

# OLC's Day in Court: Judicial Deference to the Office of Legal Counsel

Sonia Mittal\*

The Department of Justice Office of Legal Counsel's (OLC)<sup>1</sup> recent opinions on questions of national security and presidential power during the "war on terror"<sup>2</sup> have generated a vibrant debate concerning the office's legitimacy and the binding force of its opinions within the executive branch.<sup>3</sup> For some, the leak and subsequent withdrawal of OLC opinions concerning the use of enhanced interrogation methods—the so-called "torture memos"<sup>4</sup>—raised questions about the office's ability to withstand political

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\* Trial Attorney, United States Department of Justice; J.D., Yale Law School; Ph.D., Stanford University Department of Political Science. The views expressed herein are those of the author and are not purported to reflect those of the United States Department of Justice. The author would like to thank Bruce Ackerman, William Eskridge, Brianne Gorod, Judge Brett Kavanaugh, Trevor Morrison, Connor Raso, Jed Stiglitz, and the editors of the Harvard Law & Policy Review for their comments on this article.

<sup>1</sup> OLC provides authoritative legal advice to the President and executive branch agencies. It drafts opinions of the Attorney General, and also provides its own written opinions (published and unpublished), as well as oral advice—often in cases when two or more agencies disagree on the meaning of a statute or regulation. It also reviews all executive orders and pending legislation for constitutionality. *Office of Legal Counsel*, U.S. DEP'T OF JUSTICE, <http://perma.cc/DSE7-F92Z>. The office is staffed primarily by "generalist," non-career lawyers. Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1710 (2011) [hereinafter Morrison, *Alarmism*] (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)); see also BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 97 (2010) [hereinafter ACKERMAN, *DECLINE*]. For further background on OLC, see *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2092–93 (2012) [hereinafter *Developments*]; Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 711 (2005) [hereinafter Pillard, *Unfulfilled*].

<sup>2</sup> See, e.g., President George W. Bush, Address to the Joint Session of the 107th Congress at 65 (Sept. 20, 2001), <http://perma.cc/5ZXE-T7PX>.

<sup>3</sup> See ACKERMAN, *DECLINE*, *supra* note 1; JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990) [hereinafter KOH, *CONSTITUTION*]; Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13 (2011) [hereinafter Ackerman, *Lost*]; Daniel Cluchey, *Transparency in OLC Statutory Interpretation: Finding a Middle Ground*, 1 CORNELL POL. REV. 57 (2011); Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993); Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513 (1993) [hereinafter Koh, *Protecting*]; John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993); Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 42 (2011) [hereinafter Morrison, *Libya*]; Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) [hereinafter Morrison, *Stare*]; *Developments*, *supra* note 2; Morrison, *Alarmism*, *supra* note 2; Randolph D. Moss, *Executive Legal Branch Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Pillard, *Unfulfilled*, *supra* note 2; Note, *The Immunity-Confering Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086 (2008).

<sup>4</sup> ACKERMAN, *DECLINE*, *supra* note 1, at 107.

pressure to deliver opinions that “rubber-stamp” presidential actions,<sup>5</sup> as have later opinions concerning targeted killings and the use of military force in Libya.<sup>6</sup>

OLC alumni including Trevor Morrison and Jack Goldsmith have come to the office’s defense, arguing that it can and does constrain presidential power in meaningful ways.<sup>7</sup> But others, such as Bruce Ackerman, strongly disagree and have advocated transforming the office into a “courtlike” institution that, in his view, would be more capable of interpreting the law impartially.<sup>8</sup>

This recent back-and-forth has been principally concerned with the legitimacy of OLC and the binding force of its opinions *within the executive branch*. But it also has important implications for how OLC opinions are treated by courts. How do judges use OLC opinions? Are OLC’s pronouncements entitled to judicial deference, and, if so, what kind of deference?

Such questions are not easily answered. OLC is not a run-of-the-mill expert agency: its mission is to resolve legal disputes *between* expert agencies. This article provides the first comprehensive study of the Supreme Court’s treatment of published OLC opinions. Its goals are both descriptive and prescriptive. The article first demonstrates that the Court rarely cites to OLC opinions, and that it has resisted explicitly according them deference under *Chevron* and *Skidmore*. It then suggests that substantial deference to OLC opinions is often unwarranted under the Court’s stated rationales for deference to agency interpretation.

