in one of the construction-of-the-GWOT-legal-architecture opinions, the logic of a Commander-in-Chief power augmented by the urgent necessity to defend the nation permeates the GWOT memoranda, and it is especially relevant in the interrogation-related opinions.

---

[930] *Military Interrogation Memo* at 17 (coded as *Future Threat*) (internal citations omitted).
[931] Id. at 233.
[932] Id.
[933] "Cheney: Kerry Win Risks Terror Attack," *CNN.Com*, September 7, 2004, sec. America Votes 2004: Special Report, http://www.cnn.com/2004/ALLPOLITICS/09/07/cheney.terror/ ("The vice president stands by his quote in context… Whoever is elected in November faces the prospect of another terrorist attack.").
[934] Id. at 18.
[935] *Torture Memo* at 137.
[936] Id. ("may be of more importance in a war with an international terrorist organization than one with the conventional armed forces of a nation-state, due to the former's emphasis on secret operations and surprise attacks against civilians.").

FOREIGN-TO-DOMESTIC BOOTSTRAPPING

The third and final way that the Bush OLC uses *Youngstown* is to dispel what the *NSA Memo* refers to as a charge of "foreign-to-domestic bootstrapping."[937] According to OLC, Jackson's concurring opinion "reveals a concern" that the President could "claim[] authority, based upon [] foreign conflict, to extend presidential control into" the domestic realm.[938] Indeed, in Justice Jackson's view, Truman's "sinister and alarming" contention that he could seize a sector of the domestic economy based on his Commander-in-Chief authority was a naked (and illegal) power grab. Had the Court allowed it, Jackson wrote, it would have "vastly enlarge[d] [the President's] mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."[939] Thus, in the language of the Bush OLC's institutional powers jurisprudence, foreign-to-domestic bootstrapping is the intrusion of the President's foreign-sphere powers into the domestic sphere, where Congress is in the dominant constitutional position.

Having established the contours of foreign-to-domestic bootstrapping, OLC claims that no such intrusion took place in the GWOT, because "the exercise of executive authority involved [in OLC's legal opinions] is not several steps removed from the actual conduct of a military campaign."[940] As I will explain in Chapter Seven and as the empirical material presented above indicates, this defense is patently devoid of merit. In fact, OLC's opinions do exercise control over "internal affairs" by means of the President's foreign affairs powers. As I demonstrated in Chapter Five, OLC invalidates the War Crimes Act based on the President's power over treaty-interpretation and treaty termination (foreign sphere). In Chapter 4, I also showed that OLC effectively makes domestic policy by unilaterally deciding on the legal framework which allowed the domestic deployment of military force (despite the existing statutory ban).

***

[937] *NSA Memo* at 117.
[938] Id.
[939] *Youngstown*, 343 US 579, 642 (1952) (Jackson, J. concurring).
[940] *NSA Memo* at 119.

To summarize, OLC does not distinguish *Youngstown* (at least not completely), because it uses different aspects of that opinion in numerous parts of the corpus. While the Bush OLC claims that the President's independent powers alone authorize unilateral action in the GWOT, supporting legislation (i) helps to legitimate such action by elevating it to Jackson's 1st category, (ii) it helps to fend off legal challenges, and (iii), due to the phenomenon of depoliticization, it allows greater latitude for OLC's decisionmaking. Moreover, Justice Clark's sliding-scale formulation of presidential emergency powers permeates the entire corpus, as demonstrated by the *Future Threat* coded segments and OLC's "constitutional override" arguments. Lastly, although OLC asserts that executive action in the GWOT has not resulted in foreign-to-domestic bootstrapping, this dissertation debunks that argument by exposing the Bush OLC's utilization of the President's foreign affairs powers in order to invalidate domestic legislation or to usurp Congress's lawmaking authority.

(3) ARTICLE I VS ARTICLE II

Throughout the corpus, The Bush OLC maintains that Congress cannot unduly interfere with or improperly inhibit the President's core constitutional authorities.[941] More specifically, OLC claims that "fundamental principles of the separation of powers, *forbid* Congress" from doing so.[942] However, neither the 107th nor the 108th Congress took serious steps to threaten the President's unilateral conduct of the GWOT. Apart from a small number of failed bills in the House and the Senate,[943] it was not until 2005, in the wake of damning

[941] My content analysis produced 30 textual segments coded as *Undue Interference/Improper Inhibition*. In 7 of the 20 memoranda that comprise the construction-of-the-GWOT-legal-architecture period (*Military Interrogation Memo*, *Torture Memo*, *NSA Memo*, *ABM Treaty Memo*, *Military Commissions Memo*, *FISA Memo*, *War Powers Memo*), OLC disavows past and future congressional action as unduly interfering with the President's core constitutional powers.

[942] *AUMFI Memo* at 11; *SJAA Memo* at 46 ("The constitutional principle of separation of powers forbids one branch of government from usurping or controlling the exercise of powers assigned by the Constitution to another branch."); *see* also, *Padilla 2 Memo* at 54 ("As our office has consistently held during this Administration and previous Administrations, Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of military operations during the course of a campaign.").

[943] S. 1937, Military Commissions Procedure Act of 2002, February 13, 2002; H.R. 5071, Military Tribunals Act of 2002, July 9, 2002; The Foreign Terrorist Military Tribunal Authorization Act, December 13, 2001.

reports regarding the maltreatment of detainees, that the 109th Congress definitively intervened in the administration's plenary control over the war. Therefore, OLC's strong language rebuffing congressional regulation of the President's constitutional powers appears to be part of its *status quo* maintenance function rather than a reaction to an actual legislative onslaught.

THE SWIFT JUSTICE AUTHORIZATION ACT

One embryonic (and abortive) attempt at congressional regulation of the President's power over enemy combatants captured in the GWOT is memorialized in OLC's *SJAA* opinion. According to OLC, the Swift Justice Authorization Act (SJAA) introduced by Senator Patrick Leahy purported to "vest the President with limited authority to order our Armed Forces to detain certain individuals involved in terrorist acts and to establish military commissions to try those individuals for violations of the laws of war."[944] Since the SJAA never became law, and there is no mention of it in the Congressional Record, my only reference to it is OLC's identically titled legal opinion. As part of the "bill comment practice," the *SJAA Memo* is a long-winded objection to the proposed legislation's constitutional basis. In the process of what amounts to the issuing of a veto threat, OLC also lays out a detailed separation of powers analysis with regard to the government's war powers that derive from Article I and Article II. Some of OLC's logic in the *SJAA Memo* regarding institutional power relations was outlined above in section (1). Portions of the opinion that will be presented here concern OLC's reading of Congress's Article I powers to authorize the detention and trial (before military commissions) of captured enemy combatants. Briefly, the Bush OLC asserts that "Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his constitutional authority as Commander in Chief" to detain enemy combatants and to establish military commissions.[945]

"To be sure," OLC concedes in the second half of the bill comment, "the Constitution does assign Congress certain specific powers that relate to war."[946] The powers enumerated in the *SJAA Memo* include: the declaration of war (Art. I, §8, cl. 11), funding the army and the

[944] *SJAA Memo* at 9.
[945] Id. at 12.
[946] Id. at 56.

navy (cl. 12-13, §9, cl. 7), and "all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief."[947] Consequently, devoid of an express authorization in the text of the Constitution, Congress may not "use its [] Article I powers to restrict or regulate directly the President's ability to exercise his constitutional powers as Commander in Chief."[948] The bill cited four provisions of Article I, §8 as empowering Congress to issue regulations regarding the detention and trial of enemy combatants captured in the GWOT: Clauses 9, 10, 11, and 18. I will briefly review each of those clauses together with OLC's commentary. I will consider cl. 11 together with OLC's analysis of the same language in the *Transfer Memorandum*.

First, OLC examines Congress's power under §8, cl. 9 (Inferior Tribunals Clause) to ascertain whether that provision is sufficiently broad to enable the Legislature to constitute military commissions. While the SJAA identified the Inferior Tribunals Clause as the constitutional basis for Congress's conferring limited authority on the President to establish military commissions, OLC finds that the term "tribunals" in the clause's language is limited to Article III courts only.[949] Therefore, other, non-Article III, courts are created under authority that derives from elsewhere in the Constitution. Congress's ability to create territorial courts, for example, arises out of its Article IV power to "make all needful Rules and Regulation respecting the Territory… belonging to the United States,"[950] whereas its authority to establish courts for the District of Columbia inheres in Article I, §8, cl. 17, which empowers the Legislative Branch to "exercise exclusive Legislation in all Cases whatsoever, over such District… as may… become the Seat of the Government."[951] Other Article I courts such as the Court of Claims, the U.S. Tax Court, and the Customs Appeals Court have likewise been created pursuant to Congress's respective powers over "the Debts… of the United States," the "lay[ing] and collect[ion] of Taxes," and the "lay[ing] and collect[ion]… [of] Duties."

---

[947] *Ex parte Milligan*, 71 US 2, 139 (Chase, C.J. concurring).
[948] *SJAA Memo* at 56.
[949] Id. 58 ("The Inferior Tribunals Clause tracks closely the language in Article III, which provides that '[t]he judicial Power of the United States, shall be vested in one supreme Court, and in *such interior Courts as the Congress may from time to time ordain and establish.*") (emphasis original). The Supreme Court in *Glidden v. Zdanok*, 370 US 530 (1962) reached the same conclusion ("The power given to Congress in [cl. 9]… plainly relates to 'inferior Courts' provided for in Art. III, §1; it has never been relied on for establishment of any other tribunals.").
[950] *U.S. Constitution*, Article IV, §3, cl. 2.
[951] *US. Constitution*, Article I, §8, cl. 17.

Therefore, since military commissions are not tribunals in the Article III sense,[952] and given the Supreme Court's holding that they are "not convened by virtue of [an act of Congress], but pursuant to the common law of war,"[953] they must be Article II courts. As such, OLC argues that the "power to create military commissions derives from the President's Article II power as Commander in Chief."[954] Consequently, OLC finds the Inferior Tribunals Clause not to confer on Congress power over the establishment of military commissions; which entails that Congress has no authority of its own to impart to the President.

The Bush OLC also probes the dimensions of Congress's power under §8, cl. 10, the Define and Punish Clause, to "restrict[] the President's authority to punish violators of the laws of war."[955] Based on the records of the Constitutional Convention, OLC contends that the original purpose of the clause was to remedy a shortcoming of the Articles of Confederation, which provided inadequate federal power over the punishment for "Piracies and Felonies committed on the high Seas" and violations of the "Laws of Nations" (i.e., international law). As OLC concludes, despite the grant of a "generalized [] authority" to Congress to enact criminal provisions for violations against the law of nations, the Framers did not intend for Congress to "create additional tribunals or otherwise [] embark on forays into the enforcement of the laws that had been assigned to the Executive."[956] Elaborating on the "enforcement" aspect, OLC adds that nothing in cl. 10's general grant of authority "permits Congress to interfere with the President's constitutional authority as Commander in Chief to… *conduct* trials before, military commissions."[957] By contrast, cl. 14, which the Bush OLC understands as pertaining to U.S. service members only, specifically vests the power to "make *Rules* for the Government and Regulation of the land and naval Forces" in Congress. Therefore, the Constitution's silence on "the task of enforcing the laws of war against the enemy" (i.e., deciding on the procedural rules of military commissions), must be construed as resting with the Commander in Chief.[958]

---

[952] *Ex parte Quirin*, 317 US 1, 39 ("military tribunals… are not courts in the sense of the Judiciary Article.").
[953] *In re Yamashita*, 327 US 1, 20.
[954] *SJAA Memo* at 61.
[955] Id. at 67.
[956] Id. at 69.
[957] Id. at 67.
[958] Id. at 72 (citing *Yamashita*)

> But that in no way suggest that the Clause provides Congress power to dictate to the President the manner in which he may operate military commissions to enforce the laws of war. The Court [in *Yamashita*] has definitively determined that section 821 acknowledges and sanctions

Lastly, OLC also considers Congress's power under §8's cl. 18,[959] the Elastic Clause, to legislate regarding the detention and trial of captured enemy combatants. Having ruled out other potentially applicable provisions of Article I, OLC quotes Justice Scalia to describe the Elastic Clause as "the last, best hope of those who defend *ultra vires* congressional action."[960] Citing *INS v. Chadha* and *Buckley v. Valeo*, in which the Court found that the Necessary and Proper Clause does not authorize Congress to encroach on the President's constitutional powers, OLC concludes that "nothing in that provision authorizes Congress to enact legislation that would infringe upon the core constitutional powers of the Executive Branch."[961]

In sum, OLC's Article I analysis finds no constitutional basis for Congress's authority to enact the portion of the SJAA that purported to put the President's military commissions on a "clear and unambiguous legal foundation."[962] In hindsight, of course, we know that in *Hamdan* the Supreme Court rejected the administration's contention that cls. 10 and 14 of section 8 do not authorize Congress to make procedural rules for adjudication in MCs. In fact, the Court found that a combination of §8 powers (cls. 10, 11, 12, and 14) does vest that authority in the Legislative Branch.

Besides military commissions, the Swift Justice Authorization Act also proposed to give the President limited authority to detain enemy combatants in the GWOT, including in the war in Afghanistan. As OLC reports, Section 5(a) provided that the President "may direct the Secretary of Defense to detain persons who are not U.S. persons and are members of al Qaeda… upon a determination by a U.S. District Court that the person falls within the class described in this section."[963] After observing the impracticability of the bill's court-certification requirement in an ongoing armed conflict, OLC finds that it "is a flatly unconstitutional encroachment on the President's power as Commander in Chief to conduct

---

> the existing practice of convening military commissions under the authority of the military command "without qualification." […] The Court's suggestion that Congress may properly express its unqualified approval of Executive practice in this field in no way suggest that Congress possesses the far different power to curtail the President's ability as Commander in Chief to prescribe the procedures for such commission.

[959] a.k.a., the Necessary and Proper Clause, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Office thereof."

[960] Quoting, *Printz v. United States*, 521 US 898, 923 (1997) (Scalia, J.).

[961] *SJAA* at 75.

[962] *SJAA Memo* at 13 ("the bill states that it would provide a 'clear and unambiguous legal foundation' for military tribunals.").

[963] *SJAA Memo* at 51.

a military campaign."[964] Asserting the President's plenary authority over the direction of hostile operations, OLC concludes that "Congress may no more regulate the President's ability to… seize enemy belligerents than it may regulate his ability to direct troop movements in the battlefield."[965]

According to OLC, the Senate bill identified Article I, §8, cl. 11, as the legal basis for Congress's power to legislate with regard to the President's detention authority. In refuting the argument that the proposed provision would be a valid exercise of Congress's power to "make Rules concerning Captures on Land and Water," the Bush OLC notes that the word "capture" in cl. 11 refers to property only. Examining the provenance of the clause, OLC points to Article IX of the Articles of Confederation, which gave Congress the power "of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or apportioned." Since persons cannot be "'divided' [or] 'apportioned,'" OLC argues that cl. 11 cannot apply to POWs. This reading of the constitutional text is supported by Justice Story's *Commentaries*,[966] and "buttressed by the absence in the historical record of any invocation of the clause by Congress or the courts in support of legislation applying to captured persons."[967]

In conclusion, the *SJAA Memo*'s arguments are in keeping with the Bush OLC's strong departmentalist tendencies and adherence to the SSM. Throughout the opinion, OLC

---

[964] Id.

[965] Id. at 12, *see also*, *Padilla 2 Memo* at 54 ("Congress may no more regulate the President's ability to detain enemy combatants than it may regulate his ability to direct troop movements on the battlefield."); *Torture Memo* at 124, ("Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."); *Military Interrogation Memo* at 52 (same).

[966] *Transfer Memo* at 25; *see* also, Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, Online Edition, vol. 3 (University of Chicago Press, 1987), 120, http://press-pubs.uchicago.edu/founders/print_documents/a1_8_11s18.html (Justice Story interpreted §8, cl. 11 to "authorize the seizure and condemnation of the *property* of the enemy within, or without the territory of the United States" and made no mention of authority over captured persons.).

[967] *Transfer Memo* at 25; *SJAA Memo* at 64 (same); Koh and Yoo, "Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law," 733. ("In such circumstances constitutional text as well as executive and congressional practice, quasi-constitutional custom, could authorize or prevent presidential initiatives.").
The Bush OLC's reading of the historical record is not disingenuous. Leading legal authorities in this area have arrived at the same conclusion: According to Ingrid Wuerth, the Captures Clause "gives Congress control over what property can be seized by both public and private forces for the purposes of perfecting title through a judicial proceeding. What the Captures Clause does not give Congress is 'a general power to control the taking and detention of people.'" Ingrid Wuerth, "The Captures Clause," *The University of Chicago Law Review* 76 (2009): 1683–1745; see also J. M. Balkin, "Must We Be Faithful to Original Meaning?," *Jerusalem Review of Legal Studies* 7, no. 1 (June 1, 2013): 57–86; Cf. Michael Dorf, "The Undead Constitution," *Harvard Law Review* 125 (2012): 2011–55.

methodically interprets away Congress's claims to overriding constitutional powers in the areas of detention and trial of captured enemy combatants. Even though, in hindsight, we know that the Bush OLC wrongly deprecated the SJAA's claims to Congressional authority to prescribe procedural rules for military commissions, the memorandum still presumably achieved its goal. As a practical matter, OLC's bill comments have a measurable, real-world impact on legislative outcomes, because they serve as a veto threat. Therefore, unless Congress is able to muster a veto-proof majority to overcome the President's "absolute negative,"[968] OLC's antagonistic legal interpretation can effectively defeat a proposed piece of legislation. Nevertheless, the Swift Justice Authorization Act and other bills listed under footnote 941 above indicate that there were congressional initiatives for inter-branch cooperation to create a sound and enduring policy framework for the GWOT. However, as the evidence presented in this dissertation demonstrates, the Bush administration preferred the go-it-alone approach, and relied, instead, on unilateral action as authorized by OLC's quasi-judicial legislation.

THE 2001 AUMF

Despite the SJAA Memo's merciless dismantling of Congress's claims of authority to legislate over matters related to the conduct of war, in other parts of the Bush corpus, OLC readily accepts the AUMF as statutory support of the President's pre-existing constitutional powers:

> Although Congress's war powers under Article I, Section 8 of the Constitution empower Congress to legislate regarding the raising, regulation, and material support of the Armed Forces and related matters, rather than the prosecution of military campaigns, the AUMF indicates Congress's endorsement of the President's use of his constitutional war powers.

As I wrote in Chapter Three, the 2001 Authorization for Use of Military Force is the second most-often cited statute in the Bush memoranda. Although OLC maintains that supporting legislation is legally unnecessary, the Bush administration deliberately sought to capitalize on

---

[968] James Madison, *Debates in the Federal Convention of 1787*, ed. Gaillard Hund and James B. Scott, The Avalon Project (Oxford University Press, 1920), http://avalon.law.yale.edu/subject_menus/debcont.asp (At Constitutional Convention, Gouverneur Morris suggested "the expedient of an absolute negative in the Executive," because of the "tendency of the Legislative authority to usurp on the Executive.").

the rally-'round-the-flag effect after 9/11 when it obtained a "blanket authorization from Congress."[969] Indeed, the frequent citation in the corpus (60 coded segments) of the AUMF confirms my findings regarding the Bush OLC's application of Jackson's concurrence in *Youngstown:* supporting legislation helps legitimate executive action by elevating it to Jackson's 1st category, it functions as a defensive risk management tool, and, due to the phenomenon of depoliticization, it also provides greater latitude for branch-internal decisionmaking. Indeed, cross-tabulation reveals that *AUMF* textual segments almost exclusively intersect with those coded as *Recognition of Power(s)* and *Endorsement of Action*. Nevertheless, OLC's use of the AUMF before and after the Supreme Court's ruling *Hamdan* is markedly (and quantifiably) different:

2001-2003	**NSA Memo**
∑AUMF = 29	∑AUMF = 31
AUMF ∩ *Endorsement of Action* → ∑ = 18	*AUMF* ∩ *Endorsement of Action* → ∑ = 17
AUMF ∩ *Recognition of Power(s)* → ∑ = 13	*AUMF* ∩ *Recognition of Power(s)* → ∑ = 10

Table 14: Sum of AUMF codes and cross-tabulation with related codes

In the pre-*NSA* memoranda, OLC uses the AUMF to justify the use of military force abroad (*War Powers Memo*[970]) and domestically (*Domestic Military Memo*[971]), to buttress the President's authority to detain enemy belligerents belonging to the Padilla class (*Padilla 2 Memo*[972]), and as tertiary authorization for the use of military force against Iraq (*Iraq and AUMFI Memos*[973]). In each of those opinions, the AUMF has the status of "endorsement" or "recognition," but OLC does not draw on the Joint Resolution for a source of authority to act – instead, it primarily relies on strong constitutional arguments regarding the sufficiency of presidential wartime authority.

[969] *Stellar Wind Memo* 31; *Cf.* Tom Daschle, "Power We Didn't Grant," *Washington Post*, December 23, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/22/AR2005122201101.html.
[970] *War Powers Memo* at 94 (The AUMF "has confirmed that the President has broad constitutional authority to respond, by military means or otherwise, to the incident of September 11.").
[971] *Domestic Military Memo* at 57 ("[the AUMF] does not limit its authorization and recognition of executive power to use force abroad… [I]t contemplates that the domestic use of force may well be necessary and appropriate.").
[972] *Padilla 2* at ("President's constitutional authority to detain enemy combatants during the present conflict is bolstered by [the AUMF]").
[973] *AUMFI Memo* at 26 ("Were the President to order military action against Iraq… he would be acting with prior statutory authorization pursuant to Pub. L. No. 107-40").

As the table above indicates, there is a dramatic shift in OLC's utilization of the AUMF after the Supreme Court's decision in *Hamdi v. Rumsfeld.* The Court's overall favorable ruling in that case explains why. While the plurality declined to entertain the government's original position that "the Executive['s] [] plenary authority to detain pursuant to Article II"[974] was sufficient to overcome §4001(a)'s prohibition against the detention of U.S. citizens, it did so because it found that a ruling on constitutional grounds was not necessary. Writing for the plurality, Justice O'Connor stated that the Court "[need] not reach [the constitutional] question" because the government's alternative position that "Congress has in fact authorized Hamdi's detention, through the AUMF" adequately resolved the matter at hand.[975] She did, however, conclude that the detention of enemy combatants (even those who fall in the Padilla class) "is so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[976] Therefore, in litigation before the Supreme Court, the AUMF fulfilled its function in the sense of my second "application of *Youngstown*" category.

The year that Congress passed the Joint Resolution, Professor Michael Paulsen described the AUMF as "creat[ing] very nearly plenary presidential power to conduct the present war on terrorism, through the use of military and other means, against enemies both abroad and possibly even within the borders of the United States, as identified by the President, and without apparent limitations as to duration, scope, and tactics."[977] In its zeal to aggrandize presidential power, independent of any authorizing legislation, however, the Bush OLC did not give the AUMF great emphasis in the early years of the construction of the GWOT legal architecture. By contrast, in the *NSA Memo*, OLC gave the AUMF a robust interpretation.[978]

For the Bush OLC, the operative language in the Supreme Court's decision was O'Connor's finding that the detention of enemy belligerents is a "fundamental (and accepted)

---

[974] *Hamdi v. Rumsfeld.*
[975] Id.
[976] Id.
[977] Michael Stokes Paulsen, "Youngstown Goes to War," *Constitutional Commentary* 19 (2002): 222–23.
[978] Based on *Zemel v. Rusk*, 381 US 1, 17 ("[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress -- in giving the Executive authority over matters of foreign affairs -- must of necessity paint with a brush broader than that it customarily wields in domestic areas.").

incident of war." Based on that wording, the *NSA Memo* declares that "[t]he Supreme Court's interpretation of the AUMF in *Hamdi v. Rumsfeld*, confirms that Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of *all traditional and accepted incidents of force* in this current military conflict."[979] No longer is the AUMF a backup (risk management) argument in the *NSA Memo*, instead, it is front and center as the link that connects the Supreme Court's endorsement of the President's war powers and the Executive's plenary authority over the conduct of hostilities. At the same time, it also functions as a legitimating device with vastly increased potency, since it "demonstrates [not only] Congress's support for the President's authority to protect the Nation," but also "adheren[ce] to Justice O'Connor's admonition that 'a state of war is not a blank check for the President.'"[980]

Based on this recalibrated argument, OLC concludes that the AUMF has "confirmed and supplemented" the Commander in Chief's power, who possesses plenary authority to conduct the war effort, to unilaterally authorize the NSA's signals intelligence activities as a "fundamental incident of the use of military force."[981] Thus, OLC moves the goalposts once more. To greatly compress: The AUMF authorizes detention, therefore, it is legal. It is also a fundamental and accepted incident of war. Consequently, other fundamental incidents of war (over which the President possesses plenary authority as Commander-in-Chief) are also legal, and they enjoy the sanction of all three branches of government. Essentially, *Hamdi* renders the constitutional override argument unnecessary and folds an extraordinarily wide range of Commander-in-Chief powers into the AUMF as long as they can labeled as "fundamental incidents of war."[982] As OLC puts it in the *NSA Memo*: "The Constitution gives the President the full authority necessary to carry out [the] solemn duty [to protect the American people], and he has made clear that he will use all authority available to him, *consistent with the law* [the AUMF], to protect the Nation."[983]

---

[979] *NSA Memo* at 20.
[980] Id.
[981] Id*,* elsewhere in the *NSA Memo*, OLC refers to warrantless foreign intelligence gathering as a "fundamental tool of warfare," a "fundamental incident of waging war," a "fundamental tool of war," or a fundamental method of conducting wartime surveillance."
[982] *N.B.*, Jack Goldsmith's explanation is that the altered application of the AUMF had to do with personnel change at the Office of Legal Counsel, which I do not disagree with, however, *Hamdi*'s ruling undeniable recalibrated the legal arguments available to OLC; *see*, Goldsmith, *The Terror Presidency*, 181.
[983] *NSA Memo* at 10.

In sum, *Hamdi* changed the war paradigm from one unilaterally designed and implemented by the Executive Branch, to one in which the blanket authorization that the Bush administration sought in the immediate aftermath of 9/11 effectively stands in for a declaration of war endorsed by all three branches. Indeed, the AUMF continues to play an essential role in the borderless "forever war" against terrorism.[984] As Bradley and Goldsmith report, President Obama greatly expanded the scope of the AUMF to cover al Qaeda and "associated forces."[985] Furthermore, in 2014, eleven years after the passage of the Joint Resolution, the Executive Branch construed the AUMF "to authorize extensive and ongoing use of military force against the Islamic States," a terrorist organization which John Brennan described as having a "'global reach.'"[986] In addition, Obama also relied on the AUMF in targeting operations "by manned and unmanned aircraft, by special forces and other soldiers on the ground, and in offensive cyber operations."[987] The Obama OLC even cited the AUMF as legal authority for lethal drone operations targeting U.S. citizens.[988]

---

[984] Jack Goldsmith and Curtis A. Bradley, "Obama's AUMF Legacy," *American Journal of International Law* 110, no. 4 (March 29, 2017): 636.