The article proceeds as follows: Part I surveys the current debate concerning OLC and argues that it fails to consider the ways in which courts can and do consider OLC opinions. Part II undertakes a comprehensive analysis of the Supreme Court’s treatment of OLC opinions. It suggests that the Court has consistently resisted according OLC opinions deference under established deference regimes. At most, Supreme Court opinions accord OLC opinions what William Eskridge and Lauren Baer have called “consultative deference” by citing to them as evidence of historical practice.<sup>9</sup> At times, the justices have argued that “anti-deference,” or a presumption *against* agency interpretation, is appropriate for OLC guidance.<sup>10</sup> Part III suggests that the Court’s practice of citing to OLC opinions primarily as evidence of historical

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<sup>5</sup> *Id.* at 104.

<sup>6</sup> See, e.g., Scott Shane & Charlie Savage, *Report on Targeted Killing Whets Appetite for Less Secrecy*, N.Y. TIMES, Feb. 5, 2013, <http://perma.cc/MZ86-YWK4>; Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES, June 17, 2011, <http://perma.cc/WV6N-BDBJ>.

<sup>7</sup> See generally GOLDSMITH, *supra* note 3; Morrison, *Alarmism*, *supra* note 1.

<sup>8</sup> Bruce Ackerman, *Abolish the White House Counsel: And the Office of Legal Counsel, Too, While We’re at It*, SLATE (Apr. 22, 2009), <http://perma.cc/4TZ-XZ3L>.

<sup>9</sup> William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1111 (2008).

<sup>10</sup> See, e.g., *Crandon v. United States*, 494 U.S. 152 (1990).

practice may serve to inoculate its decisions from debate concerning the office.

Part IV outlines a doctrinal framework for deference to OLC opinions. It argues that OLC opinions and memoranda are likely not entitled to *Chevron* deference, and raises the possibility of a “coercion” problem for courts reviewing agency interpretations shaped by OLC. It also suggests that OLC opinions engaging in constitutional interpretation are not entitled to deference under the Court’s announced deference regimes. Part V argues that substantial deference to OLC opinions under *Skidmore* or unannounced deference regimes is often not warranted under the Court’s stated rationales for deference to agency interpretation.

Building on this descriptive and doctrinal foundation, Part VI identifies a dilemma facing agency general counsel charged with deciding whether and when to solicit OLC advice. Agency general counsel regularly seek OLC’s advice in order to enhance the legitimacy of their legal positions within the executive branch. But relying on OLC advice may—explicitly or implicitly—weaken the agency’s position in court since traditional expert agencies often enjoy stronger claims to judicial deference than OLC. As a result, agency counsel would be wise to consider how seeking OLC guidance may affect the agency’s position in court before soliciting the office’s advice.

The Conclusion considers the previous Parts within the broader context of judicial-executive relations. Should OLC seek greater judicial deference to its opinions? If so, how should it do so? It suggests that greater judicial deference may hinge on reforms designed to improve OLC’s conformity with the policies underlying the Supreme Court’s deference decisions—particularly transparency and consistency of interpretation.

## I. JUDICIAL DEFERENCE TO EXECUTIVE BRANCH LEGAL INTERPRETATION: A MISSING LINK IN EXECUTIVE CONSTITUTIONALISM

While the so-called “torture memos”<sup>11</sup> were widely debated, executive branch scholars disagree about their broader implications. OLC alumni including Trevor Morrison and Jack Goldsmith have come to the office’s defense—characterizing the opinions as regrettable “anomalies” and emphasizing powerful norms and constraints that enable the office to provide meaningful checks on the presidency.<sup>12</sup> According to Morrison, “OLC has long espoused a commitment to acting on its best understanding of the law, and the institutional culture of the office reflects that deeply rooted commitment . . . .”<sup>13</sup> “The torture memos notwithstanding, OLC faces sig-

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<sup>11</sup> ACKERMAN, *DECLINE*, *supra* note 1, at 107.

<sup>12</sup> *See* GOLDSMITH, *supra* note 3, at 37; Morrison, *Alarmism*, *supra* note 2, at 1708, 1749; Morrison, *Libya*, *supra* note 1, at 64.