[985] Goldsmith, 636

> The Obama administration thus went beyond the holding of Hamdi in construing the AUMF to authorize the U.S. military to detain four groups of individuals: (1) members of Taliban forces; (2) members of Al Qaeda forces who are engaged in hostilities against the United States or its coalition partners; (3) members of associated forces; and (4) those persons who have given substantial support to one of the other groups. The administration also argued that "the AUMF is not limited to persons captured on the battlefields of Afghanistan," and that "individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself."

[986] Id. 637.

[987] Id. 635.

[988] Memorandum for the Attorney General, *Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi*, July 16, 2010

> Al-Aulaqi is a United States citizen, however, and so we must consider whether his citizenship precludes the AUMF from serving as the source of lawful authority for the contemplated DoD operation… the AUMF authorized the President to detain a member of Taliban forces… even though… [he] was a U.S citizen. […] [W]e believe the AUMF's authority to use lethal force abroad also may apply in appropriate circumstances to a United States citizen who is part of the forces of an enemy organization within the scope of the force authorization.

(4) JUDICIAL POWER

> *"Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."*
>
> – Chief Justice Warren E. Burger, *Haig v. Agee*

As national security law expert Amichai Cohen writes in *Rethinking the Law of Armed Conflict in an Age of Terrorism*, "[i]nvocation of the war paradigm… means that there is or should be no judicial intervention in the operation of the executive."[989] Indeed, the four relevant institutional powers codes that emerge from the Bush corpus reflect Cohen's observation. The codes themselves provide an initial impression of the role that OLC envisions for the Judiciary in the context of the Global War on Terrorism: *Deference* (18 coded segments), *Incompetence* (2), and *Political Questions Doctrine* (12).

According to OLC, "during war Congress plays a reduced role in the war effort and the courts generally defer to executive decisions concerning the conduct of hostilities."[990] Indeed, the Supreme Court has traditionally given wide berth to the Executive Branch's decisions regarding foreign policy and national security. In 1952, the Court explained that matters relating "to the conduct of foreign relations… are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[991] Subsequent decisions affirm that deferential stance. In 1965, the Court wrote that the nature of "contemporary international relations" is such that the coordinate branches must allow the Executive a great deal more discretion in the foreign sphere than they would in the domestic realm.[992] In another case related to foreign affairs, the Burger Court cautioned in a nearly unanimous ruling that, "[m]atters related to foreign policy and national security are rarely proper subjects for judicial intervention."[993] As a result of the Judiciary's express admissions of institutional limitations in those policy areas, OLC sees its role as

---

[989] Ford and Cohen, *Rethinking the Law of Armed Conflict in an Age of Terrorism*, 168.
[990] *Military Interrogation Memo* at 48.
[991] *Harisiades v. Shaughnessy*, 342 US 580, 589 (1952).
[992] *Zemel v. Rusk*, 381 US 17 ("[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress – in giving the Executive authority over matters of foreign affairs – must of necessity paint with a brush broader than that it customarily wields in domestic areas.").
[993] *Haig v. Agee*, 453 US 280, 292 (1981)

correspondingly greater, and filling the void that the courts leave behind. As the Bush OLC points out in the *AUMFI Memo*:

> As the Supreme Court has noted, "the decisions of the Court in th[e] area [of foreign affairs] have been rare, episodic, and afford little precedential value for subsequent cases." Historical practice and the ongoing tradition of Executive Branch constitutional interpretation therefore play an especially important role in this area."[994]

Six broad policy areas emerge from the textual segments coded as *Deference, Incompetence*, and *Political Questions Doctrine*. As I will demonstrate below, in the areas of treaty suspension/termination, treaty interpretation, observance of customary international law (CIL), the government's war powers, and intelligence gathering OLC does not only acknowledge the courts' self-professed limitations, but also calls for deference to the Executive Branch's decisions in the Global War on Terrorism.

First, OLC finds that in all matters treat-related, the "need for discretion and speed of action favor" a limited role for the Judicial Branch.[995] Therefore, as OLC argues in the *Treaties and Laws Memo*, the President's decision to suspend the "Nation's Geneva III obligations as to Afghanistan" should enjoy substantial deference from the courts.[996] Indeed, in *Clark v.* Allen, the Court found that "the question whether a state is in a position to perform its treaty obligations is essentially a political question."[997] Hence, the opinion concludes that any decision regarding U.S. treaty obligations toward a failed state necessarily excludes judicial review. As I wrote in part (d) of Chapter Four above, this line of reasoning grossly underrates the effect that the judicialization of politics has had on the Court's institutional behavior, and, consequently, led to OLC's failure to predict the Supreme Court's reaction to the suspension of the rights-protective provisions of the Third Geneva Convention.

Second, OLC points out that on the rare occasion that courts have intervened in matters related to treaties, they have traditionally accorded great weight to the Executive

---

[994] *AUMFI Memo* at 31 (footnote 3).
[995] *ABM Treaty Memo* at 18 ("Judicial decisions in the area are rare, while the need for discretion and speed of action favor deference to the arrangements of the political branches.").
[996] *Treaties and Laws Memo* at 73 ("he federal courts would not review such political questions, but instead would defer to the decision of the President."); *moreover*, in the *ABM Treaty Memo*, OLC finds that the Supreme Court's vacatur of *Goldwater v. Carter* indicates that treaty termination in unreviewable in the courts.
[997] *Clark v. Allen*, 331 US 503, 514 (1947) (quoting *Terlinden v. Ames*, 184 US 270, 288).

Branch's interpretation regarding the treaties' intent and meaning.[998] It is based on this premise that OLC delivers an extremely narrow construction of CAT's definition of torture in the *Military Interrogation* and *Torture Memos*. Drawing on the reservations, understandings, and declarations submitted by the Reagan and Bush 41 administrations as part of their ratification of CAT, OLC finds that "the treaty's text prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for 'cruel, inhuman, or degrading treatment or punishment.'"[999] Thus, despite the Office's claim in the *NSA Memo* that the administration had not engaged in foreign-to-domestic bootstrapping, OLC's narrowing of the corresponding criminal statute's[1000] scope to cover only the "most egregious conduct"[1001] is directly linked to the President's foreign-sphere power of treaty interpretation. Although the federal courts did not have an opportunity to review the Bush OLC's construction of CAT and §2340(a), OLC's institutional powers analysis suggest that had they done so, they would have accepted OLC's sharply circumscribed interpretation. However, to my knowledge, the only case[1002] in which torture victims filed civil suit against individuals responsible for the CIA's torture program was settled out of court in August of 2017, leaving no guidance as to the federal courts' construction of CAT's language.[1003]

Third, in the *Treaties and Laws* and *Military Interrogation* opinions OLC also explores whether the Geneva Conventions' common Article 3 or CAT's prohibition against torture have risen to the status of customary international law. At the core of OLC's inquiry is whether the federal courts can enforce CIL against the President. In short, OLC finds that the federal courts have no jurisdiction to force the implementation of CIL for two reasons: (i) because it is not

---

[998] *See*, *United States v. Stuart*, 489 US 353, 369 ("'the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *Charlton v. Kelly*, 229 US 447, 468 ("A construction of a treaty by the political departments of the government, while not conclusive upon a court… is nevertheless of much weight."); Kolovrat v. Oregon, 366 US 187, 194 (1961) ("While court interpret treaties for themselves, the meaning given them by the department of government particularly charged with their negotiation and enforcement is given great weight.").

[999] *Torture Memo* at 3.

[1000] 18 USC §2340(a).

[1001] *Torture Memo* at 3.

[1002] *Salim et. al. v. Mitchell et al*., the case was a civil suit filed against two psychologist who helped devise and implement the CIA's torture program. The case was filed under the Torture Victim Protection Act (Pub. L. No. 102-256); *see* more at American Civil Liberties Union, "Salim et Al. v. Mitchell et Al.," ACLU of Washington, n.d., https://www.aclu-wa.org/cases/salim-et-al-v-mitchell-et-al-0.

[1003] Sheri Fink, "Settlement Reached in C.I.A. Torture Case," *The New York Times*, August 17, 2017, sec. U.S., https://www.nytimes.com/2017/08/17/us/cia-torture-lawsuit-settlement.html.

federal law under the definition of the Supremacy Clause, and (ii) CIL "would expand the federal judiciary's authority into areas where it has little competence, where the Constitution does not textually call for intervention, and where it risks defiance by the political branches."[1004] Moreover, as the Bush 41 OLC observed in 1989, "[i]f the United States is to participate in the evolution of international law, the Executive must have the power to act inconsistently with international law where necessary."[1005] Therefore, the courts' imposition of CIL's standards would be an illegitimate exercise of the judicial function, as it is "an integral part of the President's foreign affairs power" to act inconsistently with customary international law when he finds that it is in the national interest to do so.[1006]

Fourth, as OLC remarks in the pre-MO memoranda, "it would be difficult – or impossible – to articulate any precise multi-pronged legal 'test' for determining whether a particular attack or set of circumstances constitutes 'war' justifying application of the laws of war."[1007] Indeed, due to that very difficult, courts have consistently deferred to the political branches' judgement regarding the status of the country as to peace or war.[1008] What the Supreme Court has decided, however, is that formal requirements, such as a declaration of war, are not necessary for a state of war to exist and for the laws of war to apply.[1009] Relying on the *Prize Cases* and more recent court decisions such as *Campbell v. Clinton*, OLC makes the definitive determination that President Bush alone could find that in light of the "scale, duration, extent, and intensity" of the terrorist attacks directed against the United States, the conflict with al Qaeda can be described as war. Thus, OLC's ably exploits the vacuum created by the Court's deferential stance vis-à-vis the political branches' *de facto* judgement regarding

---

[1004] *Treaties and Laws Memo* at 184.

[1005] *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. OLC 170.

[1006] Id.

[1007] *Military Commissions Memo* at 66;

[1008] *See*, *Talbot v. Seeman*, 5 US 1, 28 (1801 ("congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be notice."); *The Three Friends* ("it belongs to the political departments to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.").

[1009] In *Bas v. Tingy*, 4 US 35 (1800), the Court referred to the Quasi-War with France as "limited, partial war" or an "imperfect war." The Justices found that "hostilities may subsist between two nations" even on a limited basis. According to Justice Bushrod Washington, George Washington's nephew, the definition of a war (whether "perfect" or "imperfect") is "an external contention by force, between some of the members of the two nations, authorized by the legitimate power."

war or peace – and its quasi-legal determination fills that void. The far-reaching policy consequences of that quasi-legal determination were outlined in Chapters Four and Five.

OLC also points out that the courts have recognized the limitations of the judicial power with regard to the "degree of force the crisis demands."[1010] Therefore, OLC asserts that "[i]n wartime, it is for the President alone to decide what methods to use to best prevail against the enemy,"[1011] and the courts should defer to the "decisions and acts of the political department of the Government to which the power was entrusted."[1012] The Bush OLC's claim of unreviewability of "strategic or tactical decisions on the battlefield"[1013] covers virtually all aspects of military counterterrorism operations in the borderless war against terrorism. This includes, for example, detainee treatment[1014] and the domestic deployment of military force.[1015] In hindsight, we know that OLC's overoptimism regarding the Court's unqualified deference to the Executive Branch's wartime decisions was misguided and based on a state of institutional power relations that obtained prior to the wholesale juridification of politics. Even so, with the exception of military trials, the courts have largely deferred to the Executive Branch's GWOT policies.[1016]

As I wrote in Chapter Five, OLC's treatment of the WPR is the epitome of its *status quo* maintenance function. Although no court has opined on its constitutionality, it has been the subject of numerous lawsuits since its enactment in 1973. As the Bush OLC points out in the *Iraq Memo*, cases challenging the WPR have been dismissed due to "a variety of procedural defects, including lack of standing, ripeness, and the political question doctrine."[1017] Hence, while OLC counsels formal compliance, it also states that a successful court challenge on the merits is unlikely. As I previously concluded, in the absence of an authoritative court decision regarding the WPR's constitutionality, successive OLCs' legal interpretations and Congress's acquiescence to the President's recurrent use of military force abroad have created what I

[1010] *Prize Cases*, 67 US 635, 670 (1862).
[1011] *Torture Memo* at 135.
[1012] *Prize Cases*, 67 US 635, 670 (1862).
[1013] *Military Interrogation Memo* at 75; In the *Prize Cases*
[1014] Id.
[1015] *Domestic Military Memo* at 75 ("Likewise here, we believe that the courts will defer to the executive branch's representations that the deployment of the Armed Forces furthers military purposes, if the executive institutes and follows careful controls.").
[1016] They became even more deferential under President Obama, *see*, Jameel Jaffer, ed., *The Drone Memos: Targeted Killing, Secrecy, and the Law* (New York: The New Press, 2016), 44–47.
[1017] *Iraq Memo* at 50.

call a "spring loaded mechanism" – a degree of depoliticization of the President's unilateral use-of-force tradition that has effectively removed it from the political arena, making a judicial resolution the only means by which Congress could meaningfully regulate this currently well-nigh plenary presidential domain. However, as the Clinton OLC pointed out in 1994, "the Court has been particularly willing to rely on the practical statesmanship of the political branches when considering constitutional questions," making an adverse ruling on the matter extremely unlikely.[1018]

The fifth area in which OLC refers to the courts' position in the institutional power structure is intelligence gathering. As I wrote above in section (2), the federal judiciary has been solicitous of the President's inherent powers in a wide range of war-related policy areas, and intelligence gathering is one of them. Indeed, in this particular province, the federal courts have expressed acute awareness of their epistemic limitations. As the 4th Circuit Court wrote in 1980:

> the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance... the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would... unduly frustrate the President in carrying out his foreign affairs responsibilities.[1019]

Given the *Truong* court's admission of institutional incompetence, both of OLC's surveillance-related opinions (*FISA* and *NSA Memos*) rely heavily on the 4th Circuit's decision to argue for a broad independent presidential power over intelligence gathering free from judicial second-guessing. Moreover, deference to the Executive Branch's determinations in this area is further corroborated by the FISCR's ruling in *In re Sealed Case*, in which the specialized court firmly established the President's "inherent authority to conduct warrantless searches to obtain foreign intelligence information."[1020] Therefore, the appellate courts' favorable verdicts naturally lend themselves to the Bush OLC's unilateralizing interpretation of presidential

---

[1018] Clinton OLC, "Whether Uruguay Round Agreements Required Ratification as a Treaty," 18 Op. O.L.C. 232, 234 (1994); *see also "Proposed Deployment of United States Armed Forces Into Bosnia*," 19 Op. OLC 327 ("The Supreme Court has often shown itself willing to rely on the evolved practice and custom of the political branches.").

[1019] *United States v. Truong Dinh Hung,* 629 F.2d 908 (4th Cir. 1980).

[1020] *In re Sealed Case*, 310 F.3d 717, 742 (FISC of Review, 2002).

authority in the field of foreign intelligence surveillance. Given the existing court precedent, OLC's *Stellar Wind* and *NSA Memos* boldly claim that the Executive Branch can unilaterally implement warrantless foreign intelligence surveillance programs – limited only by OLC's determination that the primary target of intelligence operations is foreign rather than domestic.

The sixth and final reference to the courts' institutional limitations concerns the extension of *habeas* jurisdiction to an area leased by the United States – the U.S. naval base at Guantanamo Bay, Cuba ("GTMO"). In order to introduce OLC's institutional-powers analysis, I shall first briefly review the substance of the *GTMO* opinion. The question of sovereignty over the leased area was put to OLC because the administration had proposed to detain enemy combatants at GTMO "pending possible trial by military commissions."[1021] The administration's legal maneuvering was necessary in order to foreclose the federal courts' jurisdiction to issue writs of *habeas corpus* and thereby question detention conditions and interrogation techniques. Defining the federal courts' power to grant writ, 28 USC §2241 states the following:

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

Relying on the terms of the 1903 Lease Agreement, the Supreme Court's 1948 ruling in *Vermilya-Brown Co v. Connell*,[1022] and branch-internal precedent[1023] the Bush OLC finds that GTMO is not within the sovereign territory of the United States. OLC's opinion that prospective detainees would not be able to petition the federal courts for a writ of *habeas corpus* is based on the holding of the WWII-era case, *Johnson v. Eisentrager*. In *Eisentrager*, the Supreme Court ruled that federal courts did not have *habeas* jurisdiction over an enemy

---

[1021] *GTMO Memo* at 7.

[1022] Vermilya-Brown Co. v. Connell, 335 US 377, 392 ("Bermuda and like bases are not… our possessions."); id. 405 (""Guantanamo Naval Base, ... a leased base in Cuba ... has been ruled by the Attorney General not to be a possession; it has not been listed by the State Department as among our 'non-self-governing territories,' and the Administrator of the very Act before us has not listed it among our possessions.").

[1023] Memorandum for the Associate Attorney General, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Status of Guantanamo Bay* (Oct. 27, 1981); *Customs Duties - Goods Brought into United States Naval Station at Guantanamo Bay, Cuba*, 35 Op. Att'y Gen. 536 (1929) (describes GTMO as "a mere governmental outpost beyond our borders," and "a place subject to the use, occupation and control of the United States," but not as sovereign territory.").

alien who had been seized in the Pacific-Asian theatre of war, tried by military commission, and subsequently imprisoned in Germany. As the Court explained:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.[1024]

Affirming that Guantanamo Bay is outside the territorial jurisdiction of every U.S. federal court, OLC points also out that none of the statutory provisions establishing district court jurisdiction in the U.S. Code includes GTMO.[1025] Thus, on the basis of previous court precedent, the terms of the GTMO Lease Agreement, the Court's ruling in *Eisentrager*, and applicable statutes, OLC concludes that they "should apply to bar any habeas application filed by an alien held at [GTMO]."[1026]

Subsequently, however, OLC also discusses of the risk of a federal court exercising *habeas* review despite the lack of requisite statutory jurisdiction. As the memo states, such an outcome would fundamentally undermine "the operation of the system… [of] detainment and trial of enemy aliens."[1027] Nevertheless, OLC cautions that "[w]ithout a clear statement from Congress extending jurisdiction to [GTMO] a court should defer to the executive branch's activities and decisions."[1028] Indeed, as the opinion emphasizes, matters related to war are "solely within the discretion of the political branches," and a detention program "undertaken pursuant to the President's Commander-in-Chief and foreign affairs powers" are outside of the purview of judicial oversight.[1029]

In retrospect, we know that, in *Rasul v. Bush*, the Supreme Court rejected OLC's arguments regarding the territorial limitations of the judicial power as regards Guantanamo Bay. Hence, in another critical legal-policy area, the Supreme Court intervened to limit the

[1024] *Johnson v. Eisentrager*, 339 US 763, 777-778 (1950).
[1025] *GTMO Memo* at 20.
[1026] Id. at 13.
[1027] Id. at 31.
[1028] Id. at 29.
[1029] Id.

Executive Branch's plenary control over the GWOT, despite OLC's claims of judicial deference and incompetence.

***

As the foregoing section demonstrates, OLC's GWOT opinions refer to the limitations of the judicial power in six broad legal-policy areas. In some of those domains, such as national security and foreign intelligence gathering, the courts have expressly recognized their own institutional incompetence. In other areas such as the decision whether war exits, or the measures required to deal with a national security emergency, the courts have tended to defer to the coordinate branches' determinations due to those policy areas' intrinsically political nature, making them unsuited for a judicial resolution.

In areas where the courts have been silent, deferential, or reluctant to intervene, OLC has invariably filled the void. Moreover, the data indicate that the Office asserts co-equal or even superior interpretive authority, as it demands judicial deference to the Executive Branch's legal decisions. Notably, however, in certain legal-policy areas, such as foreign intelligence gathering, the courts have willingly confirmed the Executive's inherent constitutional powers, putting them beyond the reach of statutory regulation, and allowing OLC to be the sole judge of the legality of presidential action.

Signaling the limitations of the Office as "*the* oracle of executive branch legal interpretation,"[1030] the Bush OLC wrongly assumed that the historical trajectory of the courts' institutional behavior in wartime would dictate the Judiciary's response to presidential action after 9/11. More specifically, OLC predicted that the federal courts would be unlikely to countermand the Executive's interpretation of its own powers in the GWOT. OLC also (wrongly) assumed that in the improbable event of a court challenge to the President's conduct of the war effort, any ruling would give great weight to the Executive Branch's wartime determinations. Thus, while the Bush OLC was keenly aware and made extensive use of the alternative policy-making avenues enabled by juridification, it sorely underrated the effect of judicialization on the SCOTUS's willingness to exercise meaningful oversight of the

[1030] John O. McGinnis, "Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon Executive Branch Interpretation of the Law," *Cardozo Law Review* 15, no. 1–2 (n.d.): 428 (emphasis original).

Executive's GWOT policies. In fact, indicating the broad-based judicialization of procedural and substantive rights-claims in the second half of the 20th century, the Rehnquist and Roberts Courts did intervene in the President's conduct of the GWOT. In doing so, the Supreme Court chose to circumscribe the administration's theretofore unchallenged legal decisions, while also affirming Congress's war powers beyond that envisioned in OLC's opinions. Therefore, OLC's ability to predict judicial review has, at best, a mixed record.

CONCLUSION

In my analysis of the Bush OLC's uniquely departmentalist and Executive-centric distribution-of-powers jurisprudence, I covered five prominent features that emerge from the textual analysis: historical (institutional) practice, independent presidential powers, OLC's use of *Youngstown*, Congress's war powers, and the limitations of the federal courts. As I argued in the theory chapter and demonstrated in the empirical analyses in Chapters Four and Five, the Bush OLC's legal opinions were policy decision enabled by the phenomenon of the juridification of politics. However, since the Bush OLC's separation-of-powers arguments do not define policy directly, it may not be immediately obvious how any of the foregoing could be said to constitute an alternative form policy-making. In fact, one could dismiss OLC's institutional powers jurisprudence as an abstraction with little real-world consequence. As the cameo at the beginning of Chapter Four recounts, White House Counsel Alberto Gonzales attempted to do just that, characterizing OLC's opinions as "unnecessary" and "irrelevant" documents "generated by government lawyers to explore the limits of the legal landscape as to what the Executive Branch can do within the law and the Constitution as an *abstract matter*."[1031]

However, the extensive and detailed separation-of-powers jurisprudence analyzed above is *prima facie* evidence that OLC's opinions amount to more than irrelevant musings regarding the dimensions of the President's powers – instead, it demonstrates that the Executive Branch has developed an elaborate legal infrastructure for the exploitation of the alternative policy avenue that emerged due to the juridification of politics. Indeed, the

[1031] Gonzales, "Press Briefing by White House Counsel."

President's power to take unilateral action without legislative authorization, and even against it, would be indefensible without recourse to the separate sources model, the PPM, the quasi-constitutional custom arising from institutional practice, or other elements of OLC's institutional-powers jurisprudence.

As a matter of fact, to assume that the President does not possess independent (express or implied) constitutionally-derived powers upon which unilateral action can be taken would entail that he relies, instead, on prerogative power. However, the Bush administration squarely rejected that option. Instead, "they [] made every attempt to place each and every presidential action… on what they [thought was] the more solid foundation of the law."[1032] Jack Goldsmith's account of his time in the Bush Office of Legal Counsel confirms this observation:

> When I led the OLC during the Bush administration, I and others in the Department of Justice (DOJ) concluded that an important counterterrorism surveillance program could not continue as before, consistent with the law. At one point, I explained the prerogative tradition of Jefferson and Lincoln to White House Counsel Alberto Gonzales and Vice-President Counsel David Addington and advised them that the president could, despite DOJ legal advice, "ignore the law, and act extra-legally." The White House lawyers scoffed at my suggestion. They believed their actions were lawful; they did not want to act extra-legally; and they did not think it was appropriate to do so. They held these views even though they believed that the proposed modification of the surveillance program would result in many Americans being killed… Despite the jeopardy of one of the most important counterterrorism initiatives in the government, the president's senior lawyers showed no interest in prerogative power.[1033]

Prerogative power was also not an available option because "many of the statutes that governed [the administration's] counterterrorism initiatives" such as the War Crimes Act, the Torture Statute, the PCA, or 18 USC Ch. 119[1034] "were criminal laws."[1035] Consequently, when OLC offered its best view of the law, "[g]overnment officials [] especially wary of violating criminal [statutes]"[1036] accepted its interpretations because successive administrations had developed a body of Executive Branch law, including a substantial distribution-of-powers

[1032] Fatovic and Kleinerman, "Extra-Legal Measures and the Problem of Legitimacy," 5.
[1033] Goldsmith, "The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation," 217.
[1034] Wire and Electronic Communications Interception and Interception or Oral Communications.
[1035] Goldsmith, "The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation," 217.
[1036] Id.

jurisprudence, that lends OLC's decisions an air of legitimacy that is otherwise associated with a court of last resort.

Although OLC's opinions are usually secret, they are also self-executing because the President acts pursuant to the Office's sanction. Therefore, whether OLC's assignment of institutional authorities and competencies is ultimately upheld, is a question of the coordinate branches' ability or willingness to challenge the Executive's actions. In this sense, OLC's institutional-powers jurisprudence is the bedrock of unilateral presidential action in the context of the juridification of politics.[1037] As Howell notes, when the President takes some form of unilateral action, the coordinate branches confront a *fait accompli*. If such an action goes unopposed by Congress and the courts, then its repeated exercise progressively entrenches it, along with OLC's legal analysis, into what eventually becomes quasi-constitutional custom. Hence, while OLC's assignment of institutional powers and competencies may not have the same direct effect as a decision of the Supreme Court does, the coordinate branches' inertia or inability to countermand Executive Branch actions establishes *de facto* precedents that, in the long term, meaningfully impact the behavior of the entire system.

In actuality, during the period that spans the construction of the GWOT legal architecture, Congress was a rather willing and pliable auxiliary to the administration and provided little-to-no counterweight to presidential unilateralism.[1038] Although the Supreme Court did weigh in on four occasions, meaningfully influencing the President's conduct of the GWOT in a narrow segment of the GWOT counterterrorism program,[1039] its institutional characteristics made it an overall limited check on executive power. In fact, as Goldsmith observes in his book *Power and Constraint: The Accountable Presidency after 9/11*, with the notable exception of enhanced interrogation techniques, the Obama administration continued most of the Bush counterterrorism program.[1040] It is, therefore, reasonable to

---

[1037] Goldsmith, "The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation," 217 (Goldsmith refers to this in the more narrow sense of "criminalization and independent enforcement of modern laws concerning war and intelligence.").

[1038] For reasons that have to do with its institutional characteristics: such as fragmentation, polarization, and partisan support of the President.

[1039] The proceedings of military commissions and the Judiciary's ability to effectuate detainees *habeas corpus* rights.

[1040] Jack L. Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11*, 1st ed (New York: W. W. Norton & Co, 2012), 5–20 (war model, military detention, forum discretion, military commissions, use of the

conclude that the Bush OLC's distribution-of-powers jurisprudence materially affected the institutional power of the Executive as well as the power relations of the three branches of government.

Guantanamo Bay detention facility, denial of the applicability of *habeas corpus* to detainees in foreign countries, global targeted killing, rendition, surveillance, secrecy).

CHAPTER SEVEN

ASSERTING INDEPENDENT INTERPRETIVE AUTHORITY

> *"To the extent that the holding assumed that the courts are free to determine whether a conflict is between the United States and another 'State' regardless of the President's view whether the other party is a 'State' or not,* we disagree with it*."*
>
> – Bush OLC, *Treaties and Laws Memorandum*

I noted in Chapter Three that much of the existing literature on OLC's Executive-centric jurisprudence assumes that the Office operates under the presumption of judicial supremacy.[1041] Given the analytical tack of this dissertation, I also observed in the methodology chapter that the content analysis of OLC's opinions is especially useful because it helps "*debunk* conventional legal wisdom."[1042] In this chapter, I set out to do just that: debunk the notion that OLC operates under a fully actualized version of judicial supremacy and catalogue the ways in which its legal opinions engage in various forms of "quasi-judicial legislation." In the coding structure, I created a set of codes named *Interpretive Authority* that I use to track and analyze OLC's pertinent arguments. The most populous single code under that category is *Executive Interpretation of the Law.* Admittedly, it is somewhat ill-suited as a *Legal Argument* sub-code, since it is akin to an *Authority* such as the *Legal Opinions* of the *OLC*. Nevertheless, it is useful as a proxy for the status of branch-internal legal interpretation in OLC's jurisprudence. If my classification scheme is correct, then OLC's contention that the Executive Branch can render authoritative interpretations of the law comes in as the second-most-often recurring code under *Interpretive Arguments*.[1043] Notably, if we changed the coding structure by placing the *Executive Interpretation* code under *Legal Opinions* of the *Executive Branch*, textual segments coded as such would far outnumber those under *Lower*

[1041] Lederman, "Balkinization: Chalk on the Spikes: What Is the Proper Role of Executive Branch Lawyers, Anyway?"; Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands," 2005.
[1042] Mark A Hall and Ronald F Wright, "Systematic Content Analysis of Judicial Opinions," *California Law Review* 96, no. 1 (2008): 84.
[1043] Second only to statutory construction.

Court, they would be a close second to *Constitution and Judicial Doctrine*, and they would equal approximately one third of the *Supreme Court*'s decisions quoted in the corpus. Indeed, what this demonstrates beyond reasonable contradiction is that the Executive Branch's interpretation of statutory, international, and constitutional law has particular salience in OLC's uniquely executive jurisprudence.

In this chapter, I will analyze four aspects of the Bush OLC's legal opinions. First, I will examine OLC's treatment of court precedent to determine the extent to which the Office operates under the presumption of judicial supremacy. Second, I will explore the role of risk assessment in OLC's opinions. Third, I will revisit the kinds of policy-making that I observed in the empirical chapters in order to create a typology of OLC's unique form of quasi-judicial legislation. And, fourth, I will survey branch-internal precedents in the corpus in order to gauge whether OLC's jurisprudence is a self-reinforcing system, and to ascertain whether OLC's institutional behavior under President Bush is an aberration or a continuation of that of previous OLCs.

1. JUDICIAL SUPREMACY?

Legal scholars have traditionally compared the interpretive activity of OLC to that of a lower court: faithfully implementing the federal courts' rulings as *modus operandi*.[1044] While the Bush OLC reliably applies the Court's precedents in most of the corpus, a total of 40 coded segments also emerged from my content analysis in which the Office's opinions exhibit incomplete lower-court mimicry and partial or absolute rejection of judicial supremacy. The three corresponding codes[1045] are: *Interpretive Equivalency*, *Interpretive Superiority*, and *Original Interpretation*.

[1044] Lederman, "Balkinization: Chalk on the Spikes: What Is the Proper Role of Executive Branch Lawyers, Anyway?" ("As a general matter, OLC attempts to give the President the 'best' view of what the law allows, where 'best' is generally understood to mean the answer to which the governing legal doctrines would most likely point (more or less akin to what a lower court does when it's trying to follow the 'rules laid down' by the Supreme Court).").

[1045] Located in the coding structure at *Interpretive Arguments / Interpretive Authority*.

INTERPRETIVE EQUIVALENCY

I observed in Chapter Six that in legal-policy areas where the courts have been silent, deferential, or reluctant to intervene, OLC has filled the void. In OLC's words in the *AUMFI Memo*, "historical practice and the ongoing tradition of Executive Branch constitutional interpretation [] play an especially important role in [the] area[s]" of foreign affairs and national security where the "decisions of the Court… are… rare, episodic, and afford little precedential value for subsequent cases."[1046] This self-professed gap-filling duty of the Office of Legal Counsel is tantamount to claiming independent interpretive authority in those domains where the federal courts do not adequately (or at all) practice their legal boundary-management function. However, as the following analysis demonstrates, OLC also asserts interpretive equivalency, and, in some cases, superiority, in areas where the federal courts have found no difficulty in exercising their judicial responsibilities.

My content analysis identified 18 textual segments in which the Bush OLC claims interpretive authority equivalent to that of the federal courts. Some of those assertions simply put the courts' pronouncements on a par with OLC's opinions by stating "we do not disagree with the analysis of the courts,"[1047] or by holding that "executive and judicial statements and decisions interpreting the Constitution and the President's powers under it"[1048] are of equal weight. As the next four categories demonstrate, however, others are more aggressive.

First, some opinions in the Bush corpus make the bold claim that the Office's reading of the law is the only acceptable interpretation; therefore, a potential adverse court ruling would necessarily be incorrect. In the *Domestic Military Memo*, for example, OLC delivers a lengthy analysis of the Constitution and corresponding judicial doctrine, arguing that the Fourth Amendment does not apply to domestic military operations for counterterrorism purposes. While explicitly recognizing that the federal courts could rule otherwise, OLC

[1046] *AUMFI Memo* at 31 (quoting *Dames & Moore v. Regan*, 453 US 654, 686 (1981).
[1047] *FISA Memo* at 35 ("We do not disagree with the analysis of the courts that it is the national security element in the search that justifies its exemption from the standard law enforcement warrant process.").
[1048] *War Powers Memo* at 9 ("Second, we confirm that conclusion by reviewing the executive and judicial statements and decisions interpreting the Constitution and the President's powers under it."); *see* also, *Treaties and Laws Memo* at 181 ("Presidents and courts have agreed that the President enjoys the fullest discretion permitted by the Constitution in commanding troops in the field.").

asserts that an opposing ruling "would be at odds with the best reading of the constitutional text and history, practice, and the case law."[1049] Elsewhere, OLC suggests that a court decision holding war crimes investigators to the requirements of *Miranda v. Arizona*,[1050] "on the grounds that such interrogations bear a [] close nexus to law enforcement," would be in error.[1051] Thus, in order to prevent an Article III court from handing down such an incorrect verdict, OLC suggests that the military authorities should decide ahead of time in which forum (criminal court or military commission) a particular enemy combatant should be prosecuted, or provide *Miranda* warnings during interrogations to ensure the custodial statements' admissibility.[1052]

Second, in several instances in the corpus, the Bush OLC also draws conclusions from Supreme Court cases that the Court did not reach. The construction of *Ex parte Quirin* in the *SJAA Memo* is one example of OLC's usurpation of the Court's "authority to decide." In *Quirin*, SCOTUS specifically declined to "inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents" by means of issuing procedural rules for military commissions.[1053] The Bush OLC, however, takes the Court's refusal to answer the constitutional question as affirmation of the President's plenary power over military commissions. Accordingly, the memo finds that "the Court['s] [denial] indicate[s] that serious questions would be raised if military commissions were treated as anything other than creatures of the President's authority as Commander in Chief."[1054]

Third, OLC also exhibits interpretive equivalency by unilaterally expanding the scope of the federal courts' holdings. As part of my analysis of OLC's institutional powers jurisprudence in Chapter Six, I discuss in some detail the 2001 Authorization for Use of Military Force. In that analysis, I demonstrate that OLC's application of the AUMF is markedly different after the Supreme Court's ruling in *Hamdi v. Rumsfeld*. Indeed, much of that change has to do with the Office's capacious interpretation of the Court's newly-issued precedent. In *Hamdi*, Justice O'Connor wrote that the detention of enemy belligerents is "so fundamental and

---

[1049] *Domestic Military Memo* at 124.
[1050] *Miranda v. Arizona*, 384 US 436 (1966).
[1051] *Miranda Memo* at 76-77.
[1052] Id. at 77.
[1053] *Ex parte Quirin*, 317 US 1, 47 (1942).
[1054] *SJAA Memo* at 31; *see* also, OLC's treatment of *Madsen*, *Hirota*, and Yamashita in the *Military Commissions Memo*.

accepted an incident of war as to be an exercise of the 'necessary and appropriate' force' Congress has authorized the President to use."[1055] Greatly expanding the scope of the Court's ruling, in the *NSA Memo*, OLC claims that other "fundamental and accepted… incident[s]" of war are not only an appropriate exercise of the President's corresponding constitutional powers, but that they have also been authorized by Congress, and approved by the Supreme Court.[1056]

Lastly, OLC also asserts co-equal interpretive authority by deciding on the best understanding of federal court cases. In the *NSA Memo*, for instance, OLC delivers an interpretation of *Youngstown* that is fundamentally different from its traditional and, indeed, near-universal reading. Claiming that the steel-seizure case did not affect the President's foreign-sphere powers,[1057] the Bush OLC concludes that, "*Youngstown* does not support the view that Congress may constitutionally prohibit the President" from exercising authority in matters of national security, in which the Constitution grants the dominant role to the Executive Branch.[1058]

INTERPRETIVE SUPERIORITY

On rare occasion, the Bush OLC also engages in remarkably confrontational behavior toward the Judiciary. As I will show below, this represents a complete break with the notion that the Office faithfully implements the federal courts' rulings. Indeed, this manner of authoritative (re)interpretation of precedent is more akin to a superior tribunal's overruling of a lower court.

[1055] *Hamdi v. Rumsfeld*, 542 US 507 (2004) (O'Connor, J. plurality opinion).

[1056] *NSA Memo* at 20 ("the AUMF demonstrates Congress's support of the President's authority to protect the Nation and, as the same time, adheres to Justice O'Connor's admonition that 'a state of war is not a blank check for the President.'"); id. 70 ("In light of the long history of prior wartime practice, the NSA activities fit squarely within the sweeping terms of the AUMF. The use of signals intelligence to identify and pinpoint the enemy is a traditional component of wartime military operations – or, to use the terminology of *Hamdi*, a "fundamental and accepted… incident of war.").

[1057] See Chapter Six ("since the case involved an attempt by President Truman at a 'dramatic extension of the President's authority over military operations to exercise control over' domestic matters. Consequently, the Supreme Court addressed 'an assertion of executive power that not only stretched far beyond the President's core Commander in Chief function, but that did so by intruding into areas where Congress had been given an express, and apparently dominant, role by the Constitution.'").

[1058] *NSA Memo* at 120.

In the first sub-category of interpretive equivalency above, I observed that OLC dismisses potentially unfavorable readings of the law as mistaken or incorrect. In some of its legal opinions, however, OLC goes as far as to explicitly distinguish existing precedent as wrongly decided. First, in the *GTMO* memorandum, OLC declares two federal court decisions regarding the legal status of Guantanamo Bay and the availability there of constitutional protections to be in error. Specifically, both the Second Circuit and the District Court for the Eastern District of New York[1059] had held that "Guantanamo Bay… is subject to the exclusive control and jurisdiction of the United States,"[1060] and therefore refugees detained therein can avail themselves of some constitutional protections. In sharp contrast, OLC claims that those cases were incorrectly decided, and "believe[s] that a federal district court [should] not accept [] arguments"[1061] that lead to the conclusion that GTMO is under U.S. sovereignty. Instead, the Office asserts that "some 'jurisdiction' and 'control' over the base" falls well short of establishing ultimate sovereignty. Therefore, the *Eisentrager*-based legal analysis, which precludes federal judges from hearing *habeas* petitions of persons held outside the sovereign territory of the United States, should apply to detainees held at Guantanamo Bay.

In another legal opinion, OLC disagrees with a ruling by the United States Military Court of Appeals and counsels that the government seek to overturn that erroneously decided precedent. In the *Criminal Charges Memo*, OLC undertakes to answer the question whether a U.S. civilian captured in Afghanistan could be charged under the Uniform Code of Military Justice and tried by court-martial. Although the UCMJ expressly prevents persons not "subject to this chapter" from being tried in that forum, 10 USC §802(a)(10) extends the jurisdiction of courts-martial "in time of war, [to] persons serving with or accompanying an armed force in the field." Nevertheless, as OLC notes, the "in time of war" language has been interpreted by the U.S. Military Appeals Court to mean a declared war only.[1062] By contrast, a lower-level military court, with whose judgment OLC agrees,[1063] had previously found the same language to apply to *de facto* wars as well. Since the armed conflict in Afghanistan is not a declared war, OLC concludes that "the case law… would likely require a court-martial to

---

[1059] *Haitian Centers, Inc. v. Sale*, 823 F. Supp. 1028 (F.D.N.Y. 1993) (*Sale* was overturned by the 11th Circuit, but the 2nd Circuit's decision still stood prior to *Rasul v. Bush*).
[1060] *Haitian Centers, Inc. v. McNary*, 363 F.2d 1326 (2nd Cir. 1992).
[1061] *GTMO Memo* at 26.
[1062] *United States v. Averette*, 41 CMR 363 (1974).
[1063] Navy-Marine Corps Court of Military Review, *United States v. Castillo*, 34 MJ 1160 (1992).

dismiss [the] case… on jurisdictional grounds."[1064] Therefore, in order to allows trials by courts-martial to go forward, the Office urges the government to persuade the Military Appeals Court to reverse its holding in *Averette*.[1065]

Even more remarkably, the Bush OLC's opinions do not stop at "overruling" district court and circuit court precedents. For instance, in the *Transfer Memo*, OLC explicitly distinguishes Chief Justice Marshall's decision in *Brown v. United States* on the grounds that it was wrongly decided. In *Brown*, the Chief Justice expressed his view that the President had "no inherent authority to hold and detain captured enemy soldiers" in the absence of authorizing legislation.[1066] However, as OLC points out, "Marshall was unable [] to cite any constitutional provision… that expressly delegates to Congress the power to make rules concerning captured persons."[1067] Moreover, Marshall's comment cannot "hold up under the weight of longstanding historical practice."[1068] Indeed, OLC observes that despite Marshall's claim to the contrary, the longstanding institutional practice of the branches demonstrates that Presidents have made policy decisions regarding the capture and detention of enemy belligerents, "with Congress's blessing – usually in the form of supporting appropriations."[1069]

Similarly, in the *Military Commissions* opinion, OLC rejects the Supreme Court's "broad pronouncements" in *Ex parte Milligan* based on its determination that the case "do[es] not accurately reflect the requirements of the Constitution."[1070] In *Milligan*, the Court held that military commissions did not have jurisdiction to try a non-combatant citizen when no marshal law had not been declared and the civilian authorities were open and functioning:

> It can serve no useful purpose to inquire what [the laws of war and their] usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that, in Indiana, the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances, and no usage of war could sanction a military trial there for

---

[1064] *Criminal Charges Memo* at 79.
[1065] Nevertheless, given the jurisdictional hurdle, OLC finds military commissions to be a more reliable vehicle of charging civilian enemy belligerents (in the Padilla class) with violations of the laws of armed conflict; see, *Criminal Charges Memo* at 85-89.
[1066] *Transfer Memo* at 43.
[1067] Id.
[1068] Id.
[1069] Id.
[1070] *Military Commission Memo* at 50.

> any offence whatever of a citizen in civil life in nowise connected with the military service.[1071]

Thus, pursuant to the *Milligan* Court's logic, military commissions are not the proper forum for the trial of U.S. citizens accused of having committed or conspired to commit acts of terrorism, because the LOAC cannot apply to non-belligerents "in states where civil courts are open."[1072] OLC's war paradigm, however, is substantially based on the application of the laws of war and the transfer of jurisdiction to try enemy combatants from Article III to Article II courts. Therefore, OLC argues that *Ex parte Quirin* has "severely limited" *Milligan*,[1073] and that its holding is a better fit for the factual circumstances of the GWOT. According to OLC, the *Quirin* Court "rejected the idea that military jurisdiction would attach only if the defendant had entered the 'theatre or zone of active military operations,'" it affirmed that certain acts such as sabotage amount to belligerency, and it made clear that citizenship cannot protect a person "from the consequences of a belligerency which is unlawful."[1074]

***

Given its structural position in the institutional architecture of the federal government, OLC has been known to fill in the jurisprudential blanks left by the courts. However, the existing literature on OLC presumes that the Office does so by faithfully implementing the Federal Judiciary's rulings as *modus operandi*. By contrast, the data presented in this section demonstrates that OLC regards its interpretive authority to be, at a minimum, equivalent to that of the federal courts. Furthermore, as the examples of interpretive superiority make clear, the Bush OLC does not even shy away from declaring the holdings of federal tribunals, including the Supreme Court, to have been incorrectly decided.

In previous chapters, I pointed out several instances where OLC's opinions effectively reinterpret the Supreme Court's rulings. In part (b) of Chapter Four, I found that OLC's elongation of the legal concept of "exigency/emergency" recalibrates SCOTUS's rulings in cases pertaining the Executive's inherent emergency authority occasioned by a sudden attack.

[1071] *Ex parte Milligan*, 71 US 2, 121, 122 (1866).
[1072] Id. 137.
[1073] *Military Commissions Memo* at 50.
[1074] *Ex parte Quirin*, 317 US 1, 37 (1942).

I also noted that it is unlikely that in cases such as *The Apollon* or the *Prize Cases* the Supreme Court contemplated that a global war against terrorism – a drawn-out and, indeed, potentially interminable military campaign, "in times [] when the other branches of Government are [able] to function"[1075] – fits the parameters of "act[ing] on a sudden emergency."[1076] Indeed, in *Kahanamoku* the Court considered a scenario in which (nearly 2 years after Pearl Harbor) civilian authority had been reestablished and reached the opposite result.

Elsewhere, I found that OLC has a tendency to rely on judicial *dicta* and to elevate it to holding such as Justice Douglas's expansive language in *Hirota*[1077] or Justice Southerland's opinion in *Curtiss-Wright*.[1078] That behavior is similar in principle to the second category of interpretive equivalency. In addition, in part (d) of Chapter Four, I pointed out that the Bush OLC misrepresents Supreme Court precedents such as *Madsen,* and *Yamashita* in order to reach the conclusion that the President alone can prescribe the procedural rules of military commissions. Such reinterpretation of precedent is akin to the instances of interpretive supremacy described above.

Therefore, in light of the evidence presented here and elsewhere in this dissertation, the Bush OLC's jurisprudence can hardly be described as faithfully implementing the federal courts' rulings as *modus operandi*. In fact, as the next sub-section demonstrates, OLC's legal decisions are at times completely unmoored from supporting legal authorities.

ORIGINAL INTERPRETATION

I observed in Chapter Five that OLC's interpretation of the applicability of the Third Geneva Convention to al Qaeda and the Taliban is "original." It is original because no[1079]

[1075] *Duncan v. Kahanamoku*, 327 US 304, 335 (Stone, C.J., concurring).

[1076] *The Apollon*, 22 U.S. (9 Wheat.) 362, 366-67 (1824).

[1077] *Hirota v. MacArthur*, 338 US 197, 208 (1948).

> The Constitution makes the President the "Commander in Chief of the Army and Navy of the United States ...." Art. II, § 2, Cl. 1. His power as such is vastly greater than that of troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country, and to punish those enemies who violated the law of war.

[1078] *U.S. v. Curtiss-Wright*, 299 US 304, 320 (1936).

> [The Vesting Clause] has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers

[1079] Or woefully insufficient.

pertinent Executive Branch precedent or court decisions guides OLC's decisionmaking. Undoubtedly, for such a legal construction to have an air of legitimacy, the Office of Legal Counsel must possess substantial independent interpretive authority. Indeed, the *Treaties and Laws* analysis is not the only place in the corpus where the Bush OLC engages in original interpretation. I identified three additional legal-policy domains in which OLC delivers similarly original constructions of the law. In one of those domains, related to 5th Amendment's Self-Incrimination Clause (*Miranda* warnings), the Office's original interpretation is "incomplete" because it does not affect the overall conclusion of the opinion. In the areas of enhanced interrogations and detainee transfer, however, OLC's original interpretation is "complete," because it determines the outcome of the corresponding legal analysis. Below, I will describe each area in some detail.

a) "INCOMPLETE" ORIGINAL INTERPRETATION

In the *Miranda Memo*, OLC probes the legal constraints that apply to the interrogation of enemy belligerents captured in Afghanistan. The question of restrictions applicable to custodial interrogations becomes especially relevant in the GWOT due to the war paradigm's blurring of the distinction between law enforcement and military operations. Specifically, under the 5th and 6th Amendments of Constitution, criminal suspects have certain procedural rights with which the government must comply for evidence to admissible in a criminal prosecution. Two clauses are relevant for OLC's legal analysis: the 5th Amendment's Self-Incrimination Clause ("SIC"), which states that "[n]o person… shall be compelled in any criminal case to be a witness against himself," and the 6th Amendment's Assistance of Counsel Clause.

In *Miranda v. Arizona*, the Supreme Court held that law enforcement officials must advise suspects "of [their] right to remain silent or [their] right to consult with [an] attorney."[1080] Under the Court's strict ruling, "unwarned" statements are presumed to be compelled, and they are inadmissible in a criminal trial. The reason why the Bush administration needed clear guidance as to whether to *Mirandize* detainees during custodial interrogations was to maintain "forum discretion."[1081] Essentially, the administration wanted

[1080] *Miranda v. Arizona*, 384 US 436, 440 (1966).
[1081] Goldsmith, *The Terror Presidency*, 10.

to ensure that statements obtained by interrogators as part of a war crimes investigation would also be available in a potential criminal trial before an Article III court.[1082]

The only aspect of OLC's analysis that is relevant for my purposes here is the territorial application of the Constitution's criminal process protections. Under current Supreme Court doctrine, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."[1083] Yet, as the Court held in *Almeida-Sanchez v. U.S.*, aliens who enter the sovereign territory of the United States (whether legally or illegally) enjoy the protections of the Constitution.[1084] As SCOTUS explained in *Eisentrager*, it is "the alien's presence within the territorial jurisdiction [of the United States] that g[ives] the Judiciary power to act."[1085] Conversely, OLC points out that Justice Kennedy's concurrence in *U.S. v. Verdugo-Urquidez* appears to have introduce an element of scale into the analysis of an alien's claim to constitutional protections. According to Kennedy, the alien "'has been accorded a generous and ascending scale of rights as he increases his identity within our society.'"[1086]

Building on Justice Kennedy's language, OLC claims that "[a]s a matter of original interpretation" of the 5th Amendment's Self-Incrimination Clause,

> there may be sound reasons for concluding that [it] does not apply to a trial of an alien whose only connection to this country consists of the commissions of a federal crime (perhaps taking place entirely abroad) and involuntarily transportation to this country to stand trial.[1087]

Since the Supreme Court has held that the Bill of Rights does not apply extraterritorially, OLC concludes that an alien who was arrested overseas and then brought to the United States to

---

[1082] *Miranda Memo* at 74 ("There is always the possibility that the investigation will lead to trial in an Article HI court. Indeed, it might be argued that this possibility is enhanced here because the only person charged so far in relation to the attacks of September 11 has been charged in federal court (even though the attacks appear to involve several violations of the laws of war), and, in any event, some war crimes can also be prosecuted as violations of federal criminal law, see 18 U.S.C. § 2441.").

[1083] *United States v. Curtiss-Wright*, 299 US 304, 318 (1936); *see* also, *Verdugo-Urquidez*, 494 US 259, 269 ("we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.").

[1084] *Almeida-Sanchez v. United States*, 413 US 266 (1973); *see* also,

[1085] *Johnson v. Eisentrager*, 339 US 763, 771 (1950).

[1086] *United States v. Verdugo-Urquidez,* 494 US 259, 269 (1990) (Kennedy, J. concurring) (quoting *Eisentrager*, 770)

[1087] *Miranda Memo* at 29.

stand trial "has not established any sort of connection with the country that warrants him the protections of the Fifth Amendment."[1088]

This interpretation of the application of the Constitution's criminal process protections, however, is in sharp contrast with the Supreme Court's applicable doctrine, and OLC admits as much. Indeed, the Supreme Court has consistently held that aliens who have entered the sovereign territory of the United States enjoy the protections of the criminal charge-related elements of the Constitution (1st, 4th, 5th, 6th, and 14th Amendments). As SCOTUS held in *Wong Wing v. United States*, "[t]hese provisions are universal in their application to all persons within the territorial jurisdiction, without regard of race, of color, or nationality."[1089] Moreover, in *Ross v. McIntyre*, the Court expressly stated that the 5th and 6th Amendments "apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere."[1090]

In another portion of the *Miranda Memo*, OLC addresses the question whether *Miranda* bars unwarned statements obtained by the investigative services of the U.S. Armed Forces from being used for purposes of criminal prosecution before an Article III court. While acknowledging that the Supreme Court's *Miranda* rule is iron-clad, OLC argues that the decision's sole purpose was to regulate the conduct of law enforcement. Since military counterterrorism operations are not law enforcement under the war paradigm, the rules prescribed in *Miranda* are not applicable. Therefore, unwarned statements obtain in a war crimes investigation should be admissible in a potential trial before an Article III court.

Its original interpretation notwithstanding, OLC warns that "the matter is not free from doubt, and there is a very substantial risk that a court would reach the opposite conclusion and decide that *Miranda*'s requirements do properly apply."[1091] Consequently, the Office concludes that war crimes investigators considering switching a particular case to the criminal context should comply with *Miranda*'s guidelines in order to avert an adverse court ruling.

[1088] Id.
[1089] *Wong Wing v. United States*, 163 US 228, 238 (1896).
[1090] *Ross v. McIntyre*, 140 US 453, 464 (1891).
[1091] *Miranda Memo* at 74.

b) "COMPLETE" ORIGINAL INTERPRETATION

In March of 2002, the Department of Defense put the following question to the Office of Legal Counsel: What are the laws applicable to the transfer of members of the Taliban militia, al Qaeda, or other terrorist organizations, who have come under the control of the United States Armed Forces, to other countries?[1092] In its response to DoD's query, the Bush OLC stakes out a strong constitutionally-based claim of plenary presidential authority over captured enemy belligerents. OLC's analysis is based on the text and structure of the constitution, and the Framing generation's understanding of constitutional concepts, as informed, in part, by British constitutional practice.