<sup>13</sup> Morrison, *Alarmism*, *supra* note 1, at 1708.

nificant incentives cutting in favor of independence, credibility, and principle.”<sup>14</sup>

Others have taken a dimmer view, arguing that such opinions can hardly be expected to be one-off occurrences. Bruce Ackerman argues that the interrogation opinions are not a “momentary aberration.”<sup>15</sup> Rather, they are “a symptom of deep structural pathologies that portend worse abuses in the future.”<sup>16</sup> For such scholars, modest reforms to strengthen the internal norms and constraints of the office aren’t enough to keep the office from signing off on the president’s positions.<sup>17</sup>

But this debate largely fails to consider how OLC opinions are treated once they find their way into court. Have OLC opinions been entitled to judicial deference, and if so, what kind of deference? Executive branch scholars have largely passed on the question of judicial deference to OLC opinions.<sup>18</sup> Leading scholarly accounts of the office are geared towards its legitimacy within the executive branch, not how much deference courts give under *Chevron* and *Skidmore*.<sup>19</sup>

Why has the growing literature on executive branch legal interpretation failed to explore judicial deference to OLC opinions? The primary answer seems to be that most executive branch scholars believe that OLC opinions are unlikely to be the immediate subjects of judicial review. The office seeks to avoid possible conflicts with the judicial branch by declining to issue opinions on “matters in litigation.”<sup>20</sup> Moreover, scholars argue that direct judicial review of OLC opinions—particularly opinions involving questions

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<sup>14</sup> *Id.* at 1722.

<sup>15</sup> ACKERMAN, *DECLINE*, *supra* note 1, at 95.

<sup>16</sup> *Id.*

<sup>17</sup> Ackerman, *Lost*, *supra* note 3, at 35.

<sup>18</sup> *See, e.g., Developments*, *supra* note 1, at 2101.

<sup>19</sup> Under *Chevron*’s more deferential regime, “courts defer to reasonable, formalized agency interpretations of ambiguous statutory provisions that the agency administers.” Kent Barnett, *Codifying Chevron*, 89 N.Y.U. L. REV. (forthcoming 2014) (on file with author). *See also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”). By contrast, under *Skidmore*, courts provide deference to agency interpretation in proportion to its persuasiveness. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

<sup>20</sup> Koh, *Protecting*, *supra* note 3, at 514.

of presidential power—is often precluded by various rules of non-justiciability including standing and political question doctrine.<sup>21</sup>

But that explanation is incomplete and fails to explain the Court's reluctance to engage OLC opinions in other ways. This article argues that the literature's failure to consider the problem of judicial deference to OLC opinions leaves important questions of executive branch constitutionalism unexplored. The non-justiciability hypothesis has not been tested, and the extent to which OLC opinions are actually precluded from direct judicial review is unclear. Moreover, future changes in non-justiciability doctrines themselves may open the door to greater judicial scrutiny of OLC opinions. For instance, the Supreme Court's recent ruling in *Zivotofsky*, cautioning against the use of the political question doctrine in cases involving the constitutionality of statutes, may gradually open the door to greater judicial scrutiny of OLC opinions as courts engage new questions of foreign relations and presidential power.<sup>22</sup>

More importantly, by focusing on the likelihood that OLC opinions appear as the immediate subjects of judicial review, executive branch scholars fail to consider the many other ways in which courts could conceivably interact with OLC. This paper will consider judicial engagement with OLC opinions more broadly—as the subjects of direct judicial review, as inputs into agency interpretations, as potential sources of persuasive reasoning, and as evidence of “historical practice.”<sup>23</sup>

The literature's reluctance to consider the question of judicial deference to OLC is particularly peculiar in light of the fact that the Supreme Court may be relying on OLC somewhat more heavily in recent decades.<sup>24</sup> Justices

<sup>21</sup> GOLDSMITH, *supra* note 3, at 32; Moss, *supra* note 4, at 1304.

<sup>22</sup> *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427–28 (2012) (emphasizing that the political question doctrine is “a narrow exception” to the judiciary's obligation to decide cases). On the Court's choice to leave certain questions to be resolved by the political branches, see *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>23</sup> Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) [hereinafter Bradley, *Gloss*]; Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013) [hereinafter Bradley, *Constraint*].