Having delivered an extensive interpretation of the relevant authorities, about one third of the way into its opinion, OLC concedes that textual sources alone cannot provide an adequate response to DoD's question:

> Because of the novelty of this question and the lack of any direct guidance from the opinions of this Department or decisions by the federal judiciary, we review the relevant history here to demonstrate the depth of support for the conclusion that the President enjoys the unrestricted constitutional power to dispose of prisoners of war.[1093]

Accordingly, OLC goes on to present a detailed survey of prisoner-of-war policies throughout U.S. history. Based on the historical record, the Office concludes that the Executive's "unchallenged and exclusive control over individuals captured during military operations" definitively establishes the existence of a plenary presidential power to detain captured enemy combatants and to transfer them to the custody of another state.

While this interpretation is concededly original, OLC's interpretive behavior in the *Transfer Memo* is not an aberration. Instead, it is in line with the Office's intrinsically Frankfurtarian hermeneutical tradition: it seeks to demonstrate the existence of quasi-constitutional custom. Thus, the *Transfer* analysis is an example of OLC's original interpretation that may be unmoored from legal precedent, but that adheres to longstanding institutional practice for guidance.

[1092] *Transfer Memo* at 9.
[1093] Id. at 32.

OLC's legal construction in the *Torture* and *Military Interrogation* memoranda, however, includes elements of original interpretation that are not only unmoored from judicial and branch-internal precedent, but that also lack the Frankfurtarian pedigree that the *Transfer* analysis possesses.

At the outset of its statutory analysis in the *Military Interrogation Memo*, OLC concedes that there is no case law interpreting of §2340A, the Torture Statute. "In light of the paucity of" reference authorities, the Office proposes to "discuss[] at length [] the text of the statute, its legislative history," related statutes, and the treaty history of the Convention Against Torture, "in order to provide guidance as to the meaning of the elements of torture."[1094]

In Chapter Six, I argued that OLC's abandonment of its Frankfurtarian interpretive tradition significantly contributes to the extreme conclusion reached in the interrogation-related memoranda. Here, I will examine those portions of the twin opinions that are thoroughly "original." In other words, I will consider only those segments that fit two criteria: (i) OLC's analysis has no court or branch-internal precedent on point, and (ii) the analysis makes not reference to lateral precedent (such as the TVPA[1095]) or other provisions of the U.S. Code. Of course, reasonable minds could disagree with my approach, and claim that the entirety of OLC's interrogation analysis should be regarded as "unmoored from supporting legal authorities." Nevertheless, under the analytical approach of this section, two particular segments of the *Torture* and *Interrogation Memos* qualify as completely original interpretations.[1096]

18 USC §2340 provides the definitions of the terms used in the Torture Statute. According to §2340(2), "'severe mental pain or suffering' means the prolonged mental harm caused by or resulting from" a number of predicate acts, including the infliction of severe physical pain or suffering, the administration of mind-altering substances, the threat of imminent death, or the threat that any of the foregoing will be done to another person. Since the term "prolonged mental harm" is ambiguous, and it does not appear elsewhere in the U.S. Code, it leaves OLC considerable room for interpretation.

[1094] *Military Interrogation Memo* at 127.
[1095] Torture Victim Protection Act, 28 USC §1350.
[1096] The relevant analysis in identical in the two memoranda.

As an aside, one could point out that acting in a purely executive capacity would mean that, at this point, OLC should conclude its inquiry as inconclusive, thus, permitting no action. Since the statutory language is unclear, the coordinate branches should exercise their constitutional functions and either change the statute or interpret its meaning before the Executive Branch can take further action based upon it. However, an Executive acting unilaterally can exploit the juridification of politics and interpret the meaning of the statute to allow action without having to take recourse to the textbook inter-branch policy-making process.

In its analysis, the Bush OLC engages in extensive construction of the statutory language. In line with the canon of construction that the legislative purpose is expressed in the ordinary meaning of the words used in the statue,[1097] OLC turns to dictionary definitions of the word "prolong." After concluding that "'prolong' adds a temporal dimension to the harm," meaning that "the harm must be one that is endured over some period of time,"[1098] OLC goes on to provide a nonexclusive list of mental disorders that would fit §2340's definition. Based on the DSM-IV,[1099] OLC concludes that the development of "posttraumatic stress disorder" or "chronic depression" "might satisfy the prolonged harm requirement."[1100]

Sub-section (2)(B) of §2340 provides that "the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality" satisfies the requirement of "severe mental pain or suffering," and, therefore, constitutes torture. OLC's construction of the sub-section's language is another example of "complete" original interpretation. As OLC points out, the phrase "disrupt profoundly the senses or personality" is "not used in the mental health literature nor is it derived from elsewhere in U.S. law."[1101] Again, OLC goes on to make what essentially amounts to educated guesses and states, "we think the following examples would constitute a profound disruption of the senses or personality."[1102] To illustrate just how far removed this portion of the *Torture Memo* is from the domain of traditional legal construction, I will summarize OLC's findings:

[1097] *See*, *INS v. Phipathya*, 464 US 183, 189 (1984).
[1098] *Torture Memo* at 26.
[1099] Diagnostic and Statistical Manual of Mental Disorders.
[1100] *Torture Memo* at 26.
[1101] *Torture Memo* at 36.
[1102] Id.

- "Drug-induced dementia" causing "significant memory [sic] impairment"[1103] manifesting in: "deterioration of language function," "repeating sounds or words over and over again," "impaired ability to execute simple motor activities."
- "[B]rief psychotic disorder" manifesting in: "psychotic symptoms" such as "delusions, hallucinations, or even a catatonic state."
- Onset of OCD manifesting in "aggressive and horrific impulses" or "repetitive behaviors." According to OLC, "[s]uch compulsions or obsessions *must be 'time consuming.'*"
- "[P]ushing someone to the brink of suicide, particularly where the person comes from a culture with strong taboos against suicide, and it is evidenced by acts of self-mutilation, would be a sufficient disruption of the personality to constitute a 'profound disruption.'"

If one were to disregard, difficult as it is, the moral turpitude of OLC's "original" interpretation of §2340, one could note that this type of reliance on social science data has been observed in the Supreme Court's opinions in a number of jurisprudential areas[1104] such as abortion,[1105] sex discrimination, and school desegregation.[1106] Therefore, dissociating from the moral bankruptcy that OLC's interrogation-related memoranda exhibit, we can conclude that by rendering entirely original interpretations of the law, unmoored from legal precedent, the Bush OLC displays the kind of interpretive authority that is normally associated with the nation's highest court.

***

To summarize, the data presented in this section demonstrates that OLC's lower-court mimicry is incomplete and that the Office does not operate under a fully actualized version of judicial supremacy. In other words, it does not faithfully implement the rulings of the federal courts as *modus operandi*. Moreover, the Bush OLC's interpretive behavior exhibits properties that are generally associate with the Supreme Court or a tribunal of last resort. Therefore, in light of its original interpretations, we can conclude that the Bush OLC asserts co-equal and

[1103] In all likelihood, OLC incorrectly quotes the DSM-IV's relevant portion. OLC most likely intended to write "significant cognitive impairment."
[1104] Rosemary J. Erickson and Rita J. Simon, *The Use of Social Science Data in Supreme Court Decisions* (Urbana: University of Illinois Press, 1998).
[1105] Harry Blackmun relied on medical data extensively in his majority opinion.
[1106] *See*, Kenneth K. Wong and Anna C. Nicotera, "Brown v. Board of Education and the Coleman Report: Social Science Research and the Debate on Educational Equality," *Peabody Journal of Education* 79, no. 2 (March 2004): 122–35.

independent authority to interpret the laws. Indeed, it is due precisely to that co-equal and independent interpretive authority that the Bush OLC can engage in quasi-judicial policy-making in a wide range of national-security-related policy areas.

2. RISK MANAGEMENT / APPRAISING OPTIONS

> *"Whenever a lawyer offers a legal opinion, there is always a possibility that other legal actors will take a contrary view. If that risk is substantial and the lawyer apprises the client of the magnitude of that risk, the lawyer has adequately advised and informed the client. The authors of the Guantanamo Memorandum certainly met that standard."*
>
> – Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*

Despite the Bush OLC's assertive interpretive behavior, which, as I argued above, can be properly characterized as co-equal to that of the federal courts/the Supreme Court, OLC's "decisions" do not have the legal status that the Supreme Court's rulings enjoy. Therefore, they are only final to the extent that the coordinate branches do not countermand them. Indeed, the Federal Judiciary considered a number of legal-policy areas during President Bush's term in office and, in some instances, chose to rule against the government. Specifically, in *Rasul v. Bush*, SCOTUS held that Guantanamo Bay detainees are entitled to *habeas* review in the federal courts, despite the administration's contention that GTMO was not sovereign U.S. territory. Therefore, OLC's *Eisentrager*-based legal interpretation was explicitly rejected. Moreover, in *Hamdi v. Rumsfeld*, the Court found that while U.S. citizens may be detained as enemy combatants in the Global War on Terrorism, they cannot be held indefinitely without charge or a meaningful opportunity to challenge their detention. Consequently, OLC's strong constitutional claim that the President has plenary power over captured enemy belligerents, who can be interned until the cessation of hostilities, was rebuffed by a plurality of the Court. Finally, in *Hamdan v. Rumsfeld*, the Supreme Court struck down the military commissions system created by the administration on the grounds that the MCs' rules violated the UCMJ and common Article 3. Thus, contradicting OLC's claim of an unreviewable presidential power of treaty suspension/termination, the majority found that common Article 3 did apply to the armed conflict in Afghanistan, contrary to the President's

determination. Moreover, four of the Justices signed a sententious, one-page concurrence emphatically rejecting executive unilateralism:

> Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary. Where, as here, no emergency prevents consultation with Congress, judicial insistence upon consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine – through democratic means – how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.[1107]

As I stated in prior empirical analyses, defensive risk management is part of OLC's function as the Executive Branch's authoritative legal interpreter. While the Bush OLC invariably asserts "super-strong" constitutionally-derived powers[1108] as a basis for unilateral executive action, in most of its auto-interpretations it also furnishes alternative options or risk management tools. Recognizing that the federal courts are reluctant to decide the legality of executive actions on constitutional grounds,[1109] the Bush OLC consistently explores statutory ways to reach the conclusions its constitutional analyses produce.

In Chapter Four of this dissertation, I found alternative explanations/risk management tools in four legal-policy areas. In part (a), I noted that OLC's determination that war exists is based on a quasi-legal determination of the "scale, duration, extent, and intensity" of al Qaeda's attacks on the United States.[1110] OLC also points out, however, that if such a justification for the application of the war paradigm were found lacking, NATO's invocation of Article 5 of the North Atlantic Treaty in the aftermath of 9/11 should serve as a "factor… virtually conclusive in itself in establishing that the attacks rise to the level of an armed conflict."[1111]

In part (b) of the same chapter, I found that OLC's legal analysis interpreting away the restrictions of the PCA on the domestic deployment of military force employs multiple

---

[1107] *Hamdan v. Rumsfeld*, 548 US 557 (2006).
[1108] Vicki C Jackson, "Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity," *Notre Dame Law Review* 75, no. 3 (2000): 1004.
[1109] *See* Neal Kumar Katyal and Thomas P Schmidt, "Active Avoidance: The Modern Supreme Court and Legal Change," *Harvard Law Review* 128, no. 8 (2015): 2117 ("to avoid a direct constitutional ruling appears to be in harmony with the general attitude of reticence toward constitutional adjudication exemplified most notably by Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*.").
[1110] Based on Supreme Court decisions deferring to the political branches' judgment in the matter.
[1111] *Military Commissions Opinion* at 88.

interpretive avenues. To wit, the Bush OLC cites the Insurrection Statute,[1112] as well as the 2001 AUMF[1113] as alternatives to the constitutional analysis that the President's Article II powers can override the statutory barrier imposed by the Posse Comitatus Act.

Moreover, OLC's *Padilla* analysis also invokes the AUMF as an Act of Congress in the sense of 18 USC §4001(a), that can surmount the statutory prohibition on the "imprison[ment] or [] det[ention]" of U.S. citizens falling in the Padilla class.[1114]

In part (d) of the first empirical chapter, I also observed that OLC's legal analysis asserting the sufficiency of the President's Commander-in-Chief power to establish military commissions does not stand on a single, constitutional, leg. Instead, OLC points out that in the context of the GWOT, the President need not rely on inherent powers alone, since 10 USC §821 ""endorses sufficiently broad jurisdiction for the commissions."[1115] Thus, besides serving as a recognition of the President's independent power on that score, §821 also functions as an alternative explanation, i.e., a risk management tool.

Lastly, the interrogation-related memoranda also employ risk management/alternative explanation strategies to reach the conclusion that Executive Branch agents cannot be prosecuted for "carrying out the President's Commander-in-Chief powers."[1116] Citing justification defenses available in the law, OLC argues that "a defendant accused of violating Section 2340A could have… grounds to properly" raise "necessity" or "defense of another" to eliminate criminal liability.[1117]

As OLC explains, while necessity is not recognized as a defense in federal criminal laws, the Supreme court has acknowledged it in *United States v. Bailey*.[1118] According to LaFave and Scott's *Substantive Criminal Law*,

> the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.[1119]

[1112] 10 USC Chapter 13.
[1113] Pub. L. No. 107-40.
[1114] 18 USC §4001(a).
[1115] Id. at 27.
[1116] *Torture Memo* at 127.
[1117] Id. 139.
[1118] 444 US 394, 410 (1980).
[1119] Wayne R. LaFave and Austin W. Scott, *Substantive Criminal Law*, vol. 1, Criminal Practice Series (St. Paul, Minn: West Pub. Co, 1986), 629.

Therefore, as OLC points out, the necessity defense can justify the "intentional killing of one person to save two others."[1120] Importantly, for such a defense to be available, the defendant's intention must be to avoid the greater harm. As OLC concludes, "under the current circumstances" such a dense could be maintained in order to defuse a criminal charge for violation of §2340A:

> Under these circumstances, a detainee may possess information that could enable the United States to prevent attacks that potentially could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.[1121]

In identical passages in the *Torture* and *Military Interrogation* memoranda, the Bush OLC also explores whether an Executive Branch agent could claim "defense of another" to justify violations of the Torture Statute. Indeed, defense of another, even when deadly force is involved, "is deeply embedded in our law, both as to individuals and as to the nation as a whole."[1122] Moreover, as the Bush OLC argues, nothing in the "text, structure or history" of §2340A precludes the application of this common law defense to justify torture.[1123]

There are three elements of the "defense of another" doctrine which OLC considers in some detail: necessity, reasonable belief in the necessity of using force, and proportionality. As OLC explains, the use of force to "avoid the danger of unlawful bodily harm" must be necessary.[1124] A defender is justified in using (even deadly) force, if he reasonably believes that "the other is in immediate danger of unlawful bodily harm from his adversary,"[1125] and, thus, the use of force to prevent harm is *imminently* necessary. Second, while the reasonable belief element is indispensable, "if a defendant reasonably believed an attack was to occur, but the facts subsequently showed no attack was threatened, he may

---

[1120] *Torture Memo* at 145; according to LaFave and Scott, "it is better that two lives be saved and one last than that two be lost and one saved;" This is also referred to as the "choice of evils" defense.

[1121] Id. at 147.

[1122] Id. at 151; *United States v. Peterson*, 483 F.2d 1222, 1228-29 (D.C. Cir. 1973)

> More than two centuries ago, Blackstone, best known of the expositors of the English common law, taught that "all homicide is malicious, and of course amounts to murder, unless… excused on the account of accident or self-preservation…" Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time.

[1123] Id. at 153.

[1124] *Torture Memo* at 155.

[1125] LaFave and Scott, *Substantive Criminal Law*, 1:663–64.

still raise [defense of another]."[1126] Third, the amount of force used in defense of another must be proportional to the threat. Thus, if the threat does not rise to the level of death or serious bodily injury, the defender may not resort to deadly force.[1127] As OLC concludes, applying the elements of the defense of another to the "current circumstances,"

> [i]f an attack appears increasingly likely, but our intelligence services and armed forces cannot prevent it without the information from the interrogation of a specific individual, then the more likely it will appear that the conduct in question will be seen as necessary. If intelligence and other information support the conclusion that an attack is increasingly certain, then the necessity for the interrogation will be reasonable.

One could argue, as the Bush OLC posits, that the use of force against a detainee who is not himself about to carry out an act of terrorism cannot be justified on the basis of defense of another. However, the Office believes that the interrogation of a person who participated in the planning and preparation of an attack

> would be justified under the doctrine of self-defense, because the combatant by aiding and promoting the terrorist plot 'has culpably caused the situation where someone might get hurt. If hurting him is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible.'[1128]

Additionally, OLC claims that the Supreme Court's ruling in *In re Neagle* can be used "bolster and support an individual claim" that a violation of the Torture Statute should be excused. In *Neagle*, the Supreme Court acquitted a U.S. Marshal of criminal charges for shooting and killing Justice Steven Field's assailant. The Court held that Neagle was justified in protecting Justice Field and explained that

> [w]e cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death.[1129]

[1126] *Torture Memo* at 156.
[1127] LaFave and Scott, 651 ("if a defendant reasonably believed an attack was to occur, but the facts subsequently showed no attack was threatened, he may still raise self-defense.").
[1128] *Torture Memo* at 160 (quoting Michael S. Moore, "Torture and the Balance of Evils," *Israel Law Review* 23, no. 2&3 (1989): 280–344.).
[1129] *In re Neagle*, 135 US 1, 65 (1890).

According to the Bush OLC, *Negle* is a recognition of the President's power to "take measures for the protection of the U.S. Government," which, in turn, derives from the Take Care Clause of Article II. Therefore, the Court did not address the question of whether Neagle's action could be validated as an exercise of defense of another, because he was "implementing the Executive Branch's authority to protect the United States government."[1130] Extrapolating *Neagle*'s ruling to the "current situation," OLC concludes that an Executive Branch official who, in the exercise of his official duties, violates §2340A should be able to claim impunity "on the basis of protecting the nation from attack."[1131]

***

Despite the defeat of some of its legal arguments in the federal courts, OLC's risk management tools helped vindicate other elements of the Bush administration's counterterrorism program. For example, an alternative, AUMF-based, legal interpretation saved the President's detention authority in *Hamdi*. Also, while the *Hamdan* Court invalidated the military commissions system as it was constituted in 2006, the Court implicitly recognized the President's inherent constitutional power to establish MCs. Lastly, while the Bush OLC's *GTMO* analysis was rejected by the Supreme Court in *Rasul*, OLC did in fact warn the Department of Defense that such an outcome was possible. Nevertheless, due to the administration's overconfidence in JEU, it did not heed that warning and, instead, relied exclusively on the legal authority provided by OLC's opinion.

In sum, while OLC asserts independent interpretive authority co-equal to that of the federal courts, its often-secret memoranda do not have the status of an Article III court's ruling. Therefore, OLC must explore multiple interpretive avenues in order to ensure the longevity of its legal opinion.

[1130] *Torture Memo* at 161.
[1131] Id. 162.

3. A TYPOLOGY OF OLC'S POWER TOOLS

Throughout this dissertation, I have argued that OLC's legal opinions can be viewed as unilateral power tools. Indeed, as I demonstrated in previous chapters, the Bush administration's "juridified executive unilateralism" resulted in sweeping policy changes in multiple areas, obviating recourse to inter-branch institutional cooperation. However, as my empirical analyses in prior chapters make clear, OLC's legal interpretive activity accomplishes more than "just" policy change. Below, I will present a typology of OLC's power tools, in order to bring together the multiple strands of JEU documented in this dissertation.

1. Framework construction

I begin Chapter Four by elaborating on the "war paradigm," the legal framework that OLC built for the Bush administration to be able to unilateralize policy-making in the Global War on Terrorism. As I explain there, OLC's quasi-legal determination that war exists ensured that, as Command in Chief, the President would retain near-complete control of the war effort. Furthermore, the legal framework of war also enables the Executive Branch to vastly enlarge its influence over domestic matters, by conceptualizing the GWOT as a borderless effort.

2. Usurping Congress's lawmaking authority (quasi-judicial legislation)

As the case studies in Chapters Four, Five, and Six demonstrate, OLC's opinions can produce either positive or negative change in the domestic legal regime. Positive change entails new rules, while negative change entails the nullification of existing rules. The *Padilla Memos*, for example, bring about "positive law" by unilaterally deciding that the President can detain U.S. citizens as enemy combatants in the GWOT. Another example that I consider in Chapter Four is OLC's expansion of the "battlefield" into the domestic realm, thereby enabling domestic military operations. In several of its opinions, the Bush OLC also broadly construes the AUMF in order to claim statutory support for a vast range of unilateral executive actions such as the use of military force, warrantless foreign intelligence gathering, the suspension of the PCA, and the detention of U.S. citizens. Lastly, the interrogation

memoranda, the Bush OLC also changes the scope of existing statutory laws (the Torture Statute) by means of narrowing interpretation.

3. Nullifying domestic legislation (≈line-item veto)

As I observe throughout this dissertation, many of the Bush OLC's opinions also cause negative change, in other words, they undo existing statutory regulations. One example is OLC's decision that the PCA does not apply to domestic military operations for counterterrorism purposes. This nullification is made possible by OLC's imposition of a war paradigm, which conceptualizes the conflict with al Qaeda as war, thereby removing domestic military counterterrorism activities from the category of law enforcement. On several occasions in the corpus, OLC also deploys the President's foreign-sphere powers of treaty interpretation and treaty suspension/termination in order to do away with or dramatically narrow the scope of domestic legislation such as the WCA and the Torture Statute. Furthermore, the Bush OLC's opinions rely extensively on canons of construction such as the constitutional avoidance canon in order to eliminate entire statutes or aspects of statues, much like a veto or line-item veto would.

4. Nullifying international law

In Chapter Five, I analyze the Bush OLC's reading of the President's power over treaties. According to OLC's strong constitutional arguments, the President has exclusive (inherent) power over treat suspension and termination. Based on that constitutional authority, the Bush OLC advises President Bush that he can unilaterally suspend the United States' Geneva obligations toward Afghanistan and, by extension, the Taliban militia. Moreover, OLC's *Treaties and Laws* opinion also strips members of al Qaeda of GC3 and common Article 3 protections. In its interrogation-related memoranda, the Bush OLC also deploys the President's power to interpret treaties in order to narrowly construe CAT's definition of torture, effectively rendering its constraints inoperative.

4. Enhancing independent constitutional powers

As the empirical chapters demonstrate, the Bush OLC's constitutional analysis generously interprets the President's Article II powers. Specifically, by relying on John Yoo's

conception of the Commander-in-Chief power, OLC claims that the President must have "the fullest possible range of power available to a military commander."[1132] Furthermore, in its utilitarian application of Jackson's 1st category, the Bush OLC also acknowledges supporting legislation in an effort to augment the President's independent powers. Additionally, many of OLC's opinions justifying the use of military force abroad also draw on international authorities to buttress the President's near-plenary power over troop deployment.

5. Exploiting the structural position/institutional characteristics of the Executive

In part (b) of Chapter Four, I point out that that OLC defines the President's inherent power to use military force as flowing from the structure of the Constitution.[1133] Elsewhere OLC argues that the institutional characteristics of the Executive (unitariness, speed, secrecy) make it better suited for wartime decisionmaking than Congress or the Courts. Based on these considerations, OLC claims that the President alone can conduct hostilities, make prisoner-of-war policy, and even issue procedural rules for military commissions.

6. Changing the parameters of legal constructs

In the *Domestic Military Memo*, OLC effectively changes the dimensions of the legal concept of exigency. OLC's conceptual stretching results in the recalibration of the Supreme Court's applicable precedents and the creation of a free-wheeling Commander-in-Chief authority to protect the United States from international terrorism. Moreover, in the *Military Commission Memo*, OLC imports a fixture of classical battlefield warfare into the non-traditional War against Terrorism. As a result of OLC's transplantation of the military commission into the GWOT, jurisdiction over the trial and punishment of "enemy combatants" (i.e., known or suspected terrorists) is transferred from Article III to Article II courts.

[1132] Yoo, "The Continuation of Politics by Other Means."
[1133] *Domestic Military Memo* at 37 ("the clauses of Article I… flow together with Article II's Commander in Chief and Executive Power Clauses[.]").

7. Status quo maintenance

As I explain in Chapter Five, *status quo* maintenance does not change the legal landscape. Instead, opinions that engage in this kind of interpretive behavior insist on ceding no constitutional ground to Congress over a domain that OLC considers to properly belong to the President. In the same chapter, I use the WPR to demonstrate the role of *status quo* maintenance: Since no court has ruled on its constitutionality, any potential future decision would have to take into consideration both the President's persistent objection to its legality, as well as the institutional practice that has grown up around it. Therefore, in the *AUMFI Memo*, OLC urges the President to issue a signing statement affirming the redundancy of legislation authorizing the use of military force.

8. Defining institutional power relations

Although not a unilateral power tool in the strict sense of the term, as I argue at the end of Chapter Six, some of the Bush OLC's institutional powers arguments effectively redefined institutional power relations in the long term. Indeed, when the coordinate branches allow the President to take some form of unilateral action, it establishes a measure of institutional precedent. Repeated exercise of such action, in turn, progressively entrenches it, along with OLC's legal analysis, into what eventually becomes quasi-constitutional custom. Therefore, if the coordinate branches accept the new governing arrangement, then OLC's definition of institutional powers and competences becomes operative.

9. Policy recommendation

During the coding process, I created a group of codes under *Interpretive Arguments* called *Non-Legal Toolkit*. As the name suggests, coded segments expressing non-legal arguments fall under this category. Some of the sub-codes refer to the *Future Threat* of terrorism, others describe OLC's common-sense observations regarding complex legal issues. Here, I will discuss those 17 textual segments in the corpus that I coded as *Policy Recommendation*.

Undoubtedly, OLC's function is strictly interpretive. Nevertheless, on numerous occasions in the Bush corpus, it also expresses policy preferences or proposes specific

actions.[1134] Thus, it is by far the most blunt of the power tools considered in this section, since policy recommendations essentially pre-determine the best course of action to be followed. Below, I will survey some of OLC's policy recommendations.

First, as I point out in part (1) above, OLC does not only disagree with the Court of Military Appeals' decision in *Averette*, but it also recommends that the Executive Branch seek to overturn that ruling in order to allow trials of U.S. citizens captured in Afghanistan by courts-martial.[1135] Second, in the *Miranda Memo*, OLC proposes that war crimes investigators should establish a set of guidelines as to when detainees should be *Mirandized* in order to maximize the Executive Branch's forum discretion.[1136] Third, in the *Torture Memo*, OLC suggests ways in which interrogators applying "enhanced interrogation techniques" would be able to establish "good faith," which, as OLC argues, negates the specific intent requirement of §2340A and eliminates a charge of torture.[1137] Fourth, in the *Iraq Memo*, OLC recommends that the President order the invasion of Iraq without delay, in order to prevent Saddam Hussein from transferring WMD to terrorist groups.[1138] Lastly, in the *Treaties and Laws Memo*, OLC suggests that the President should not engage in case-by-case determination of detainees' POW status in Afghanistan, instead, he should categorically determine that Taliban prisoners fall outside of Article 4 of GC3.[1139]

4. BRANCH-INTERNAL *STARE DECISIS*

Although the purpose of this dissertation is to show why the Bush administration was able to take distinctly unilateral actions in the aftermath of 9/11 and to monopolize the design

---

[1134] Whether it is a policy position that the requesting agency communicated to OLC or the author's personal preference, or simply the most logical of the available choices is immaterial for my purposes here.
[1135] *Criminal Charges Memo* at 79.
[1136] *Miranda Memo* at 77.
[1137] *Torture Memo* at 29 ("A defendant could show that he acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience.").
[1138] *Iraq Memo* at 130 ("The President could determine that, were we to wait until after Iraq has transferred WMO to terrorist groups, it would be very difficult to determine where and when WMD would be used, given the sporadic nature of terrorist attacks and the terrorist tactic of infiltrating the civilian population.").
[1139] *Treaties and Laws Memo* at 153 ("Although these provisions seem to contemplate a case-by-case determination of an individual detainee's status, the President could determine categorically that all Taliban prisoners fall outside article 4. Under Article II of the Constitution, the President possesses the power to interpret treaties on behalf of the Nation.").

and implementation of the legal framework that came to govern the Global War on Terrorism, in part of this section I will look beyond the jurisprudence of the Bush OLC. My purpose in doing so is to gauge whether OLC's jurisprudence is a self-reinforcing system, and to ascertain whether OLC's institutional behavior under President Bush is an aberration or a continuation of that of previous OLCs. I will also examine a peculiar form of self-referential *stare decisis*, in which the Bush OLC relies on its own opinions as precedent to guide its legal interpretation.

As OLC highlights in the *FISA Memo*, "this Office has maintained, across different administrations and different political parties," that the development of an aggressively pro-Executive jurisprudence is necessary in order to protect "the President's constitutional responsibility to defend the nation."[1140] Although, given the unique subject matter of the legal-policy areas in the Bush corpus, branch-internal *stare decisi*s cannot be said to fully dictate the outcome of OLC's legal analysis, the Bush OLC does rely on predecessor OLCs' opinions in significant ways.

Stare Decisis qua previous precedent

First, as Table 15 below demonstrates, in the area of troop deployment, the Bush OLC draws heavily on the opinions of former post-Watergate OLCs, regardless of political party affiliation. Indeed, in its first national-security-related opinion, the *War Powers Memo*, the Bush OLC cites OLC precedent 14 times. As the abundance of *OLC* coded segments demonstrates, the Office appears to be remarkably consistent on the point that the President has the constitutional authority to deploy military force abroad. Indeed, merely seven years after the passage of the WPR, the first post-Watergate OLC held, that

> [o]ur history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval. This pattern of presidential initiative and congressional acquiescence may be said to reflect the implicit advantage held by the executive over the legislature under our constitutional scheme in situations calling for immediate action. Thus, constitutional practice over two centuries, supported by the nature of the

[1140] *FISA Memo* at 31.

> functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power.[1141]

Accordingly, the Carter OLC advised the President that he had independent constitutional authority to "deploy troops at some risk of engagement," to order "a military expedition to rescue the hostages or to retaliate against Iran if the hostages are harmed," and to "repel an assault that threatens [our] vital interests in the region."[1142] In another memorandum related to the Iran Crisis, the Carter OLC held that the President's authority to protect the "lives and property of Americans abroad" is "well established" as reflected by historical practice going back "to the time of Jefferson."[1143]

Memo title	Bush OLC	Non-Bush
War Powers	0	14
FISA Memo	0	5
Domestic Military	1	7
Military Commissions	0	0
ABM Treaty	0	8
Criminal Charges	0	1
Miranda	2	0
GTMO	0	1
Treaties and Laws	2	2
Article 4	2	0
Transfer	6	3
Padilla 1	7	1
Padilla 2	5	1
SJAA	0	0
Torture	2	6
Zubaydah	3	0
AUMFI	0	4
Iraq	11	11
Military Interrogation	14	13
NSA	0	3

Table 15: Branch-internal stare decisis

In addition, the Bush corpus contains three Clinton-era legal opinions which claim that the President "acting without specific statutory authorization, lawfully may introduce United States [] troops into" hostilities.[1144] Moreover, Bush 41 OLC precedent similarly holds that the

[1141] *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980)
[1142] Id.
[1143] *Presidential Powers Relating to the Situation in Iran*, 4A Op. O.L.C. 115, 121 (1979)
[1144] The *Bosnia Opinion*, 19 Op. O.L.C. 327, 327 (1995)

President has "authority to commit troops overseas without specific Congressional approval."[1145]

While the *Iraq* M*emo* reiterates many of the same OLC precedents that are cited in the *War Powers* opinion, there in one striking addition. Namely, the Carter OLC opined in 1977 that not only does the President have independent constitutional power to deploy troops abroad, but that the United States is obliged to implement the Security Council's Resolutions adopted under Chapter VII of the U.N. Charter.[1146] In fact, the *Rhodesia Memo* appears to be the most decisive legal precedent in the Bush OLC's *Iraq* analysis, which concludes that President Bush had indisputable legal authority to use military force against Iraq.

Successive OLCs also appear to have been remarkably consistent in their denial of the WPR's constitutionality. In 1980, for example, the Carter OLC opined that "there may be applications [of the reporting and consulting requirements of the WPR] which raise constitutional questions."[1147] Four years later, the Reagan OLC underscored that "[t]he Executive Branch has taken the position from the very beginning that [] the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces,"[1148] and that the Resolution's "purpose and policy statement [cannot] constrain the exercise of the President's constitutional power."[1149] Notably, the Clinton OLC's relevant legal interpretation in the *Bosnia Memo* boldly claimed the WPR "lend[s] [] support to the conclusion… that the President has authority, without specific statutory authorization, to introduce troops into hostilities in a substantial range of circumstances."[1150] Therefore, the Bush memos' strong constitutional claim that the WPR cannot restrict the President's authority to use military force, and their assertion that it provides statutory recognition of the President's pre-existing inherent power did not originate in the Bush OLC.

While OLC precedent supporting the President's unilateral troop deployment power and the unconstitutionality of the WPR abound in the Bush corpus, the Bush OLC also finds

---

[1145] *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. at 6
[1146] *Re: Proposed Executive Order Entitled* "Transactions Involving Southern Rhodesia" at 2 (Dec. 13, 1977)
[1147] *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization.*
[1148] *Overview of the War Powers Resolution*, 8 Op. O.L.C. at 271 (1984).
[1149] *Executive Power with Regard to the Libyan Situation*, 5 Op. O.L.C. 432, 441 (1981)
[1150] *Proposed Deployment of United States Armed Forces in Bosnia and Herzegovina*, 19 Op. O.L.C. 327, 327 (1995)

branch-internal precedent in other legal-policy areas. I will now turn to those precedents, and briefly describe how the Bush OLC applies them in its legal memoranda.

In the *Domestic Military Memo*, for example, OLC refers to a Bush-41-era legal opinion in which the Office claimed that "Posse Comitatus Act does not prohibit military involvement in actions that are primarily military or foreign affairs related, even if they have an incidental effect on law enforcement, provided that such actions are not undertaken for the purpose of executing the laws."[1151] Therefore, the Bush OLC has branch-internal precedent that informs its conclusion that even if the President's Commander-in-Chief authority were found not to override the PCA, he may still deploy military force domestically, because, under the war paradigm, military operations for counterterrorism purposes are not law enforcement.

In corroboration of its Frankfurtarian interpretive approach, the Bush OLC cites the 1994 *Uruguay Round Agreements* memorandum in four of its legal opinions. In the *Uruguay Memo*, the Clinton OLC argued that historical practice plays a crucial role in the distribution of institutional powers, especially in the field of foreign relations. According to the memo,

> the Court has been particularly willing to rely on the practical statesmanship of the political branches when considering constitutional questions. […] The persistence of these controversies (which trace back to the eighteenth century), and the nearly complete absence of judicial decisions resolving them, underscore the necessity of relying on [] precedent to interpret the relevant constitutional provisions.[1152]

Although the Supreme Court disagreed with OLC's position regarding the status of Guantanamo Bay and the reach of the federal courts to grant *habeas* review, the Bush OLC legal analysis is not *sui generis*. In fact, it adheres to Executive Branch precedent in the form of a 1981 Regan OLC opinion.[1153] Namely, in *Re: Status of Guantanamo Bay*, the Office opined that GTMO was not part of the United States for purposes of the Immigration and Naturalization Act. As I conclude in Chapter Six, the Bush administration's desire for revenge and its apparent vindictiveness against "enemy combatants" in the Global War on Terrorism, led to the abandonment of decades of accumulated institutional practice in the areas of GC3 and interrogation methods. Nevertheless, given the Court's precedent in *Vermilya-Brown* and

---

[1151] *Application of the Posse Comitatus Act to Assistance to the United States National Central Bureau*, 13 Op. O.L.C. 195 (1989)
[1152] *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. 232, 234 (1994)
[1153] In addition, its application of court precedent is also not disingenuous.

the branch-internal precedent in *Re: Status of Guantanamo Bay*, its *GTMO* analysis cannot be said to have ignored *stare decisis*.

Chapter Five of this dissertation investigates the Bush OLC's constitutional analysis regarding the President's power over treaties. In what I call the *ABM Treaty* analysis, OLC claims that the President has plenary authority over treaty making and treaty interpretation as well as inherent power to suspend and/or terminate treaties. The Bush OLC draws on seven branch-internal precedents to substantiate its strong constitutional claims. Establishing the contours of the President's treaty powers, The Bush OLC cites a 1990 legal opinion, which claimed the President has broad discretion with regard to treaties, because "[i]n the conduct of negotiations with foreign governments, it is imperative that the United States speak with one voice. The Constitution provides that that one voice is the President's."[1154]

With respect to treaty termination, the Bush OLC cites a 1988 opinion in which the Office concluded that "the President's plenary authority in the field of foreign relations includes his power to terminate treaties."[1155] Moreover, in 1996, the Clinton OLC also stated that the President may decide when circumstances render a treaty suspended. Thus, according to the *Dellinger Memo*, "[a]ssuming that the President does have the power unilaterally to terminate a treaty, it appears to follow that he also has the authority to relieve the United States of the affirmative obligations imposed on it by particular treaty provisions."[1156]

While it is undeniably true that the *Torture Memo*'s analysis is substantially based on OLC's narrowing interpretation of §2340's statutory language, another mainstay of its logic is the President's power to interpret the meaning of treaties. Particularly, OLC claims that, in the interpretation of treaties, the "authoritative statements made by representatives of the Executive Branch are accorded the most interpretive value."[1157] This is so, according to the 1987 *Sofaer Memo*, because the "division of treaty-making responsibility between the Senate and the President is essentially the reverse of the division of law-making authority, with the President being the draftsman of the treaty and the Senate holding the authority to grant or

[1154] *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 40 (1990)
[1155] *Re: The President's Authority to Terminate the International Express Mail Agreement with Argentina Without the Consent of the Postal Service* (June 2, 1988).
[1156] *Re: Section 233(a) of S. 1745* ("Dellinger Memo").
[1157] *Military Interrogation Memo* at 201.

deny approval."[1158] Therefore, the Bush OLC relies extensive on the "reservations, understandings and declarations… submitted to the Senate by the Executive Branch" in order to find that CAT's definition of torture must be interpreted narrowly, "prohibit[ing] only the most extreme forms of physical or mental harm."[1159]

The Bush OLC also considers the capacity of customary international law to restrict presidential action in two of its memoranda: *Treaties and Law* and *Military Interrogation*. In the *Treaties and Laws Memo*, OLC explores the question whether common Article 3 has risen to the status of CIL and, if so, whether federal courts can enforce it against the President's determinations in the GWOT. In the *Military Commissions Memo*, OLC considers the possibility that CAT's prohibition is so universally accepted that it has attained the status of CIL and examines whether it can bind the President. Answering the question in the negative, OLC cites a Bush 41-era opinion as dispositive. Namely, in the 1989 *FBI Memo*, the Office found that CIL cannot bind the President because "[i]f the United States is to participate in the evolution of international law, the Executive must have the power to act inconsistently with international law where necessary."[1160] Indeed, the Bush 41 OLC concluded that acting inconsistently with CIL in the national interest is "an integral part of the President's foreign affairs power."[1161] Thus, while the Bush OLC undeniably flouted established institutional practice in order to declare the Geneva Conventions inapplicable to members of al Qaeda and the Taliban, its CIL analysis is consistent with Executive Branch precedent.

Scholars and commentators who have written on the subject of the Bush OLC's enhanced interrogation program, have invariably found that the Office grossly overinflates the Commander-in-Chief power in order to justify torture and to exonerate the torturers. To my knowledge, however, scholarly accounts have heretofore failed to identify that the Bush OLC relies on branch-internal precedent to assert categorical immunity from prosecution. Relying heavily on the avoidance canon in the *Torture Memo*, OLC first finds that §2340A may be unconstitutional:

[1158] *Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 31 (Apr. 9, 1987) ("Sofaer Memo")
[1159] *Torture Memo* at 49.
[1160] *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. OL.C. at 170
[1161] Id.

> Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we would construe Section 2340A to avoid this constitutional difficulty, and conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.[1162]

Subsequently, however, the memo references a 1984 opinion titled *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege*. According to the *Contempt* memo, the Department of Justice would refuse to pursue criminal charges against an Executive Branch agent who had acted "pursuant to an exercise of the President's constitutional power."[1163] As the 1984 opinion states,

> [t]he President, through a United States Attorney, need not, indeed may not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege. Nor could the Legislative Branch or the courts require or implement the prosecution of such an individual.[1164]

Accordingly, OLC maintains that while Congress may define the federal crimes that the President should prosecute, "[it] cannot compel the president to prosecute outcomes taken pursuant to the [his] own constitutional authority. If Congress could do so, it could control the President's authority through manipulation of federal criminal law."[1165] In sum, although the Commander-in-Chief override figures prominently in OLC's *Torture* analysis, the 1984 opinion establishes categorical immunity from federal criminal prosecution of actions taken pursuant to the President's constitutional powers.

***

To conclude part one of this section, the data indicate that while the Bush OLC undoubtedly went beyond precedent, its pro-Executive interpretive behavior is not an aberration but a continuation of that of previous OLCs. Furthermore, OLC's jurisprudence is a self-reinforcing system in which the Office's opinions establish their legitimacy with reference

[1162] *Torture Memo* at 124.
[1163] Id. at 130.
[1164] *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. OLC 101.
[1165] *Torture Memo* at 130.

to previous determinations. As I argue in Chapter Six, Executive actions based on those determinations, in turn, establish their legitimacy, and create progressively stronger quasi-constitutional custom.

SELF-REFERENTIAL *STARE DECISIS*

The data presented in Table 15 further complicates the question of what *stare decisis* means in OLC's jurisprudence. As the data indicate, the Bush OLC's opinions become increasingly self-referential from the *War Powers Memo* to the *Military Interrogation Memo*. While the pre-MO memoranda contain a single instance of self-referentiality, midway through the construction of the GWOT legal architecture that number increases to seven and concludes its precipitous rise at 14 in the *Military Interrogation Memo*. Multiple factors could explain the Bush OLC's self-referentiality: On the one hand, it could be the result of a dearth of pertinent branch-internal precedent. However, as we saw above, that data do not support this conclusion. Instead, a better explanation is what we have seen throughout the empirical chapters: the Bush's OLC's exercise of quasi-judicial legislation and the administration's reliance on JEU.

Indeed, the Bush OLC's self-referentiality is further evidence of what I call in Chapter Six, a veritable legal construction project that was under way in the early years of the Global War on Terrorism. Furthermore, it also demonstrates that the Bush OLC's opinions are tightly interwoven and interdependent. Therefore, when institutional and public pushback to the President's unilaterally designed and implemented counterterrorism program forced the administration to recant some of its legal positions, OLC's memoranda were repudiated in bulk. Somewhat counterintuitively, however, OLC's retraction of its opinions did not result in the annulment of its legal arguments. As I point out in Chapter Six, they successfully established governing arrangements that demonstrably persisted despite the handover of power to a Democratic President. Moreover, the *Hamdi*-based *AUMF* logic obviated the need for super-strong constitutionally-based power claims and allowed a muscular and centralized executive authority over the conduct of the "forever war" to become entrenched.

Conclusion

The data presented in this chapter indicate that the Bush OLC's opinions assert independent legal interpretive authority co-equal to that of the Federal Judiciary. Therefore, the Bush OLC does not operate under a fully actualized version of judicial supremacy. While OLC's legal interpretations do not enjoy the status of Article III courts' rulings *de jure*, due to successful risk management strategies and the fact that OLC's opinions are essentially self-executing, their *de-facto* effect can be readily observed in the Executive Branch's unilateral actions. Although the Bush OLC undeniable goes beyond the legal precedent established by predecessor administrations, in light of the evidence presented above, its interpretive behavior is not an aberration but a continuation of that of previous OLCs

CHAPTER EIGHT

CRITICAL JUNCTURE?

THE PRE-WATERGATE MEMORANDA

"[T]he Executive Department, by means of this power over foreign relations, holds in its keeping the safety, welfare, and even permanence of our internal and domestic institutions. And in wielding this power it is untrammeled by any other department of the Government; no other influence than a moral one can control or curb it; its acts are political, and its responsibility is only political."

– John Norton Pomeroy, *An Introduction to the Constitutional Law of the U.S.*

"I do not think [President Roosevelt] was much concerned with the gravity or implications [of signing 9066]. He was never theoretical about things. What must be done to defend the country must be done. The decision was for the Secretary of War, not for the Attorney General… Public Opinion was on their side, so that there was no question of any substantial opposition… Nor do I think that the constitutional difficulty plagued him – the Constitution has never greatly bothered a wartime president. That was a question of law, which ultimately the Supreme Court must decide."

– Attorney General Alexander Biddle, *In Brief Authority*

National security crises of various kinds are not unusual phenomena in the nation's political life and the United States has frequently resorted to military force in response to such crises. [1166] Since the United States wrested its independence from the British Empire in the Revolutionary War, it has engaged in eighty-five significant military operations. Of the eighty-five, six were declared wars, ten undeclared, and the remaining sixty-nine "significant engagements."[1167] Thus, according to Mark Brandon, between 1776 and 2019, the span of 243 years, the United States was committed to armed conflict in 197 years, that is, more than

[1166] M. E. Brandon, *The Constitution in Wartime: Beyond Alarmism and Complacency*, Constitutional Conflicts (Durham [N.C.]: Duke University Press, 2005), 11.
[1167] Id.

80% of the nation's lifetime. According to the classification scheme used in Brandon's study, in the 19th century, the United States did not use its military in only twenty-eight years. In the 20th century there were a mere six years in which the U.S. did not engage in significant military operation. In the 21st century, there have been no such years.[1168]

Given the ubiquity of national security crises, it is not surprising that pre-Watergate legal memoranda also address the topic of the President's power to confront emergency situations. In this chapter, I will examine six pre-Watergate legal opinions issued between 1937 and 1970 that consider the power of the President to take action in response to a national security crisis. My aim is to compare corresponding JEU markers as well as some of the specific arguments of pre-Watergate legal opinions with those of the Bush administration. This comparison will help ascertain whether those significant dissimilarities that I predict in the theory and methodology chapters and ascribe to Watergate indeed exist. If the data that I explore in this case study support my hypotheses, then I can conclude with high certainty that there is a "Watergate effect" operating in the Bush OLC's opinions. That, in turn, will establish that the Watergate Regime (J_A and J_B) precipitated the juridification of inter-branch politics, causing J_C, and ${}_AJ_D$.

As I point out in the Chapter One, the number of pre-1977 national security-related memoranda that have been publicly released by OLC is quite limited: merely six in total. Their subject matter, however, fits the overall inquiry, and, therefore, it is appropriate to use them in comparison with the Bush memoranda to confirm the existence of a critical juncture. Just like in the Bush case study, I broke down the data in MaxQDA in order to elicit the JEU markers that I set forth in the methodology chapter. In what follows, I will explore the distribution of coded segments in the pre-Watergate opinions as well as some of the specific arguments they pursue in order to highlight distinctions between the Bush corpus and its pre-1977 counterpart.

[1168] I updated the numbers to include the Libya conflict and put it in the "significant engagements" category, since the fight against Isis is part of the GWOT, I did not include it as a separate armed conflict. The data is up-to-date through 2019.

JEU MARKERS

In the methodology chapter, I hypothesized that when JEU is absent then OLC's legal opinions should be purely advisory opinions. In other words, I do not expect them to "adjudicate a case" in the same vein as an activist court would legislate from the bench. Thus, they should simply advise as to the constitutionality/legality of contemplated action. Furthermore, I proposed that the following "markers" would indicate the lack of JEU: less complex decisions, the lack of Executive Branch precedent as dispositive of the question at hand, predominantly constitutional law interpretation, no risk assessment, no adjudication of institutional power relations, complete court mimicry along with full recognition of judicial supremacy, and the presence of non-legal arguments. Before I go into the analysis of some of the specific arguments pursued in the memos, I will first describe the data based on the JEU markers:

1. Complexity

Admittedly, complexity is a somewhat subjective metric. While certain characteristic of the memoranda (such as their length) are objectively measurable and quantifiable, I rely primarily on the distribution of coded segments to determine their complexity.

Bush	Pre-Watergate	Bush
Courts	35	754
Congress	14	550
Constitution and Judicial Doctrine	14	485
Executive Branch	9	378
International	7	351
Historical	55	336
Legal/analytical Constructs	4	282
Academia	4	193
Non-Federal Law	0	10

Table 16: Distribution of Authority coded segments

The pre-Watergate memoranda are significantly shorter than their Bush-era counterparts. This is also reflected in the number of coded segments contained in each

opinion. There are 264 coded segments in the pre-Watergate memoranda, meaning that each opinion contains an average of 44. By contrast, the Bush corpus includes 6387 coded textual segments, or an average of 319 per opinion. The most often-recurring codes in the pre-Watergate opinions are *Historical* (55) and *Institutional Practice* (23), indicating that the Office has traditionally relied on quasi-constitutional custom as dipositive. In fact, of the 97 textual segments in the *Rehnquist Memo*, the most modern of the six pre-Watergate memoranda, 38 fall under the categories *Historical* (19) and *Institutional Practice* (19). Moreover, the entirety of the 1962 *Missile Bases Memo* is essentially a extended discussion of the United States' right of "regional self-defense" and institutional practice under the Monroe Doctrine. The second-most often recurring code in the pre-Watergate corpus is *Supreme Court* with 35 coded segments. *Congress* and *Constitution* tie in third place, with 14 coded segments each. Since textual segments referring to historical/institutional practice and the opinions of the Supreme Court are not interpreted the same was as legal authorities, their preponderance in the corpus indicates that pre-Watergate memoranda are more factual and less interpretive than the Bush memos.

2. Kind of question asked

In Chapter One, I predict that in the post-Watergate context, multiple highly specific memoranda would address lateral issues within the same national security emergency. Conversely, due to the less "legalistic" governing arrangement prior to Watergate, pre-OLC memos are expected to be fewer in number and to be less specific. While the pre-Watergate data set is quite limited, some generalizations can be made, nonetheless. Only two of the opinions address questions of authority under specific statutes. The *Removal Memo* considers the President's authority under the Enemy Alien Act, and the *Wireless and Cable Information Memo* examines the Communications Act of 1934 in some detail. The rest of the pre-Watergate memos address broad questions regarding the President's and the nation's right to use military force. Therefore, they are quite unlike the highly specific memoranda seen in the Bush corpus. Moreover, the *Wireless and Cable Information Memo*, which is divided into three parts, only cites the Communications Act of 1934 in part one, relying instead on the President's constitutional powers to effect censorship of mail and cable communications in the rest. Thus, the memo reverts back to presidential authority as a general matter.

3. Constitutional vs. statutory law interpretation

According to my list of expectations regarding pre-Watergate memoranda, they should be more focused on constitutional than statutory law interpretation. The data in the pre-Watergate memoranda large confirm this prediction. Pre-Watergate OLCs are four times as likely to engage in the interpretation of constitutional provisions than statutory provisions. This is likely due to what Goldsmith refers to as the "hyper-legalization" of warfare and national security in the wake of Vietnam and the Watergate Regime. Interestingly, pre-Watergate opinions are just as likely to engage in international source construction as constitutional interpretation. This indicates that pre-Watergate OLCs draw heavily on international law as a source of authority.

4. International law/treaty interpretation

Two of the memoranda in the pre-Watergate corpus discuss international law only. In those memos, however, the president's independent power is not considered as a source of authority. Instead, they emphasize the importance of complying with international law and drawing authority from the nation's international commitments. While the Bush OLC also uses international law as a source of authority, it only does so as complementary, tertiary authorization beyond that provided by domestic law. Since the post-Watergate OLCs regards the WPR as a recognition of the President's legal authority to act unilaterally, thus fixing the values of corresponding constitutional-law variables, international authorities play a correspondingly smaller role in their legal analysis. Notably, pre-Watergate memoranda are just as likely to engage in international law interpretation as constitutional construction, indicating that international law plays an especially important role in the legitimation of executive action, especially in the Cuba-related Cold War-era memoranda. Undoubtedly, the United States' "commit[ment] to the use of collective security procedures"[1169] during the Cold War is as much a source of authority to act as a policy choice to isolate the Soviet Union.

[1169] *Missile Bases Memo* at 29.

5. Negative vs. positive interpretation

Another remarkable feature of the pre-Watergate memoranda is the complete absence of negative construction codes attaching to statutory or international authorities. In fact, the positive construction code *Compliance* appears most often in the corpus. In the *Wireless and Cable Information Memo*, for example, OLC counsels that President Roosevelt should comply with the Communications Act of 1934 to "take over and control the radio stations of the county."[1170] In the Rehnquist Memo, OLC points out that given the duration of the Vietnam conflict "and its requirements in terms of both men and materiel, [it] ha[s] long since become sufficiently large so as to raise the most serious sort of constitutional question [of the insufficiency of presidential power alone to pursue the war effort] had there been no congressional sanction of that conflict."[1171] Therefore, in sharp contrast to the Bush OLC's legal reasoning, the *Rehnquist Memo* recognizes that the Gulf of Tonkin resolution was necessary to authorize ongoing hostilities. In short, I find no evidence that the pre-Watergate memoranda engage in the interpreting-away of legal obligations. In this sense, they are not unilateral power tools but truly advisory opinions.