<sup>24</sup> At the time of publication, Supreme Court opinions (majority and minority) referred to OLC opinions, memoranda, or testimony zero times before 1980; three times in the 1980s, *Sec'y of the Interior v. California*, 464 U.S. 312, 320 n.6 (1984), *U.S. v. Sells Eng'g*, 463 U.S. 418, 459–60 (1983) (Burger, C.J., dissenting), *I.N.S. v. Chadha*, 462 U.S. 919, 969 n.5 (1983) (Rehnquist, C.J., dissenting); five times in the 1990s, *Bragdon v. Abbott*, 524 U.S. 624, 642–43 (1998), *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 161 n.9 (1993), *id.* at 190 n.3 (Blackmun, J., dissenting), *United States v. Alvarez-Machain*, 504 U.S. 655, 686 n.34 (1992) (Stevens, J., dissenting), *Crandon v. United States*, 494 U.S. 152, 174 (Scalia, J., concurring); five times in the 2000s, *Boumediene v. Bush*, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting), *BP Am. Prod. v. Burton*, 549 U.S. 84, 97–98 (2006), *Gonzales v. Oregon*, 546 U.S. 243, 253–54, 267, 272 (2006), *id.* at 276, 286, 296 (Scalia, J., dissenting), *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 360 (2005) (Souter, J., dissenting); and seven times since 2010, *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2562–63, 2566–67, 2569, 2571 (2014), *id.* at 2604, 2610, 2615–16 (Scalia, J., concurring), *Arizona v. United States*, 132 S. Ct. 2492, 2528 (2012) (Alito, J., concurring in part and dissenting in part), *Golan v. Holder*, 132 S. Ct. 873, 879 n.3 (2012), *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477,

have cited to OLC opinions in key national security and foreign relations cases, including *United States v. Alvarez-Machain* and *Boumediene v. Bush*. Although it is dangerous to read into these trends, they may serve as modest indicators of OLC's influence at the Supreme Court—an issue that this article will consider at length.

The literature's reluctance to consider OLC opinions as serious candidates for judicial review directs attention away from thorny doctrinal questions and strong patterns of judicial behavior, once the opinions find their way to court. The following provides the first comprehensive study of the Supreme Court's treatment of published OLC opinions. Its goals are both descriptive and prescriptive—to provide a comprehensive account of Supreme Court deference to published OLC opinions and to consider what shape deference should take moving forward. It then argues that substantial deference is not warranted under the Supreme Court's stated rationales for agency deference, including: (1) agency expertise, (2) consistency of interpretation, (3) proximity to the President, (4) agency procedure, and (5) transparency and public participation. That being said, the Court has consistently relied on OLC opinions as evidence of historical practice—a traditional basis for evaluating the scope of presidential power.<sup>25</sup>

## II. A DESCRIPTIVE ACCOUNT OF SUPREME COURT DEFERENCE TO OLC

Perhaps the most striking aspect of the Supreme Court's treatment of OLC opinions is the relatively few occasions on which it has acknowledged the opinions at all. Instead of legitimizing OLC's vast array of legal interpretation in its decisions, the Court seems to have quietly put it aside. Although OLC has published more than a thousand opinions since 1934,<sup>26</sup> Supreme Court Justices have referred to OLC opinions in relatively few cases.<sup>27</sup>

The manner in which the Justices cite to the opinions may also suggest a subtle minimization of the office's vast array of legal interpretation.<sup>28</sup> Only one majority opinion of the Court, *Bragdon v. Abbott*, has explicitly accorded OLC deference under an established deference regime such as *Chev-*

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538–40, 546 (2010) (Breyer, J., dissenting), *New Process Steel v. N.L.R.B.*, 560 U.S. 674, 677 (2010), *id.* at 698 (Kennedy, J., dissenting).

In addition to the cases mentioned above, Supreme Court opinions or memoranda mention OLC in the following additional cases: *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 922 n.3 (2004), *Morrison v. Olson*, 487 U.S. 654, 665, 667 (1988), *Laird v. Tatum*, 409 U.S. 824, 828 (1972) (Rehnquist, J.) (mem.), and *Rodrigue v. Aetna*, 395 U.S. 352, 365 (1969). These cases are not included in the set above because they do not cite to specific OLC opinions, memoranda, or testimony.

<sup>25</sup> Bradley, *Gloss*, *supra* note 23.

<sup>26</sup> See *Office of Legal Counsel Opinions*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/olc/opinions>, <http://perma.cc/M3VU-W4XL>.

<sup>27</sup> See cases cited *supra* note 24.