6. Reinterpretation of authorities

While in the Bush memoranda I identified both reinterpretation of Supreme Court precedent and narrow construction or interpreting-away of statutory restrictions on Executive Branch actions, the pre-Watergate memoranda exhibit no such reinterpretive behavior. In the *Removal Memo*, for example, OLC points out that the majority's holding in *Ex parte Milligan* may have become antiquated due to "the changed conditions of warfare," nevertheless, it adheres to the *Milligan* Court's guidance to conclude the "declaration of active military operations at a place where the courts are functioning would probably not be approved by the Supreme Court."[1172]

[1170] *Wireless and Cable Information Leaving the United States* at 7.
[1171] *Rehnquist Memo* at 140.
[1172] *Removal Memo* at 27.

7. Executive Branch precedent as dispositive

In the six memoranda that comprise the pre-Watergate corpus, there is only one reference to Executive Branch precedent in the form of an OLC opinion. In the *Missile Bases Memo*, an opinion that discusses the role that the Monroe Doctrine might play in contemplated presidential action to prevent the establishment of Soviet missile capabilities in Cuba, OLC cites a 1961 branch-internal legal precedent. That opinion, however, is cited as a counterpoint to OLC's larger argument that the United States could properly assert the Monroe Doctrine to justify a "pacific blockade" of Cube on the basis of "interests [of] bloc security" as recognize by the doctrine.[1173] Thus the lack of branch-internal precedent indicates that pre-Watergate OLCs do not assert independent interpretive authority of the kind I observe in the Bush case study. There, unlike in the pre-Watergate memos, OLC's assertion of independent interpretive authority is indispensable for its exercise of quasi-judicial legislation made possible by the alternative policy-making avenue produced by the juridification of politics.

8. OLC policy-making

There is no evidence in the pre-Watergate memos of OLC policy-making. As I indicate under point 4, OLC generally counsels compliance with the law. That is, after all, the classic function of advisory opinions. Moreover, as I will discuss below, when OLC does recommend unilateral action potentially incompatible with existing statutory rules, it does so on the basis of purely political arguments.

9. Complete vs. incomplete court mimicry and judicial supremacy

I coded a total of 35 segments in the pre-Watergate corpus as *Courts*. 32 of those refer to the Supreme Court's opinions, while 3 refer to lower court rulings. As I note in point 5 above, pre-Watergate memoranda do not engage in re-interpretation of court precedents. The only example that I can identify in which OLC disagrees with existing court precedent (and

[1173] *Missile Bases Memo* at 49.

regards *Milligan* as obsolete), however, is insufficient evidence that OLC's court mimicry is incomplete. Indeed, despite its criticism of the opinion, the *Removal Memo* faithfully applies *Milligan* and finds that it would likely bar a declaration of martial law in an area outside the zone of active military operations. Moreover, while the memo expresses OLC's conviction that "the establishment of martial law is a political question into which the courts will not inquire,"[1174] it warns that the Supreme Court had recently done just that "and determined that military necessity did not exist."[1175] Therefore, the *Removal Memo* expressly acknowledges judicial supremacy.

In the 1937 *President's Power Memo*, OLC considers four cases (*Little v. Barreme*, *Kansas v. Colorado*, *In re Neagle*, and *U.S. v. Curtiss-Wright*) to find that the Supreme Court's decisions have been used by both proponents and detractors of independent presidential power in the field of foreign relations. Unlike the Bush OLC, however, the 1937 Office highlights that both *Neagle* and *Curtiss-Wright*'s broad pronouncements regarding the President's foreign affairs powers are made in *dictum*. Therefore, it does not engage in the elevation of *dicta* to holding.

10. Defining institutional power relations

In Chapter Six on the Bush OLC's institutional powers jurisprudence, I provided a detailed analysis of the elaborate legal infrastructure OLC developed for the exploitation of the alternative policy avenue that emerged due to the juridification of politics. I highlight in that chapter that the Bush OLC's unilateralization of decisionmaking in the GWOT substantially depends on the President's independent powers being immune from congressional regulation. In sharp contrast to the Bush memoranda, pre-Watergate memos largely reinforce Congressional authority. In fact, the code *Co-Equality* which appears four times in pre-Watergate memos is completely missing from the Bush corpus. In the *Rehnquist Memo*, for example, OLC finds that "if the contours of the divided war power contemplated by the framers of the Constitution are to remain, constitutional practice must include executive resort to Congress in order to obtain its sanction for the conduct of hostilities which

[1174] *Removal Memo* at 29.
[1175] Id. at 29 (the case is *Sterling v. Constantin*, 287 US 378 (1932)).

reach a certain scale."[1176] Therefore, the opinion proposes that the President's unilateral power to use military force is limited to hostilities that fall well short of full-scale war. As OLC explains, based on the holding of *Bas v. Tingy*, a "declaration of war [is] viewed by the Executive Branch to authorize complete subjugation of the enemy, and some form of 'unconditional surrender' on the part of the enemy."[1177] In the undeclared Korean and Vietnam Wars, however, "the goals have been the far more limited ones of the maintenance of territorial integrity and the right to self-determination."[1178] Therefore, OLC concludes that due to the "duration of the Vietnam conflict, and its requirement in terms of both men and materiel" it would have "raise[d] the most serious of constitutional question" had Congress not sanctioned the use of military force in the Gulf of Tonkin resolution.

Similarly, in the *Removal Memo*, OLC states that the President's legal authority under the Enemy Alien Act (50 USC §21) does not extend to the removal of Japanese Americans. Therefore, it suggests that only the declaration of martial law, i.e. the suspension of the customary legal order, would allow the Executive Branch to hold U.S. citizens of Japanese descent "in a restricted zone."[1179] Instead of attempting to usurp Congress's lawmaking authority, OLC cites "questions of policy and public morality" in its refusal to fold the emergency into the law:

> The establishment of martial law in a delimited zone for the sole purpose of confining therein a particular citizen or group of citizens would also raise questions of policy and public morals. If this can be done with respect to the Japanese here involved, it might be done at any time with respect to any citizen. Thus, it would approach the practices of the German and Italian governments, so bitterly denounced in this country, of establishing citizen concentration camps in which citizens may be confined without due process of law.

11. One interpretation of the law vs. alternative avenues

As my predictions in the methodology chapter indicate, OLC memos in the absence of juridification are not expected to be unilateral power tools. Therefore, in my list of hypotheses regarding pre-Watergate memos, I predicted that they would not include assessments of risks

[1176] *Rehnquist Memo* at 109.
[1177] Id. at 29
[1178] Id. .
[1179] *Removal Memo* at 3.

posed by coordinate law interpreters. While my findings generally confirm this hypothesis, the data points produced by content analysis paint a more nuanced picture.

In considering the President's power to remove Japanese Americans from Hawaii, the *Removal* opinion does not definitively determine the exact dimensions of Executive Branch legal authority. Instead, it suggests that the suspension of *habeas corpus* could be one means by which to prevent Japan from using Japanese persons (citizens or non-citizens) in "[fifth column activities, espionage and sabotage [that] have been and are being employed on an unprecedented scale."[1180] However, while OLC states that it "think[s] the President has the power" to unilaterally suspend *habeas corpus*, "whether the controversy over this subject should be again precipitated at this time is a question which should be carefully considered."[1181] Elsewhere, OLC cautions that the imposition of martial law "in a delimited zone for the sole purpose of confining therein objectionable citizens might not be a good case in which to have [the question of martial law in an area where no military necessity exists] directly passed upon by the Court."[1182]

In sum, the risk management tools in pre-Watergate memoranda are either absent, or they consider possible scenarios that should be avoided on prudential grounds in order to foreclose confrontation with the coordinate branches. By contrast, the Bush OLC's opinions explore multiple interpretive avenues in order to ensure that unilateral presidential action can proceed unobstructed. In short, pre-Watergate OLCs' opinions do not exhibit sufficient interpretive authority to override competing legal considerations. Instead, as I will demonstrate below, some of them suggest straying from the letter of the law and claim that "substance should prevail over form."[1183]

Political advice?

The third most-often recurring code in the pre-Watergate corpus is *Political.* To illustrate the importance of this code, I will consider the 1937 *President's Power Memo* in some detail. Admittedly, the arguments pursued in that opinion are very likely outliers even in the pre-

[1180] Id. at 19.
[1181] Id. at 31.
[1182] Id. at 29.
[1183] *Rehnquist Memo* at 157.

Watergate context. Indeed, the Kennedy OLC's memoranda, while not policy decisions like those of the Bush OLC appear to be formally similar and far more legalistic than the 1937 *President' Power Memo*. Nevertheless, the Roosevelt OLC's[1184] opinion corroborates Jack Goldsmith's finding that President Roosevelt "acted in a permissive legal culture that is barely recognizable to us today. [Because] [i]t was an era… before Watergate."[1185]

The *President's Power* opinion was authored on the eve of World War II, as hostilities were brewing in the Far East and in Europe: Japan had already effectively invaded China, and Spain was riven by civil war. Although no legal question is specifically stated in the memo, it appears to have been occasioned by the enactment of the Neutrality Act of 1937 whose purpose was to limit U.S. involvement in future wars. Thus, in light of the Neutrality Act's restrictions, OLC considers the President's power to act under his own constitutional power, even in contravention of statutory requirements.

Part III of the memo is titled "The President's position in the Far Eastern and Spanish Affairs as Affected by the Neutrality Act of 1937." OLC's analysis emphasizes that the Act gave President Roosevelt broad discretion to decide when in a foreign state a "state of war" or "civil strife" exists in order to trigger the law's application. The Neutrality Act stipulated that upon such presidential determination

> it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to any belligerent state named in such proclamation, or to any neutral state for transshipment to, or for the use of, any such belligerent state.

While FDR acted quickly to impose an arms embargo on Spain, he was hesitant to find that a state of war existed between Japan and China. However, as the memo asserts, the President was under no obligation to make a premature finding. Instead, he was "entitled to [] a reasonable time to investigate, consider, come to his own conclusion, and act."[1186] Thus, OLC

[1184] The memo is dated November 8, 1937, which is prior to the establishment of OLC. Before OLC's predecessor, the Executive Adjudications Division (equivalent to OLC in all but name), was created by the Reorganization Plan of 1950, the responsibility to draft legal opinions and provide legal counsel to other agencies in the Executive Branch was delegated to the Office of the Assistant Solicitor General. That office, in turn, was created by Attorney General Order No. 23,507 on December 30, 1933, pursuant to the Independent Offices Appropriation Act of 1933. Thus, although it is not an opinion of the Office of Legal Counsel, it is, in all relevant respects, tantamount to it. For simplicity's sake I will refer to the Assistant Solicitor General's office as OLC.

[1185] Goldsmith, *The Terror Presidency*, 49.

[1186] *President's Power Memo* at 224

argues "he could not be fairly criticized" for the delay, especially "if the delay should meet with popular approval."[1187]

The motif of "popular approval" as a source of legal authority permeates the entire opinion. In fact, the pre-World War II OLC asserts that "since the extent of the President's power has been a controversial one," the most appropriate answer as to its contours can be found in Chief Justice Marshall's statement in *Marbury v. Madison*:

> [T]he president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.[1188]

Accordingly, OLC claims that presidential power is ultimately "dependent upon the will of the sovereign," and in the United States "the people constitute the sovereign."[1189] Therefore, whether the President can successfully exercise any political power "is dependent upon public opinion."[1190] In sharp contrast to the fixed values of institutional authorities that we see in the Bush corpus, the 1937 OLC states that "it is doubtful if the question of the extent of the President's powers ever will be definitely determined."[1191] Due to the vagary of public opinion, it "may favor one thing today and another tomorrow."[1192] Thus, the 1937 memo claims that it is political rather than juridical legitimacy that determines the limits of executive action:

> [T]he power which the public will permit the executive to exercise will vary from time to time according to the circumstances involved… It follows that a President today, in the performance of an act of which the general public approves, may assume and exercise a power with the approbation of the public; but tomorrow, in the performance of some act of which the public does not approve, he will exercise the same or a like power at his peril.[1193]

This passage reflects a fundamentally different logic of presidential power than that expressed in the Bush memoranda. In fact, it is quite identical to Posner and Vermuele's description of presidential authority in *The Executive Unbound*. As I note in the theory

---

[1187] Id.
[1188] *Marbury v. Madison*, 5 US 137, 165-166 (1803).
[1189] *President's Powers Memo* at 134.
[1190] 134.
[1191] Id.
[1192] Id.
[1193] 137.

chapter, I disagree with Posner and Vemuele's views regarding the modern presidency as being completely plebiscitary. Instead, as I explain in Chapter Two, the transformative process of juridification has caused the accretion of legal interpretive authority in judicial and extra-judicial decision-makers and fundamentally affected the President's exercise of unilateral authority. Therefore, the alternative policy-making avenue that I describe in this dissertation is a far better conceptualization of the post-Watergate exercise of presidential unilateralism than Posner and Vermuele's apparently atavistic description in *The Executive Unbound*. Indeed, it is only in the pre-Watergate juridico-political context that the 1937 memo can make the claim that the power of the President is not susceptible to description in legal terms:

> The question must be considered realistically. It is essentially practical and does not admit of a legalistic treatment that fails to take into account human nature in the individual and in the mass. If it be shocking to legal concept to conclude that a President at one time under the Constitution has the power to do an act in respect of foreign relations, and that the same or another President under the same Constitution has not the power to do such an act at another time, the trouble is not with the conclusion but with the concept. History corroborates the conclusion, while at the same time overturning any legal theory on the subject that does not accord with experience.

I open this dissertation with a vignette describing Congress's institutional deference toward the Executive Branch's endogenously rendered legal interpretations of its own powers. The Senate hearing featured in that vignette took place in 2011, seventy-four years after the penning of the *President's Powers* memorandum. A lot had transpired in the intervening decades that the 1937 OLC could not foresee; among them, the critical juncture, Watergate. As the evidence presented in this chapter indicates, the legislatively-imposed constitutional corrective has, in fact, impacted the political system, the policy process, and the concept of legitimacy in significant ways. It is for this reason that in 1937, in a legal culture that bore little resemblance to that in which the GWOT would be fought, the *President's Power Memo* can assert with confidence that:

> In the field of foreign relations, the Chief Executive moves in a zone of twilight where he may proceed with assurance of his powers under the Constitution only when the people follow and approve.[1194]

***

[1194] *President's Power Memo* at 143.

The data presented in this chapter demonstrates that the pre-Watergate memoranda exhibit considerable differences to the Bush's OLC legal opinions. Therefore, it confirms my hypothesis that Watergate is a critical juncture that not only formalized previously informally exercised powers, but also affected the concept of legitimacy and institutional power relations, and effectively recalibrated the policy-making potential of legal actors within the Executive Branch.

CONCLUSION

RULE OF LAW VS. RULE BY LAW

While there is a large body of literature that examines the Bush administration's post-9/11 legal-policies, this dissertation addresses an important gap in the relevant scholarship. As the political scientist James Pfiffner observed in *Torture as Public Policy*, "many of the legal memoranda of the Bush administration were in fact policy decision, since the legal judgment determined what type of treatment of detainees was allowed."[1195] Based on that finding, I ask the question why we see the particular kind of unilateralism in the Bush administration's institutional behavior which prioritizes legal tools to achieve desired policy goals. In brief, my answer is the juridification of politics. Other scholars such as Ran Hirschl and Gordon Silverstein have greatly advanced our understanding of the juridification of U.S. politics, at least as it relates to the role of the courts in the policy-making process. However, as I explain in the theory chapter, judicialization is only one aspect of a larger system-wide transformative process whereby legal rules, rationales, and resolutions come to supplant real-world political conflict. In order to understand why the Bush administration would rely on a uniquely legal strategy as well as why OLC's legal opinions can constitute policy-making, I contribute to and expand the existing literature on juridification. By doing so, I attempt to bridge the conceptual divide between "lawyerly reasoning" and the real-word manifestations of Executive unilateralism. Therefore, this dissertation is also an important contribution to the growing literature on presidential direct action.

After performing a deep contextual analysis of all OLC memoranda that fall within the period that I call the "construction of the GWOT legal architecture," in Chapter Seven I propose a typology of OLC's unilateral power tools which sums up the various manifestations of OLC's quasi-judicial legislation. In light of the data that emerges from OLC's legal opinions and the government's subsequently enacted policies, it becomes clear that the Bush administration consciously engaged in a legal strategy (JEU) not only to aggrandize the powers of the presidency but also to achieve desired policy goals without recourse to inter-branch

[1195] Pfiffner, *Torture as Public Policy*, 2010, 115.

politicking. Furthermore, while the administration frequently defied existing statutory constraints, by relying on OLC's legal memoranda it remained in formal compliance with the law.

According to Clement Fatovic, "in a liberal democratic society it is difficult – if not impossible – to justify any policy, program, or measure that lacks a solid basis in law. Whether sincere or not, everyone appears to accept that law is the only legitimate basis for government action."[1196] Indeed, as Jack Goldsmith tells us, the Bush administration was obsessed with legality. While it invariably made sure that its actions would be based on the authoritative legal opinions issued by the Office of Legal Counsel, it sacrificed what Roosevelt's OLC referred to as "public morality." Consequently, grossly immoral actions resulted from the administration's formally legal policies.

Notably, most of the Bush administration's counterterrorism program that OLC helped construct remains in effect. This indicates that despite the Court's limitation of executive unilateralism at the margins and the formal retraction of the Bush OLC's opinion by the Obama administration, they continue to dictate government action in significant way. This raises the very real possibility that if OLC's power tools can monopolize policy-making in the GWOT, then it can also do so in other policy areas. Therefore, it is imperative that future research examine OLC's jurisprudence in non-national-security-related domains.

Moreover, as I conclude in Chapter Six, OLC's legal memoranda did not only bring about lasting policy change, but they also effectively recalibrated governing arrangements by allowing the President to assume near-plenary control over the conduct of the GWOT. Despite the Bush OLC's protestations in the *NSA Memo* that no foreign-to-domestic-bootstrapping had occurred as a result of the administration's unilaterally designed and implemented counterterrorism policies, the evidence indicates otherwise. Specifically, OLC successfully deployed the President's foreign affairs powers to narrow and, in some cases, to nullify domestic legislation. In fact, as I demonstrate in Chapter Four, many of OLC's legal opinions effectively usurped Congress's domestic lawmaking authority.

Although juridification has significantly enhanced the power of the courts to review all forms of government action, litigation is not an adequate solution to control JEU. Simply put, the courts cannot be expected to police the political branches' actions at all times. As

[1196] Fatovic, "Settled Law in Unsettling Times," 2009, 14.

Justice Stone wrote in *U.S. v. Butler*, "courts are not the only agency of government that must be assumed to have capacity to govern."[1197] As I explain in Chapter Seven, while the Supreme Court mitigated the Bush administration's unilateralism in more-or-less meaningful ways, many of the terrorism policies that continue to be in effect have never been vetted by the courts. Moreover, in recent cases field by the ACLU, the Obama administration successfully convinced the Federal Judiciary that they should defer to the Executive Branch's conduct of the war effort.[1198]

Therefore, Congress must play an active role in the ongoing Global War Against Terrorism. Some scholars have urged Congress to enact framework legislation regulating the use of drones in surveillance and targeting operations.[1199] Undoubtedly, enacting such legislation is not without risks, as the Executive would likely interpret it as congressional recognition of a power it already possesses. Therefore, scholars must inquire how the President's free-wheeling national security authority legitimated by OLC's interpretive activity can be kept within constitutional limits. By examining the Bush OLC's reliance of JEU, this dissertation takes an initial step toward that goal.

As the Bush administration's use of JEU indicates, the coalescence of legality and legitimacy poses a very real risk to the concept of the rule of law. The renowned legal scholar, David Dyzenhaus, warns that "[e]ven the barest forms of rule by law seem to evoke the idea that the rule is legitimate because it is in accordance with the law, that is, the rule of law."[1200] Therefore, a governing arrangement in which OLC's legal interpretations can define the legitimacy of presidential action even in contravention of laws passed "in Pursuance []of" the Constitution runs the risk of subverting the rule of law in favor of rule by law.

[1197] *U.S v. Butler*, 297 US 1 (1936).

[1198] *See*, *Al-Aulaqi v. Panetta*.

[1199] Jack Goldsmith, "U.S. Needs Rules of Engagement for Secret Warfare," *The Washington Post*, n.d., https://www.washingtonpost.com/opinions/us-needs-rules-of-engagement-for-secret-warfare/2013/02/05/449f786e-6a78-11e2-95b3-272d604a10a3_story.html?utm_term=.e1aabb9ab264.

[1200] Dyzenhaus, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?"

Appendix

Codebook

1 ADDRESSEE	11
2 QUESTION	51
3 CONCLUSION	70
3.1 non court like judgment	11
3.2 COURT-LIKE JUDGMENT	319
4 AUTHORITIES	0
4.1 Legal Constructs	0
4.1.1 Efficacy	1
4.1.2 Common Law	10
4.1.3 Criminal Law	0
4.1.3.1 Negligence	2
4.1.3.2 Evidentiary Standard	4
4.1.3.3 Reasonable Person	14
4.1.3.4 Intent	0
4.1.3.4.1 Good Faith	12
4.1.3.4.2 General Intent	7
4.1.3.4.3 Specific Intent	20
4.1.4 Government's Interest	16
4.1.5 Grave Breach	0
4.1.6 Habeas Corpus	4
4.1.7 Imminence	16
4.1.8 Legal Excuses	0
4.1.8.1 Feasibility	2
4.1.8.2 Necessity	30
4.1.8.3 Self-defense/Defense of another	67
4.1.9 Procedural Requirements	1
4.1.10 Public Safety	8
4.1.11 Removal Procedures	0
4.1.11.1 Extradition	3
4.1.11.2 Removal	1
4.1.12 Search/Seizure/Intelligence Collection	0
4.1.12.1 Reasonableness	16
4.1.12.2 Intelligence Collection	14
4.1.12.3 Seizure	2
4.1.12.4 Warrant Requirement	9
4.1.12.5 Suspicionless Searches	1
4.1.13 Secrecy/Classification	1

4.1.14 Takings	2
4.1.15 Use of Force	0
4.1.15.1 Deadly Force	5
4.1.15.2 Proportionality	8
4.1.16 War/Armed Conflict	0
4.1.16.1 Armistice/Ceasefire	4
4.1.16.2 War Crimes	2
4.2 CONSTITUTION and JUDICIAL DOCTRINE	3
4.2.1 Consitution	6
4.2.2 Article IV	3
4.2.3 Preamble	2
4.2.4 Article I	16
4.2.4.1 Rules and Regulations for land and naval Forces	1
4.2.4.2 Rules for Captures on Land and Water	2
4.2.4.3 Necessary and Proper Clause	1
4.2.4.4 Define and Punish	6
4.2.4.5 Captures Clause	1
4.2.4.6 raise and support armies	5
4.2.4.7 Ex Post Facto Clause s9c3	1
4.2.5 Article II	11
4.2.5.1 Pardon Power	1
4.2.5.2 Executive Privilege	3
4.2.5.3 Treaty Power	50
4.2.5.4 Take Care	2
4.2.5.5 Commander-in-Chief	151
4.2.5.6 The Executive Power	4
4.2.5.7 Unitary Executive	9
4.2.5.8 Sole Organ	9
4.2.6 Article III	3
4.2.7 Bill of Rights	4
4.2.7.1 1st Amendment	1
4.2.7.2 4th Amendment	41
4.2.7.2.1 Special needs	7
4.2.7.3 5th Amendment	10
4.2.7.3.1 Grand Jury Indictment	4
4.2.7.3.2 Due Process Clause	4
4.2.7.3.2.1 Procedural Due Process	1

4.2.7.3.2.2 Substantive Due Process (shock the conscience)	6
4.2.7.3.3 Just Compensation Clause	6
4.2.7.3.4 Miranda	28
4.2.7.3.5 Self-Incrimination Clause	8
4.2.7.4 6th Amendment	3
4.2.7.4.1 Jury Trial	4
4.2.7.4.2 Counsel	4
4.2.7.5 8th Amendment	1
4.2.7.5.1 Cruel and Unusual Punishment	16
4.2.8 Declaration of War	7
4.2.9 Supremacy Clause	6
4.2.10 Treason Clauses	8
4.2.11 Vesting Clause	26
4.3 Non-federal Law	0
4.3.1 State analogue of ABA Prof Rule	2
4.3.2 Model Penal Code	8
4.4 Courts	0
4.4.1 Military Courts	0
4.4.1.1 US v. Olson	1
4.4.1.2 US v. Dickenson	2
4.4.1.3 Castillo	1
4.4.1.4 Averette	1
4.4.2 FISA Court	6
4.4.3 SUPREME COURT	4
4.4.3.1 Ann Arbor v. US	1
4.4.3.2 Acton	1
4.4.3.3 Albright v. Oliver	1
4.4.3.4 Am Fed Lab v. Watson	1
4.4.3.5 Amiable Isabella, the	1
4.4.3.6 Application of Gault	1
4.4.3.7 Banco N de Cuba v. Sabbatino	1
4.4.3.8 Barreme	1
4.4.3.9 Bas v. Tingy	1
4.4.3.10 Beecham v. US	1
4.4.3.11 Bell v. Wolfish	1
4.4.3.12 Berkemer v. McCarthy	1
4.4.3.13 Bethesda Hosp Assn v. Bowen	2

4.4.3.89 Madsen	5
4.4.3.90 Malloy v. Hogan	1
4.4.3.91 Martin v. Mott	3
4.4.3.92 Mathis v. US	2
4.4.3.93 Matthews v. Diaz	1
4.4.3.94 McCulloch v. Maryland	1
4.4.3.95 McCulloch v. Sociedad	1
4.4.3.96 Mechanics' and Trader's Bank	1
4.4.3.97 Mechanics&T Bank v. Union Bank	1
4.4.3.98 Michigan Dept of State Police v. Sitz	3
4.4.3.99 Michigan v. Summers	3
4.4.3.100 Middlendorf v. Henry	1
4.4.3.101 Miller v. US	2
4.4.3.102 Miranda v. AZ	3
4.4.3.103 Mistretta v. US	3
4.4.3.104 Montoya v. US	1
4.4.3.105 Morales v. Trans World airlines	1
4.4.3.106 Morissette v. US	2
4.4.3.107 Morrison v. Olson	1
4.4.3.108 Moyer v. Peabody	2
4.4.3.109 Myers v. US	1
4.4.3.110 Near v. Minnesota	1
4.4.3.111 Nixon v. Adm of Gen Servs	1
4.4.3.112 Nixon v. Admin of GS	1
4.4.3.113 Nixon v. Fitzgerald	5
4.4.3.114 NJ v. TLO	1
4.4.3.115 NLRB v. Catholic Bishops	3
4.4.3.116 NW Indian Cemetery Ass	1
4.4.3.117 NY Life Ins v. Hendren	1
4.4.3.118 NY v. Quarles	9
4.4.3.119 NYTimes v. US	1
4.4.3.120 Oregon v. Elstad	1
4.4.3.121 PA v. Labron	2
4.4.3.122 Paquete Habana	2
4.4.3.123 Porter v. Nussle	1
4.4.3.124 Printz v. US	3
4.4.3.125 Prize Cases	21

4.7.8.5.3.4 Fed 25	1
4.7.8.5.3.5 Fed 74	5
4.7.8.5.3.6 Fed 70	3
4.7.8.5.3.7 Fed 23	5
4.8 EXECUTIVE BRANCH	2
4.8.1 International Law	0
4.8.1.1 Treaty understanding/reservation	12
4.8.1.2 Instrument of Ratification	4
4.8.2 Papers/Public Statements	0
4.8.2.1 CIA	0
4.8.2.1.1 GenCounsel	1
4.8.2.2 DOD	1
4.8.2.2.1 Joint Chiefs of Staff	2
4.8.2.2.2 SECDEF	3
4.8.2.2.3 Report	10
4.8.2.3 UN Ambassador/USC Rep	8
4.8.2.4 DOJ	1
4.8.2.4.1 Sol Gen	1
4.8.2.4.2 AG	3
4.8.2.5 Presidents	0
4.8.2.5.1 Reagan	8
4.8.2.5.2 JFK	5
4.8.2.5.3 Lincoln	1
4.8.2.5.4 Clinton	30
4.8.2.5.5 Bush41	19
4.8.2.5.6 Bush43	9
4.8.2.6 Armed Forces	3
4.8.2.6.1 Navy	2
4.8.2.6.2 Army	7
4.8.2.7 STATE	21
4.8.3 Legal Opinions	0
4.8.3.1 OLC	0
4.8.3.1.1 Pre-Watergate OLC	3
4.8.3.1.1.1 Rehnquist Memo	6
4.8.3.1.2 Carter-OLC	8
4.8.3.1.3 Reagan OLC	21
4.8.3.1.3.1 Contempt Opinion	3

4.9.5.6.5.3 Mil Commissions 821	22
4.9.5.6.5.4 Aiding the Enemy 904	7
4.9.5.6.5.5 Spying 906	1
4.9.5.6.5.6 manslaughter 919	0
4.9.5.6.5.7 Murder 918	1
4.9.5.7 18 USC	1
4.9.5.7.1 Assault 113	17
4.9.5.7.2 Chapter 16 - Extradition	0
4.9.5.7.2.1 extradition without regard to treaty for comity 3181(b)	1
4.9.5.7.3 Enlistment Foreign Service 959	1
4.9.5.7.4 Expedition ag Friendly Nation 960	1
4.9.5.7.5 Foreign murder of US national 1119	1
4.9.5.7.6 Homicide under Terrorism 2332	1
4.9.5.7.7 Instate Stalking 2261A	10
4.9.5.7.8 Interception of electronic comm prohibited 2511	6
4.9.5.7.9 Lmt Detention 4001(a)	13
4.9.5.7.10 Logan Act 953	1
4.9.5.7.11 Maiming 114	7
4.9.5.7.12 mat support or resources to terror orgs 2339B	1
4.9.5.7.13 Mil Extraterritorial Juriscdiction A 3261	12
4.9.5.7.14 not committed in any Districts 3238	1
4.9.5.7.15 PCA 1385	16
4.9.5.7.16 Protection of officers 1114	1
4.9.5.7.17 providing material support to terrorists 2339A	1
4.9.5.7.18 Serious BI 1365h(3)	2
4.9.5.7.19 SMTJ 7	14
4.9.5.7.20 Substantial BI 113(b)(1)	1
4.9.5.7.21 Torture 2340	88
4.9.5.7.22 Treason 2381	4
4.9.5.7.23 Use of WMDs 2332a	1
4.9.5.7.24 WCA 2441	17
4.9.5.8 28 USC	0
4.9.5.8.1 Power to Grant Writ 2241	1
4.9.5.8.2 DistCourt Jurisdiction 81-131	1
4.9.5.8.3 TVPA 1350 note	13
4.9.5.9 50 USC	0
4.9.5.9.1 IEEPA	0

5.3.5.1.15 not available	3
5.3.5.1.16 not included	1
5.3.5.1.17 prohibited	1
5.3.5.1.18 Silence	7
5.3.5.1.19 suspension/termination	36
5.3.5.1.20 UNCONSTITUTIONAL	39
5.3.5.1.21 unenforceable	4
5.3.5.1.22 unlikely	6
5.3.5.1.23 unnecessary	30
5.3.5.1.24 violation	2
5.3.5.2 positive construction	0
5.3.5.2.1 authorized	1
5.3.5.2.2 available/applicable	62
5.3.5.2.3 COMPLIANCE	14
5.3.5.2.4 consistent	4
5.3.5.2.5 CONSTITUTIONAL	2
5.3.5.2.6 evolution	5
5.3.5.2.7 flexibility	4
5.3.5.2.8 high	6
5.3.5.2.9 increase	1
5.3.5.2.10 likely	1
5.3.5.2.11 must be used	11
5.3.5.2.12 necessary/exigent	13
5.3.5.2.13 not limited	2
5.3.5.2.14 overlap	1
5.3.5.2.15 override	5
5.3.5.2.16 presence	1
5.3.5.2.17 proportional	5
5.3.5.2.18 reasonable	5
5.3.5.2.19 still in effect/not expired	14
5.3.5.2.20 sufficient	4
5.3.5.3 by breadth	0
5.3.5.3.1 narrow construction/narrowly tailored	9
5.3.5.3.2 broad construction	30
5.3.5.4 by SOURCE type	0
5.3.5.4.1 statutory construction	209
5.3.5.4.2 regulatory construction	5

5.4 NON-LEGAL toolkit	0
5.4.1 Practical/practical necessity	32
5.4.2 future threat	13
5.4.3 Political	14
5.4.3.1 undemocratic	1
5.4.3.2 Policy recommendation	17
5.4.4 Prerogative	2
5.4.5 Analogy	30
5.4.5.1 War	3

BIBLIOGRAPHY

Abramowitz, Michael. "Bush's Tactic of Refusing Laws Is Probed," July 24, 2006. http://www.washingtonpost.com/wp-dyn/content/article/2006/07/23/AR2006072300511.html.

Adams, Kevin. "Can President Trump Legally Send Troops to the Border? It's Complicated." *Washington Post*, April 17, 2018, sec. Made by History. https://www.washingtonpost.com/news/made-by-history/wp/2018/04/17/can-president-trump-legally-send-troops-to-the-border-its-complicated/.

Adler, David Gray. "The Law: George Bush as Commander in Chief: Toward the Nether World of Constitutionalism." *Presidential Studies Quarterly* 36, no. 3 (September 2006): 525–40.

Adler, David Gray, and Larry Nelson George, eds. *The Constitution and the Conduct of American Foreign Policy*. Lawrence, Kan: University Press of Kansas, 1996.

Amar, Akhil Reed. *America's Constitution: A Biography*. New York, NY: Random House, 2006.

American Civil Liberties Union. "Salim et Al. v. Mitchell et Al." ACLU of Washington, n.d. https://www.aclu-wa.org/cases/salim-et-al-v-mitchell-et-al-0.

Anclien, Joseph J. "Broader Is Better: The Inherent Powers of Federal Courts." *NYU Annual Survey of American Law* 64 (2008): 37–84.

Andrade, Dale. "The Campaigns of World War II: Luzon." World War II Commemorative Series, n.d. https://history.army.mil/catalog/pubs/72/72-28.html.

Arend, Anthony Clark. "International Law and the Preemptive Use of Military Force." *The Washington Quarterly* 26, no. 2 (March 2003): 89–103.

Balkin, J. M. "Must We Be Faithful to Original Meaning?" *Jerusalem Review of Legal Studies* 7, no. 1 (June 1, 2013): 57–86.

Balkin, Jack. "Youngstown and The President's Power to Torture." Balkinization, July 16, 2004. https://balkin.blogspot.com/2004/07/youngstown-and-presidents-power-to.html.

Balkin, Jack M., and Sanford Levinson. "Understanding the Constitutional Revolution." *Virginia Law Review* 87, no. 6 (October 2001): 1045.

Banks, William C. "Troops Defending the Homeland: The Posse Comitatus Act and the Legal Environment for a Military Role in Domestic Counter Terrorism." *Terrorism and Political Violence* 14, no. 3 (September 2002): 1–41.

Barilleaux, Ryan J., and Christopher S. Kelley, eds. *The Unitary Executive and the Modern Presidency*. 1st ed. Joseph V. Hughes Jr. and Holly O. Hughes Series on the Presidency and Leadership. College Station: Texas A&M University Press, 2010.

Barton, Benjamin H. "An Article I Theory of the Inherent Powers of the Federal Courts." *Catholic University Law Review* 61 (2011): 1–61.

Bauer, Bob. "Power Wars Symposium: The Powers Wars Debate and the Question of the Role of the Lawyer in Crisis." *Just Security*, November 18, 2015. https://www.justsecurity.org/27712/powers-wars-debate-question-role-lawyer-crisis/.

Bein, Lt. Colonel Peter J. "General MacArthur and the Yamashita Decision." Carlisle Barracks, PA: U.S. Army War College Department of Command Leadership and Management, May 1989. https://apps.dtic.mil/dtic/tr/fulltext/u2/a209673.pdf.

Bell, Griffin B., and Ronald J. Ostrow. *Taking Care of the Law*. Macon, Ga: Mercer University Press, 1986.

Bellia, Patricia L. "Executive Power in Youngstown's Shadows." *Constitutional Commentary* 19 (2002): 87–154.

Ben-Asher, Noa. "Legal Holes." *Unbound* 5, no. 1 (2009): 1–20.

Bessette, Joseph M. "Rethinking Justice Jackson's Concurrence in Youngstown v. Sawyer." In *The Limits of Constitutional Democracy*, edited by Jeffery K. Tulis and Stephen Macedo. Princeton University Press, 2010.

Bialke, Major Joseph. "United Nations Peace Operations: The Applicable Norms and the Application of the Law of Armed Conflict." LLM Thesis, University of Iowa, 2000. https://apps.dtic.mil/dtic/tr/fulltext/u2/a380930.pdf.

Biddle, Francis. *In Brief Authority*. Westport, Conn: Greenwood Press, 1976.

Black, Henry Campbell. *Black's Law Dictionary*. Edited by Bryan A. Garner. 8. ed. St. Paul, Minn: Thomson/West, 2007.

Blichner, Lars Chr., and Anders Molander. "Mapping Juridification." *European Law Journal* 14, no. 1 (December 19, 2007): 36–54.

Boisson de Chazournes, Laurence, and Luigi Condorelli. "Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests." *International Review of the Red Cross* 837 (March 31, 2000). /eng/resources/documents/article/other/57jqcp.htm.

Bradley, Curtis A., and Trevor W. Morrison. "Historical Gloss and the Separation of Powers." *Harvard Law Review* 126, no. 2 (December 2012): 411–85.

Bradley, W. James, and Kurt C. Schaefer. *The Uses and Misuses of Data and Models: The Mathematization of the Human Sciences.* The Uses and Misuses of Data and Models: The Mathematization of the Human Sciences. Thousand Oaks, CA: Sage Publications, 1998.

Brenna, William J. "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises." presented at the Hebrew University, Jerusalem, Israel, December 22, 1987.

"Brief of Historians and Scholars of Ex Parte Quirin as Amicus Curiae in Support of Petitioner." Al-Marri v. Spagone, n.d.

Brig. Gen. Whitney, Courtney. "The Case of General Yamashita: A Memorandum." General Headquarters, Supreme Command for the Allied Powers, Government Section, November 22, 1949. https://www.loc.gov/rr/frd/Military_Law/pdf/Yamashita.pdf.

Briggs, Herbert W. "The Attorney General Invokes Rebus Sic Stantibus." *American Journal of International Law* 36, no. 1 (1942): 89–96. https://doi.org/10.2307/2192195.

Brooks, Rosa Ehrenreich. "Failed States, or the State as Failure?" *The University of Chicago Law Review* 72, no. 4 (2005): 1159–96.

Bruff, Harold H. *Untrodden Ground: How Presidents Interpret the Constitution*. Chicago: University of Chicago Press, 2016.

Buchstein, Hubertus. "The Concept of 'Self-Binding' in Constitutional Theory." In *Critical Theory and Democracy*, 56–80. New York: Routledge, n.d.

Bush, George W. Military Order - Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 37 WCPD 1665 § (2001). https://www.govinfo.gov/app/details/WCPD-2001-11-19/WCPD-2001-11-19-Pg1665.

———. "President's Radio Address." May 8, 2004. https://georgewbush-whitehouse.archives.gov/news/releases/2004/05/20040508.html.

Caraley, Demetrios. "American Political Institutions after Watergate: A Discussion." *Political Science Quarterly* 89 (1974): 713–49.

Casper, Gerhard. “Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model.” *The University of Chicago Law Review* 43, no. 3 (1976): 463–98.

Clark, Kathleen. “Ethical Issues Raised by the OLC Torture Memorandum.” *Journal of National Security Law and Policy*, 2005, 455–72.

Clines, Francis X., and Steven Lee Myers. “Attack on Iraq: The Overview; Impeachment Vote in House Delayed as Clinton Launches Iraq Air Strike, Citing Military Need to Move Swiftly.” *The New York Times*, December 17, 1998, sec. World. https://www.nytimes.com/1998/12/17/world/attack-iraq-overview-impeachment-vote-house-delayed-clinton-launches-iraq-air.html.

CNN. “Cheney: Kerry Win Risks Terror Attack.” *CNN.Com*, September 7, 2004, sec. America Votes 2004: Special Report. http://www.cnn.com/2004/ALLPOLITICS/09/07/cheney.terror/.

———. “U.S., Britain End Airstrikes in Iraq - December 19, 1998.” Accessed December 11, 2018. http://www.cnn.com/WORLD/meast/9812/19/iraq.strike.06/.

Confirmation Hearing on The Nomination of Alberto R. Gonzales To be Attorney General of The United States, Pub. L. No. S. Hrg. 109-4, § Committee on the Judiciary (2005). https://www.congress.gov/109/chrg/shrg99932/CHRG-109shrg99932.htm.

Confirmation Hearing on the Nomination of Michael B. Mukasey to be Attorney General of the United States, Pub. L. No. S. Hrg. 110-478, § Committee on the Judiciary (2007). https://fas.org/irp/congress/2007_hr/mukasey.html.

Cooper, Phillip J. *By Order of the President: The Use and Abuse of Executive Direct Action*. Second edition, Revised and expanded. Studies in Government and Public Policy. Lawrence, Kansas: University Press of Kansas, 2014.

———. “Power Tools for an Effective and Responsible Presidency.” *Administration & Society* 29, no. 5 (November 1997): 529–56.

Corwin, Edward S., Randall Walton Bland, Theodore T. Hindson, and J. W. Peltason. *The President: Office and Powers, 1787-1984: History and Analysis of Practice and Opinion*. 5th rev. ed. New York: New York Uni. Press, 1984.

Daschle, Tom. “Power We Didn’t Grant.” *Washington Post*. December 23, 2005. http://www.washingtonpost.com/wp-dyn/content/article/2005/12/22/AR2005122201101.html.

Dellinger, Walter E. “Principles to Guide the Office of Legal Counsel,” December 21, 2004.

Department of Defense Directive, 5100.77 AD-A272 470 § (1979).

Department of Defense Directive, 5100.77 § (1998).

Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism, Pub. L. No. J-107-50, § Committee on the Judiciary, 598 (2001).

Dershowitz, Alan M. “Is It Necessary To Apply ‘Physical Pressure’ To Terrorists - And To Lie About It?” *Israeli Law Review* 23, no. 2 & 3 (1989): 192–200.

Devins, Neal. “Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives.” *Willamette L. Rev.* 45 (2008): 395.

Dickinson, Matthew J. “We All Want a Revolution: Neustadt, New Institutionalism, and the Future of Presidency Research.” *Presidential Studies Quarterly* 39, no. 4 (December 2009): 736–70.

Dobbs, Greg. “The Parallels and Differences between Pearl Harbor and 9/11.” *The Denver Post*. Accessed December 14, 2018. https://www.denverpost.com/2016/12/06/the-parallels-and-differences-between-pearl-harbor-and-911/.

Dorf, Michael. “The Undead Constitution.” *Harvard Law Review* 125 (2012): 2011–55.

Dyzenhaus, David. “Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?” *Cardozo Law Review* 27 (August 21, 2008): 2005–40.

———. *The Constitution of Law Legality in a Time of Emergency*. Cambridge: Cambridge University Press, 2006.

Easterbrook, Frank H. “Presidential Review.” *Case W. Res. L. Rev.* 40 (1989): 905–29.

Eichenberg, Richard C., Richard J. Stoll, and Matthew Lebo. “War President: The Approval Ratings of George W. Bush.” *Journal of Conflict Resolution* 50, no. 6 (December 2006): 783–808.

Eig, Larry M. “Statutory Interpretation: General Principles and Recent Trends.” Congressional Research Service, September 24, 2014. https://fas.org/sgp/crs/misc/97-589.pdf.

Ellis, Richard, and Michael Nelson, eds. *Debating the Presidency: Conflicting Perspectives on the American Executive*. Washington, D.C: CQ Press, 2010.

Elsea, Jennifer K. “Detention of American Citizens as Enemy Combatants,” February 24, 2005. https://fas.org/sgp/crs/misc/RL31724.pdf.

———. “The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law.” *Congressional Research Service*, n.d., 73.

Emerson, J Terry. “Treaty Termination Revisited.” *Woodrow Wilson Journal of Law* 4, no. 1 (1982): 1–26.

Epstein, Lee, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal. “Ideological Drift among Supreme Court Justices: Who, When, and How Important.” *Nw. UL Rev.* 101 (2007): 1483–1541.

Erickson, Rosemary J., and Rita J. Simon. *The Use of Social Science Data in Supreme Court Decisions*. Urbana: University of Illinois Press, 1998.

Eskridge Jr, William N., and Philip P. Frickey. “Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking.” *Vand. L. Rev.* 45 (1992): 593.

Fallon, Richard H. *The Dynamic Constitution: An Introduction to American Constitutional Law*. New York: Cambridge University Press, 2004.

Farrand, Max, ed. *The Records of the Federal Convention of 1787*. Vol. 2nd. 3 vols. vols. New Haven: Yale University Press, 1911.

Fatovic, Clement. “Settled Law in Unsettling Times: A Lockean View of the War on Terror.” *The Good Society* 18, no. 2 (2009): 14–19.

Fatovic, Clement, and Benjamin A. Kleinerman. “Extra-Legal Measures and the Problem of Legitimacy.” In *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*. New York: Oxford University Press, 2013.

Fay, MG George R. “Investigation of Abu Ghraib Detention Facility and 205th Military Intelligence Brigade,” August 25, 2004. https://www.thetorturedatabase.org/document/fay-report-investigation-205th-military-intelligence-brigades-activites-abu-ghraib.

Fink, Sheri. “Settlement Reached in C.I.A. Torture Case.” *The New York Times*, August 17, 2017, sec. U.S. https://www.nytimes.com/2017/08/17/us/cia-torture-lawsuit-settlement.html.

Fischer, Miles P. “Applicability of the Geneva Conventions to ‘Armed Conflict’ in the War on Terror.” *Fordham International Law Journal* 30, no. 3 (2006): 509–34.

Fisher, Louis. “Invoking Inherent Powers: A Primer.” *Presidential Studies Quarterly* 37, no. 1 (March 2007): 1–22.

———. “Military Tribunals: Historical Patterns and Lessons.” Congressional Research Service, July 9, 2004. https://apps.dtic.mil/dtic/tr/fulltext/u2/a463084.pdf.

———. “Military Tribunals: The Quirin Precedent.” Congressional Research Service, March 26, 2002. http://www.au.af.mil/au/awc/awcgate/crs/rl31340.pdf.
———. *Nazi Saboteurs on Trial: A Military Tribunal and American Law*. Lawrence, Kan: University Press of Kansas, 2003.
Fisher, Louis, and David Gray Adler. “The War Powers Resolution: Time to Say Goodbye.” *Political Science Quarterly* 113, no. 1 (March 1998): 1–20.
Flinders, Matthew, and Jim Buller. “Depoliticisation: Principles, Tactics and Tools.” *British Politics* 1, no. 3 (November 2006): 293–318.
Fontana, David. “Docket Control and the Success of Constitutional Courts.” In *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon. Edward Elgar Publishing, 2011.
Ford, Christopher A., and Amichai Cohen, eds. *Rethinking the Law of Armed Conflict in an Age of Terrorism*. Lanham, MD: Lexington Books, 2012.
Ford, Matt. “When the President Defies the Supreme Court.” *The New Republic*, April 24, 2018. https://newrepublic.com/article/148108/president-defies-supreme-court.
Frank, John P. “Edward Bates, Lincoln’s Attorney General.” *The American Journal of Legal History* 10, no. 1 (January 1966): 34–50.
Froomkin, Dan. “White House Succumbs to Pressure.” *Washington Post*, June 23, 2004, sec. Politics. http://busharchive.froomkin.com/A64079-2004Jun23.html.
Gellman, Barton, and Dana Priest. “U.S. Strikes Terrorist-Linked Sites in Afghanistan, Factory in Sudan.” *Washington Post*, August 21, 1998. https://www.washingtonpost.com/wp-srv/inatl/longterm/eafricabombing/stories/strikes082198.htm.
George, Alexander L., and Andrew Bennett. *Case Studies and Theory Development in the Social Sciences*. BCSIA Studies in International Security. Cambridge, Mass: MIT Press, 2005.
Gergen, David. PBS Frontline: Cheney’s Law. Accessed January 30, 2019. https://www.pbs.org/wgbh/pages/frontline/cheney/interviews/gergen.html.
Gerring, John. *Party Ideologies in America, 1828 - 1996*. Cambridge: Cambridge Univ. Press, 2001.
Gillman, Howard. “Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism.” In *The Supreme Court and American Political Development*, edited by Ronald Kahn and Kenneth Ira Kersch. Lawrence, Kansas: University Press of Kansas, 2006.
Glennon, Michael J. *Constitutional Diplomacy*. Princeton, N.J: Princeton University Press, 1990.
Goldsmith, Benjamin Wittes and Jack L. “United States Detention Policy: Will Obama Follow Bush or FDR?” *Brookings* (blog), January 29, 2009. https://www.brookings.edu/opinions/united-states-detention-policy-will-obama-follow-bush-or-fdr/.
Goldsmith, Jack. “The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation.” In *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*, edited by Clement Fatovic and Benjamin A. Kleinerman. New York: Oxford University Press, 2013.
———. “U.S. Needs Rules of Engagement for Secret Warfare.” *The Washington Post*, n.d. https://www.washingtonpost.com/opinions/us-needs-rules-of-engagement-for-secret-warfare/2013/02/05/449f786e-6a78-11e2-95b3-272d604a10a3_story.html?utm_term=.e1aabb9ab264.
Goldsmith, Jack, and Curtis A. Bradley. “Obama’s AUMF Legacy.” *American Journal of International Law* 110, no. 4 (March 29, 2017): 628–45.

Goldsmith, Jack L. *Power and Constraint: The Accountable Presidency after 9/11*. 1st ed. New York: W. W. Norton & Co, 2012.

———. *The Terror Presidency: Law and Judgment inside the Bush Administration*. New York: Norton, 2009.

Gonzales, Alberto. "Press Briefing by White House Counsel." June 22, 2004. https://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040622-14.html.

Gordon, Michael R. "Raid on Iraq; Bush Launches Missile Attack on a Baghdad Industrial Park as Washington Greets Clinton." *The New York Times*, January 18, 1993, sec. World. https://www.nytimes.com/1993/01/18/world/raid-iraq-bush-launches-missile-attack-baghdad-industrial-park-washington-greets.html.

Grant, Susan-Mary. *Oliver Wendell Holmes, Jr.: Civil War Soldier, Supreme Court Justice*. New York: Routledge, 2016.

Graveline, Christopher, and Michael Clemens. *The Secrets of Abu Ghraib Revealed: American Soldiers on Trial*. 1st ed. Washington, D.C: Potomac Books, 2010.

Green, Donald P., and Ian Shapiro. *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science*. New Haven, Conn.: Yale Univ. Press, 1994.

Greenberg, Karen J., and Joshua L. Dratel, eds. *The Torture Papers: The Road to Abu Ghraib*. New York: Cambridge University Press, 2005.

Habermas, Jürgen, and Thomas MacCarthy. *The Theory of Communicative Action: Reason and the Rationalization of Society*. Vol. 1. Boston: Beacon, 2007.

Habermas, Jürgen, and William Rehg. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. 1 MIT Press paperback ed., 4. printing. Studies in Contemporary German Social Thought. Cambridge, Mass.: MIT Press, 2001.

Halbert, Sherrill. "The Suspension of the Writ of Habeas Corpus by President Lincoln." *The American Journal of Legal History* 2, no. 2 (April 1958): 95–116.

Hall, Mark A, and Ronald F Wright. "Systematic Content Analysis of Judicial Opinions." *California Law Review* 96, no. 1 (2008): 63–122.

Hamilton, Alexander, James Madison, and John Jay. *Federalist Papers (Amazon Classics Edition)*. S.l.: Lake Union Publishing, 2017.

Hamilton, Alexander, James Madison, John Jay, and Lawrence Goldman, eds. *The Federalist Papers*. Oxford World's Classics. Oxford; New York: Oxford University Press, 2008.

Henkin, Louis. *Foreign Affairs and the United States Constitution*. 2nd ed. New York: Oxford University Press, 1996.

Hetherington, Marc J., and Michael Nelson. "Anatomy of a Rally Effect: George W. Bush and the War on Terrorism." *Political Science and Politics* 36, no. 01 (January 2003): 37–42.

Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. First Harvard University Press paperback edition. Cambridge London: Harvard University Press, 2007.

Holder, Eric. "Letter to Patrick J. Leahy," May 22, 2013.

———. "Remarks as Prepared for Delivery." presented at the West Point's Center for the Rule of Law Grand Opening Conference, West Point, NY, April 15, 2009. https://www.justice.gov/opa/speech/attorney-general-eric-holder-west-points-center-rule-law-grand-opening-conference.

Hollis-Brusky, Amanda. "Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000." *Denver University Law Review* 89, no. 1 (January 2011): 197–244.