<sup>28</sup> While this paper uses citation of OLC opinions as one rough indicator of the Office's influence in Supreme Court opinions, it does not suggest that this measure is either perfect or complete. For instance, assessment of the extent to which OLC opinions appear in the record before the Court would provide another useful measure of the Office's influence.

ron or *Skidmore*.<sup>29</sup> More often, the Supreme Court declines to cite to OLC opinions in cases where they are clearly relevant,<sup>30</sup> or simply uses the opinions to support its statements regarding historical practice.<sup>31</sup>

In *Bragdon*, the Court explicitly accorded an OLC opinion *Skidmore* deference. *Bragdon* concerned an HIV-positive patient who brought an action against her dentist under the Americans with Disabilities Act (ADA) for refusing to treat her in his office. Relying on regulations applying the Rehabilitation Act's inclusive understanding of HIV to the ADA, the Court held that HIV qualified as a "disability" under the ADA even if the infection had not progressed to the symptomatic phase. The Court emphasized that its holding was supported by a "consistent course of agency interpretation before and after enactment of the ADA."<sup>32</sup> It accorded *Chevron* deference to administrative guidance issued by the Department of Justice (the agency directed by Congress to issue implementing regulations) to implement the public accommodation provisions of Title III of the ADA, and *Skidmore* deference for the views of other agencies under both the Rehabilitation Act and the ADA.<sup>33</sup>

The Court's discussion of a relevant 1988 OLC opinion concluding that the Rehabilitation Act protects asymptomatic HIV-infected individuals from discrimination was accorded *Skidmore*, not *Chevron*, deference.

Every agency to consider the issue under the Rehabilitation Act found statutory coverage for persons with asymptomatic HIV. Responsibility for administering the Rehabilitation Act was not delegated to a single agency, but we need not pause to inquire whether this causes us to withhold deference to agency interpretations under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). It is enough to observe that the well-reasoned views of the agencies implementing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U. S. 134, 139–140 (1944).<sup>34</sup>

The Court proceeded to quote liberally from what it considered to be a "comprehensive and significant" OLC opinion concluding that the Rehabilitation Act protects HIV-positive individuals. In doing so, the Court relied

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<sup>29</sup> *Bragdon*, 524 U.S. at 642–47; see also *Gonzales*, 546 U.S. at 268–74. (However, in *Gonzales* the Court outlines a variety of reasons for finding the Attorney General's and OLC's reasoning unpersuasive and thus not entitled to deference under *Skidmore*.)

<sup>30</sup> For further discussion, see discussion of *New Process Steel* and *Crandon* *infra* p. 219–220.

<sup>31</sup> See, e.g., *Noel Canning*, 134 S. Ct. at 2562–63; *Arizona*, 132 S. Ct at 2528 (Alito, J., concurring in part and dissenting in part); *Jama*, 543 U.S. at 360 (Souter, J., dissenting); *Sells Eng'g*, 463 U.S. at 459–60.

<sup>32</sup> *Bragdon*, 524 U.S. at 642.

<sup>33</sup> *Id.* at 642, 646; Eskridge & Baer, *supra* note 9, at 1110.

<sup>34</sup> *Bragdon*, 524 U.S. at 642.

heavily on the opinion's reasoning and evidence to establish that HIV should properly be considered a disability under the ADA.<sup>35</sup>

But *Bragdon* is unique in its explicit and deep reliance on OLC's research and reasoning. More frequently, Justices cite to OLC opinions merely to support their claims regarding historical practice. At most, the Court accords OLC what Eskridge and Baer call "consultative deference."<sup>36</sup> Consultative deference refers to the Court's practice of expressing a deferential attitude without formally or informally invoking a deference regime grounded in particular standards of deference. It is certainly on the "low deference" side of a continuum of Supreme Court deference regimes extending from *Curtiss-Wright* super-deference to the anti-deference reflected in the rule of lenity.<sup>37</sup>

In these cases, the Court relies on some input from the agency—an amicus brief, a manual, an interpretive rule, or the like—to shape its reasoning and influence its decision. But it does so without explicitly stating that it is deferring to the agency, and without invoking any standard by which these inputs are weighed.<sup>38</sup>

Consultative deference can take a variety of forms and should itself be conceptualized as existing along a continuum ranging from "weak" consultative deference involving little reliance on the reasoning and evidence of agency guidance to "strong" consultative deference.