———. *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*. Studies in Postwar American Political Development. Oxford : New York, NY: Oxford University Press, 2015.
———. "The Federalist Society and the 'Structural Constitution:' An Epistemic Community At Work." PhD Dissertation, University of California, 2010. http://digitalassets.lib.berkeley.edu/etd/ucb/text/HollisBrusky_berkeley_0028E_10385.pdf.
———. "Unpacking the 'Reagan Revolution': The Reagan Administration, the Fledgling Federalist Society, and the New Federalism," 2008.
Howell, William G. *Power without Persuasion: The Politics of Direct Presidential Action*. Princeton, N.J: Princeton University Press, 2003.
———. "Unilateral Powers: A Brief Overview." *Presidential Studies Quarterly* 35, no. 3 (September 2005): 417–39.
Hughes, Geraint. "The Military's Role in Counterterrorism: Examples and Implications for Liberal Democracies." *Strategic Studies Institute: U.S. Army War College, Carlisle, PA*, The Letort Papers, May 2011.
"Inherent Authority." In *Wex Legal Dictionary*. Legal Information Institute, n.d. https://www.law.cornell.edu/wex/inherent_authority.
Ives, Stephen B. "Vengeance Did Not Deliver Justice." *Washington Post*, December 30, 2001. https://www.washingtonpost.com/archive/opinions/2001/12/30/vengeance-did-not-deliver-justice/072daf87-0f0b-4026-ac40-b8bd4fc2c0b9/.
Jackson, Vicki C. "Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity." *Notre Dame Law Review* 75, no. 3 (2000): 953–1010.
Jaffer, Jameel, ed. *The Drone Memos: Targeted Killing, Secrecy, and the Law*. New York: The New Press, 2016.
Jinks, Derek, and David Sloss. "Is the President Bound by the Geneva Conventions?" *University of Chicago Public Law & Legal Theory Working Paper*, 2004, 107.
Johnsen, Dawn E. "A Study in Contrasting Views of Executive Authority." *Just Security*, November 25, 2015, sec. War Powers Symposium. https://www.justsecurity.org/27891/contrasting-views-executive-authority/.
———. "Faithfully Executing the Laws: Internal Legal Constraints on Executive Power." *UCLA Law Review* 54 (2007): 1559–1612.
———. "Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?" *Law and Contemporary Problems* 67 (n.d.): 105–47.
Johnston, Henry P., ed. *The Correspondence and Public Papers of John Jay*. Vol. 4. The Founders' Constitution. University of Chicago Press. Accessed August 25, 2018. http://press-pubs.uchicago.edu/founders/print_documents/a3_2_1s32.html.
Jr, R. W. Apple. "Raid on Iraq; U.S. and Allied Planes Hit Iraq, Bombing Missile Sites in South in Reply to Hussein's Defiance." *The New York Times*, January 14, 1993, sec. World. https://www.nytimes.com/1993/01/14/world/raid-iraq-us-allied-planes-hit-iraq-bombing-missile-sites-south-reply-hussein-s.html.
"Justice Department Oversight | Video | C-SPAN.Org." Accessed July 10, 2016. http://www.c-span.org/video/?302569-1/justice-department-oversight.
Kahn, Ronald, and Kenneth Ira Kersch, eds. *The Supreme Court and American Political Development*. Lawrence, Kan: University Press of Kansas, 2006.
Kantorowicz, Ernst, Conrad Leyser, and William C Jordan. *The King's Two Bodies: A Study in*

Mediaeval Political Theology, 2016.
Kassop, Nancy. "The War Power and Its Limits." *Presidential Studies Quarterly* 33, no. 3 (September 2003): 509–29.
Katyal, Neal K. "Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within." *The Yale Law Journal* 115, no. 9 (2006): 2314–49.
Katyal, Neal Kumar, and Thomas P Schmidt. "Active Avoidance: The Modern Supreme Court and Legal Change." *Harvard Law Review* 128, no. 8 (2015): 2109–65.
Keck, Thomas M. *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism*. The University of Chicago Press, 2010.
Kelley, Christopher S. "The Unitary Executive and the Presidential Signing Statement." PhD Dissertation, Miami University, 2003. http://rave.ohiolink.edu/etdc/view?acc_num=miami1057716977.
Kinkopf, Neil. "Inherent Presidential Power and Constitutional Structure." *Presidential Studies Quarterly* 37, no. 1 (March 2007): 37–48.
Klaidman, Daniel. "Palace Revolt." *Newsweek*, February 5, 2006. https://www.newsweek.com/palace-revolt-113407.
Kmiec, Keenan D. "The Origin and Current Meanings of 'Judicial Activism.'" *California Law Review* 92, no. 5 (October 2004): 1441–77.
Koh, Harold Hongju. *The National Security Constitution: Sharing Power after the Iran-Contra Affair*. New Haven: Yale University Press, 1990.
Koh, Harold Hongju, and John Choon Yoo. "Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law." *The International Lawyer* 26, no. 3 (1992): 715–62.
Kurland, Philip B., and Ralph Lerner, eds. *The Founders' Constitution*. Online Edition. Vol. 3. University of Chicago Press, 1987. http://press-pubs.uchicago.edu/founders/print_documents/a1_8_11s18.html.
Lacey, Mike O., and Brian J. Bill, eds. *Operational Law Handbook*. Charlottesville, VA: The Judge Advocate General's School, Int'l and Operational Law Dept., 2001.
LaCroix, Alison L. "Historical Gloss: A Primer." *Harvard Law Review* 126 (2013): 75–85.
LaFave, Wayne R., and Austin W. Scott. *Substantive Criminal Law*. Vol. 1. Criminal Practice Series. St. Paul, Minn: West Pub. Co, 1986.
Lazarus, Richard J. "The (Non)Finality of Supreme Court Opinions." *Harvard Law Review* 128 (2014): 540–625.
Lederman, Marty. "Balkinization: Chalk on the Spikes: What Is the Proper Role of Executive Branch Lawyers, Anyway?" Balkinization. Accessed November 25, 2018. https://balkin.blogspot.com/2006/07/chalk-on-spikes-what-is-proper-role-of.html.
"Letter on Advisory Opinions." Documents in Early American History, 1793. http://courses.missouristate.edu/ftmiller/letteradvisoryopin.htm.
Levy, Jack S. "Case Studies: Types, Designs, and Logics of Inference." *Conflict Management and Peace Science* 25, no. 1 (February 2008): 1–18.
Libby, Lewis. "Legal Authority for a Domestic Military Role in Homeland Defense." In *The New Terror: Facing the Threat of Biological and Chemical Weapons*. Hoover Institution Press, 1999.
Lincoln, Abraham, and Don Edward Fehrenbacher. *Speeches and Writings, 1859-1865: Speeches, Letters, and Miscellaneous Writings, Presidential Messages and Proclamations*. New York, N.Y: Literary Classics of the United States, Inc., 1989.
Lithwick, Dahlia. "A Supreme Court of One," July 2, 2006.

http://www.washingtonpost.com/wp-dyn/content/article/2006/06/30/AR2006063001339.html.
Locke, John. *Two Treatises of Government*. New York: Cambridge Univ. Press, 1988.
Locke, John, and Peter Laslett. *Two Treatises of Government*. Student ed. Cambridge Texts in the History of Political Thought. Cambridge [England] ; New York: Cambridge University Press, 1988.
Lofgren, Charles A. "United States v. Curtiss-Wright Export Corporation: An Historical Reassessment." *The Yale Law Journal* 83, no. 1 (November 1973): 1–32.
Lund, Nelson. "Lawyers and the Defense of the Presidency." *BYU Law Review*, no. 1 (1995): 17–98.
———. "Rational Choice at the Office of Legal Counsel." *Cardozo Law Review* 15 (n.d.): 437–505.
Macey, Jonathan R., and Geoffrey P. Miller. "Canons of Statutory Construction and Judicial Preferences, The." *Vand. L. Rev.* 45 (1992): 647.
Madison, James. *Debates in the Federal Convention of 1787*. Edited by Gaillard Hund and James B. Scott. The Avalon Project. Oxford University Press, 1920. http://avalon.law.yale.edu/subject_menus/debcont.asp.
Magnussen, Anne-Mette, and Anna Banasiak. "Juridification: Disrupting the Relationship between Law and Politics?" *European Law Journal* 19, no. 3 (2013): 325–339.
Magnussen, Anne-Mette, and Even Nilssen. "Juridification and the Construction of Social Citizenship." *Journal of Law and Society* 40, no. 2 (June 2013): 228–48. https://doi.org/10.1111/j.1467-6478.2013.00621.x.
Mann, Thomas E, and Norman J Ornstein. *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track*. Oxford; New York: Oxford University Press, 2008.
Margulies, Peter. *Law's Detour: Justice Displaced in the Bush Administration*. Critical America. New York: New York University Press, 2010.
Marshall, John. *The Political and Economic Doctrines of John Marshall: Who for Thirty-Four Years Was Chief Justice of the United States. And Also His Letters, Speeches, and Hitherto Unpublished and Uncollected Writings*. Edited by John E. Oster. Neale Publishing Company, 1914.
Marshall, William P. "ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS." *Boston University Law Review* 88 (2008): 505–22.
Mason, Alpheus Thomas. "Inter Arma Silent Leges: Chief Justice Stone's Views." *Harvard Law Review* 69, no. 5 (March 1956): 806–38. https://doi.org/10.2307/1337581.
Matthew, Franck. "Judicial Supremacy vs. Departmentalism | National Review." Accessed December 2, 2018. https://www.nationalreview.com/bench-memos/judicial-supremacy-vs-departmentalism-matthew-j-franck/.
Maturana, Humberto R., and Francisco J. Varela. *The Tree of Knowledge: The Biological Roots of Human Understanding*. 1st ed. Boston: New Science Library, 1987.
Mayer, Kenneth R. *With the Stroke of a Pen: Executive Orders and Presidential Power*. Princeton, N.J.: Recording for the Blind & Dyslexic, 2003.
McGinnis, John O. "Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon Executive Branch Interpretation of the Law." *Cardozo Law Review* 15, no. 1–2 (n.d.): 375–436.
McMahon, Kevin J. *Reconsidering Roosevelt on Race How the Presidency Paved the Road to Brown*. Chicago: University of Chicago Press, 2010.
Mingers, John. "The Cognitive Theories of Maturana and Varela." *Systems Practice* 4, no. 4

(August 1991): 319–38.
Mitchell, Alison. "U.S. Launches Further Strike Against Iraq After Clinton Vows He Will Extract 'Price.'" *The New York Times*, September 4, 1996, sec. World. https://www.nytimes.com/1996/09/04/world/us-launches-further-strike-against-iraq-after-clinton-vows-he-will-extract-price.html.
"'Mob Rule Cannot Be Allowed to Override the Decisions of Our Courts:' President Dwight D. Eisenhower's 1957 Address on Little Rock, Arkansas," September 24, 1957. http://historymatters.gmu.edu/d/6335/.
Moe, Terry M., and William G. Howell. "Unilateral Action and Presidential Power: A Theory: Unilateral Action and Presidential Power." *Presidential Studies Quarterly* 29, no. 4 (December 1999): 850–73.
Moore, Michael. "Do We Have an Unwritten Constitution?" *Southern California Law Review* 63 (1989): 107–39.
Moore, Michael S. "Torture and the Balance of Evils." *Israel Law Review* 23, no. 2&3 (1989): 280–344.
Moss, Randolph D. "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel." *Administrative Law Review* 52, no. 4 (2000): 1303–30.
Mueller, John E. *War, Presidents, and Public Opinion*. Lanham, MD: University Press of America, 1985.
Mugerauer, Bob. "Maturana and Varela: From Autopoiesis to Systems Applications." In *Traditions of Systems Theory: Major Figures and Contemporary Developments*. New York: Routledge, 2014.
Mulhollan, Daniel. "Treaties and Other International Agreements: The Role of the United States Senate." Congressional Research Service, January 2001. https://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf.
Mustafa, Tamir. "Law versus the State: The Judicialization of Politics in Egypt." *Law & Society Inquiry* 28, no. 4 (Autumn 2003): 883–930.
Neilan, Terence. "Bush Pulls Out of ABM Treaty; Putin Calls Move a Mistake." *The New York Times*, December 13, 2001. https://www.nytimes.com/2001/12/13/international/bush-pulls-out-of-abm-treaty-putin-calls-move-a-mistake.html.
Neustadt, Richard E. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. 1. paperback ed. New York, NY: Free Press, 1991.
Oversight of the U.S. Department of Justice, Pub. L. No. S. Hrg. 112-436, § Committee on the Judiciary (2011). https://www.govinfo.gov/content/pkg/CHRG-112shrg74542/pdf/CHRG-112shrg74542.pdf.
Parry, John T. *Understanding Torture*. Ann Arbor: University of Michigan Press, 2010.
Paulsen, Michael Stokes. "Youngstown Goes to War." *Constitutional Commentary* 19 (2002): 215–59.
Peretti, Terri Jennings. *In Defense of a Political Court*. Princeton, N.J.: Princeton University Press, 2001.
Persaud, R. *The Role of Judicial Advisory Opinions in Canadian Constitutionalism and Federalism: The Senate, Patriation and Québec Veto Reference Cases Considered*. Queen's University, 1998. http://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/tape15/PQDD_0012/NQ31948.pdf.
Peruzzotti, Enrique. "Modernization and Juridification in Latin America: A Reassessment of the

Latin American Developmental Path." *Thesis Eleven* 58, no. 1 (August 1, 1999): 59–82.
Peterson, Ted, and Jay W. Jensen. "The Case of General Yamashita: A Study of Suppression." *Journalism Bulletin* 28, no. 2 (March 1951): 196–204.
Pfiffner, James P. *Power Play: The Bush Presidency and the Constitution*. Washington, D.C: Brookings Institution Press, 2008.
———. *Torture as Public Policy: Restoring U.S. Credibility on the World Stage*. Boulder: Paradigm Publishers, 2010.
Pierson, Paul, and Theda Skocpol, eds. *The Transformation of American Politics: Activist Government and the Rise of Conservatism*. Princeton Studies in American Politics. Princeton: Princeton Uni. Press, 2007.
Pildes, Richard. "The Supreme Court's Contribution to the Confrontation Over Emergency Powers." Lawfare, February 19, 2019. https://www.lawfareblog.com/supreme-courts-contribution-confrontation-over-emergency-powers.
———. "What Role Should Law Play in Areas of Vital National and International Affairs?" *Just Security*, November 13, 2015, sec. Power Wars Symposium. https://www.justsecurity.org/27583/role-should-law-play-areas-vital-national-international-affairs/.
Pillard, Cornelia. "The Unfulfilled Promise of the Constitution in Executive Hands." *Michigan Law Review* 103, no. 4 (2005): 676–758.
Pious, Richard M. "Inherent War and Executive Powers and Prerogative Politics." *Presidential Studies Quarterly* 37, no. 1 (March 2007): 66–84.
———. *The American Presidency*. New York: Basic Books, 1979.
"Plenary Power." In *Wex Legal Dictionary*. Legal Information Institute, n.d. https://www.law.cornell.edu/wex/plenary_power.
"Plenary Power." In *TransLegal*, n.d. https://www.translegal.com/legal-english-dictionary/plenary-power.
Posner, Eric. "Obama's Lawyers Have Been Nothing More Than a Rubber Stamp." Slate Magazine, November 9, 2015. https://slate.com/news-and-politics/2015/11/power-wars-book-review-of-obamas-post-9-11-presidency.html.
Posner, Eric A., and Adrian Vermeule. "Constitutional Showdowns." *University of Pennsylvania Law Review* 156, no. 991–1048 (2007). http://www.ssrn.com/abstract=1002996.
———. *The Executive Unbound: After the Madisonian Republic*. New York: Oxford University Press, 2010.
Posner, Eric, and Adrian Vermeule. "A 'Torture' Memo and Its Tortuous Critics." *Wall Street Journal*, July 6, 2004. https://search.proquest.com/docview/398892081?accountid=14541.
Posner, Richard A. *Not a Suicide Pact: The Constitution in a Time of National Emergency*. Inalienable Rights Series. New York: Oxford University Press, 2006.
Pyle, Christopher H., and Richard M. Pious. *The President, Congress, and the Constitution: Power and Legitimacy in American Politics*. New York : London: Free Press ; Collier Macmillan, 1984.
Raymond, John M. "Madsen v. Kinsella--Landmark and Guidepost in Law of Military Occupation." *The American Journal of International Law* 47, no. 2 (April 1953): 300–308.
Reel, A. Frank. *The Case of General Yamashita*. New York: Octagon Books, 1971.
Removing Politics from the Administration of Justice, § Subcommittee on Separation of Powers of the Senate Judiciary Committee (1974).

https://archive.org/details/removingpolitics00unit/page/n3.
"Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," December 2016. https://assets.documentcloud.org/documents/3232594/Read-the-Obama-administration-s-memo-outlining.pdf.
Roosevelt, Theodore. "Corollary to the Monroe Doctrine," 1905. https://www.ourdocuments.gov/doc.php?flash=false&doc=56&page=transcript.
Rudalevige, Andrew. "The Contemporary Presidency: The Decline and Resurgence and Decline (and Resurgence?) Of Congress: Charting a New Imperial Presidency." *Presidential Studies Quarterly* 36, no. 3 (September 2006): 506–24.
———. *The New Imperial Presidency: Renewing Presidential Power after Watergate*. Ann Arbor: Univ. of Michigan Press, 2006.
Saltzman, Rachel Ward. "Executive Power and the Office of Legal Counsel." *Yale Law and Policy Review* 28, no. 2 (2010): 439–80.
Sartori, Giovanni. "Concept Misformation in Comparative Politics." *American Political Science Review* 64, no. 04 (December 1970): 1033–53.
Savage, Charlie. "Bush Challenges Hundreds of Laws." *The New York Times*, April 30, 2006, sec. Americas. https://www.nytimes.com/2006/04/30/world/americas/bush-challenges-hundreds-of-laws.html.
———. *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. Little, Brown, 2007.
Schlesinger, Arthur M. *The Imperial Presidency*. Boston: Houghton Mifflin, 2004.
Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press ed. Chicago: University of Chicago Press, 2005.
Schoenwald, Jeffrey, and Henry Miller. "Terrorist Organizations Are Not Entitled To The Protection Of The Geneva Conventions." Forbes. Accessed December 6, 2018. https://www.forbes.com/sites/realspin/2015/03/26/terrorist-organizations-are-not-entitled-to-the-protection-of-the-geneva-conventions/.
Security Council Resolution 678 (1990). http://unscr.com/en/resolutions/678.
Security Council Resolution 687 (1991). http://unscr.com/en/resolutions/687.
Security Council Resolution 688 (1991). http://unscr.com/en/resolutions/688.
Segal, Jeffrey Allan, and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK ; New York: Cambridge University Press, 2002.
Seidl, David. "Luhmann's Theory of Autopoietic Social Systems." *Munich Business Research* 2 (2004): 28.
Shapiro, Martin M., and Alec Stone Sweet. *On Law, Politics, and Judicialization*. Oxford ; New York: Oxford University Press, 2002.
Sheehan, Reginald S., Rebecca D. Gill, and Kirk A. Randazzo. *Judicialization of Politics: The Interplay of Institutional Structure, Legal Doctrine, and Politics on the High Court of Australia*. Durham, N.C: Carolina Academic Press, 2012.
Shigong, Jiang. "Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China." *Modern China* 36, no. 1 (January 2010): 12–46.
Sieder, Rachel, L Schjolden, and A Angell. *The Judicialization of Politics in Latin America.* New York: Palgrave Macmillan US, 2016. http://public.eblib.com/choice/publicfullrecord.aspx?p=4716445.
Silverstein, Gordon. *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*. Cambridge [UK] ; New York: Cambridge University Press, 2009.

Speed, James. “Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President.” Attorney General Opinion, July 1865. http://famous-trials.com/lincoln/2157-commissionorder.

Statutory Construction and Interpretation. Government Series. The Capitol Net Inc, 2010.

Stewart, Potter. “Or of the Press.” *Hastings Law Journal* 26, no. 3 (1975): 631–37.

Stewart, Richard. *American Military History: The United States in a Global Era, 1917-2008*. Washington, D.C.: Center of Military History, US Army, 2010. https://history.army.mil/html/books/030/30-22/CMH_Pub_30-22.pdf.

Steyn, Johan. “Guantanamo Bay: The Legal Black Hole.” Twenty-Seventh F. A. Mann Lecture, November 25, 2003. http://www.statewatch.org/news/2003/nov/guantanamo.pdf.

Stinson, Judith M. “Why Dicta Becomes Holding and Why It Matters.” *Brooklyn Law Review* 76, no. 1 (2010): 219–64.

Stuessy, Meghan M. “Regular Vetoes and Pocket Vetoes: In Brief.” Congressional Research Service, August 2, 2016. https://www.senate.gov/CRSpubs/090a8d2a-c3f8-4c8a-9e48-e47dc35a11d9.pdf.

Symes, Gavin A. “Force Without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq.” *Michigan Journal of International Law* 19, no. 2 (1998): 581–622.

Teubner, Gunther, ed. *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*. European University Institute Ser. A 6. Berlin: de Gruyter, 1987.

The Articles of War. Accessed November 28, 2018. https://www.ibiblio.org/hyperwar/USA/ref/AW/index.html.

Tobias, Carl. “Questioning Quirin.” *The Journal of Criminal Law and Criminology* 97, no. 1 (2006): 365–75.

Tocqueville, Alexis de. *Democracy in America*. Edited by Phillips Bradley. Translated by Henry Reeve and Francis Bowen. Vintage Classics. New York: Vintage Books, 1990.

Tragardh, Lars, and Michael X. Delli Carpini, eds. “The Juridification of Politics in the United States and Europe: Historical Roots, Contemporary Debates and Future Prospects.” In *After National Democracy: Rights, Law and Power in America and the New Europe*. Portland: Hart Publishing, 2004.

Travalio, Greg, and John Altenburg. “Terrorism, State Responsibility, and the Use of Military Force.” *Chicago Journal of International Law* 4, no. Spring 2003 (n.d.): 25.

Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems. Accessed December 5, 2018. https://www.nti.org/media/documents/abm_treaty.pdf.

Tresolini, Rocco J. “Justice Rutledge and the Yamashita Case.” *Social Science* 37, no. 3 (June 1962): 150–61.

“Trial of General Tomoyuki Yamashita.” Law Reports of Trials of War Criminals. The United Nations War Crimes Commission, 1948. https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf.

Tribe, Laurence H. *The Invisible Constitution*. Inalienable Rights Series, v. 6. New York: Oxford University Press, 2008.

Tushnet, Mark. “Popular Constitutionalism as Political Law.” *Chi.-Kent L. Rev.* 81 (2006): 991–1006.

Tushnet, Mark V. “Controlling Executive Power in the War on Terrorism.” *Harvard Law Review* 118 (2005): 2673–82.

Tushnet, Mark V. *Taking the Constitution Away from the Courts*. Princeton Paperbacks. Princeton, NJ: Princeton Univ. Press, 2000.

———, ed. *The Constitution in Wartime: Beyond Alarmism and Complacency*. Constitutional Conflicts. Durham [N.C.]: Duke University Press, 2005.

Vallinder, Torbjörn. "The Judicialization of Politics—A World-Wide Phenomenon: Introduction." *International Political Science Review* 15, no. 2 (April 1994): 91–99. https://doi.org/10.1177/019251219401500201.

Van Evera, Stephen. *Guide to Methods for Students of Political Science*. Ithaca: Cornell University Press, 1997.

Varela, Francisco J. *Principles of Biological Autonomy*. The North Holland Series in General Systems Research ; 2. New York: North Holland, 1979.

Vermeule, Adrian. "Our Schmittian Administrative Law." *Harvard Law Review* 122 (n.d.): 1095–1149.

Vermeule, Adrian, and Eric A. Posner. "The Credible Executive." *Harvard Law School Faculty Scholarship Series*, 2006, 4.

Vinx, Lars. "Carl Schmitt." edited by Edward N. Zalta, Spring 2016. https://plato.stanford.edu/archives/spr2016/entries/schmitt/.

Vladeck, Steve. "President Obama's Military Commissions." *Just Security*, August 3, 2015. https://www.justsecurity.org/25188/president-obamas-military-commissions/.

Volokh, Eugene. "Foreign Law in American Courts." *OKLAHOMA LAW REVIEW* 66 (2017): 26.

Von Drehle, David, and Jeffrey Smith. "U.S. Strikes Iraq for Plot to Kill Bush." *Washington Post*, June 27, 1993. https://www.washingtonpost.com/wp-srv/inatl/longterm/iraq/timeline/062793.htm.

Walsh, Edward. "U.S. to Normalize Ties With Peking, End Its Defense Treaty With Taiwan." *Washington Post*, December 16, 1978. https://www.washingtonpost.com/archive/politics/1978/12/16/us-to-normalize-ties-with-peking-end-its-defense-treaty-with-taiwan/7d53f81a-865d-4a87-8c32-a0f6f343502c/.

Waterman, Richard W. "The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory." *Presidential Studies Quarterly* 39, no. 1 (March 2009): 5–9.

Weinraub, Bernard. "U.S. Jets Hit 'Terrorist Centers' in Libya; Reagan Warns of New Attacks If Needed." *The New York Times*, April 15, 1986, sec. Politics. https://www.nytimes.com/1986/04/15/politics/us-jets-hit-terrorist-centers-in-libya-reagan-warns-of-new-attacks.html.

White, Adam J. "Justice Jackson's Draft Opinions in the Steel Seizure Cases." *Albany Law Review* 69 (2006): 1107–33.

Whittington, Keith. *Constitutional Construction: Divided Powers and Constitutional Meaning*. Cambridge, Mass.: Harvard University Press, 2001.

———. "Departmentalism, Judicial Supremacy and DACA." Lawfare, February 26, 2018. https://www.lawfareblog.com/departmentalism-judicial-supremacy-and-daca.

———. "Extrajudicial Constitutional Interpretation: Three Objections and Responses." *N.C. L. Rev.* 80 (2002 2001): 773–852.

———. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton Studies in American Politics. Princeton, N.J: Princeton University Press, 2007.

Wilson, Woodrow. *Constitutional Government in the United States*. Kindle Edition. Wilson Press, 2013.

Winkler, Gary S. *Tortured: Lynndie England, Abu Ghraib, and the Photographs That Shocked the World*. Keyser, W. Va.: Bad Apple Books, 2009.

Winthrop, William. *Military Law and Precedents*. 2nd ed. Washington: Government Printing Office, 1920. https://www.loc.gov/rr/frd/Military_Law/pdf/ML_precedents.pdf.

Wittes, Benjamin. "The Al-Aulaqi OLC Memo: A Quick and Dirty Summary." *Lawfare*, June 23, 2014. https://www.lawfareblog.com/al-aulaqi-olc-memo-quick-and-dirty-summary.

Wong, Kenneth K., and Anna C. Nicotera. "Brown v. Board of Education and the Coleman Report: Social Science Research and the Debate on Educational Equality." *Peabody Journal of Education* 79, no. 2 (March 2004): 122–35.

Wuerth, Ingrid. "Detainee Transfer Restrictions and the Captures Clause of the U.S. Constitution." Lawfare, October 28, 2015. https://www.lawfareblog.com/detainee-transfer-restrictions-and-captures-clause-us-constitution.

———. "The Captures Clause." *The University of Chicago Law Review* 76 (2009): 1683–1745.

Wyden, Ron. "Senator Ron Wyden to Eric Holder," February 8, 2012.

Yoo, John C. "The Continuation of Politics by Other Means: The Original Understanding of War Powers." *California Law Review* 84, no. 2 (March 1996): 167–305.

Zeidenstein, Harvey G. "The Reassertion of Congressional Power: New Curbs on the President." *Political Science Quarterly* 93, no. 3 (1978): 393–409.