Considered in these terms, the Supreme Court clearly accords OLC opinions weak consultative deference at best. There are no other *Bragdon*-like references to the quality and significance of the opinions, and little analysis of their reasoning. Citations to OLC opinions often appear in footnotes or string citations corroborating the existence of a longstanding historical practice.<sup>39</sup>

This practice is most evident in the Court's recent opinion in *National Labor Relations Board v. Noel Canning*, a case involving the scope and meaning of Article II's Recess Appointments Clause. There, the petitioner, Noel Canning, challenged certain *intra*-session recess appointments to the National Labor Relations Board.<sup>40</sup> In deciding the case, the Court emphatically stressed the importance of historical practice in interpreting constitutional clauses and expressed its hesitance to "upset the compromises and working arrangements that the elected branches of Government themselves

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<sup>35</sup> *Id.* at 642–44.

<sup>36</sup> Eskridge & Baer, *supra* note 9, at 1111.

<sup>37</sup> For a summary of different deference regimes, *see id.* at 1099.

<sup>38</sup> *Id.* at 1111.

<sup>39</sup> *See e.g.*, *Golan v. Holder*, 132 S. Ct. 873, 879 n.3 (2012); *BP Am. Prod. v. Burton*, 549 U.S. 84, 97–98 (2006); *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 359–60 (2005) (Souter, J., dissenting); *United States v. Alvarez-Machain*, 504 U.S. 655, 686 n.34 (1992) (Stevens, J., dissenting); *I.N.S. v. Chadha*, 462 U.S. 919, 969 n.5 (1983) (Rehnquist, C.J., dissenting).

<sup>40</sup> *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550 (2014).



have reached” over time.<sup>41</sup> The Court cited heavily to OLC opinions and other executive guidance to establish that “history” offers “strong support for a broad interpretation” of the Clause.<sup>42</sup>

Another indication of the Court’s reluctance to accord OLC opinions substantial deference comes from the fact that minority opinions can provide more favorable treatment of OLC opinions than majority opinions.<sup>43</sup>

Robust defenses of OLC opinions often appear in dissents.<sup>44</sup> For instance, in *New Process Steel v. National Labor Relations Board*, the majority and dissenters openly split over the persuasive force of a relevant OLC opinion. The case raised the question of how many National Labor Relations Board (NLRB) members were required for the NLRB to exert its authority. The Taft-Hartley Act established a requirement of three members for a quorum and allowed the Board to delegate its authority to groups of at least three members. In June 2007, the Board (then comprised of four members and anticipating two more vacancies) delegated its authority to three members. They continued to issue Board decisions for twenty-seven months as a *two-member quorum* of a three-member group. The petitioner challenged the two-member Board’s authority to issue decisions, and the Supreme Court held that the National Labor Relations Act required that Board members maintain a membership of three in order to exercise the delegated authority of the Board.

In doing so, the Court *sub silentio* overruled an OLC opinion that was written to resolve the issue of how many members were required for the NLRB to exert its authority. The NLRB sought OLC’s advice when it first considered whether it would be possible to continue issuing decisions with only two members. The resulting OLC opinion concluded, “if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members

<sup>41</sup> *Id.* at 2559–60.

<sup>42</sup> *Id.* at 2561; *see id.* at 2561–63, 2566–71.

<sup>43</sup> At the time of publication, OLC opinions, memoranda, or testimony are cited in eight majority opinions; *id.* at 2562–63; *Golan*, 132 S. Ct. at 879 n.3; *New Process Steel v. N.L.R.B.*, 560 U.S. 674, 677 (2010); *BP Am. Prod.*, 549 U.S. at 97–98; *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *Bragdon v. Abbott*, 524 U.S. 624, 642–43 (1998); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 161 n.9 (1993); *Sec’y of the Interior v. California*, 464 U.S. 312, 320 n.6 (1984); in nine dissents: *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 546 (2010) (Breyer, J., dissenting); *New Process Steel*, 560 U.S. at 698 (Kennedy, J., dissenting); *Boumediene v. Bush*, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting); *Gonzales*, 546 U.S. at 276 (Scalia, J., dissenting); *Jama*, 543 U.S. at 360 (Souter, J., dissenting); *Alvarez-Machain*, 504 U.S. at 686 n.34 (Stevens, J., dissenting); *Haitian Ctrs. Council*, 509 U.S. at 190 n.3 (Blackmun, J., dissenting); *Chadha*, 462 U.S. at 969 n.5 (Rehnquist, C.J., dissenting); *United States v. Sells Eng’g*, 463 U.S. 418, 459–60 (1983) (Burger, C.J., dissenting); and in two concurrences: *Noel Canning*, 134 S. Ct. at 2604 (Scalia, J., concurring); *Crandon v. United States*, 494 U.S. 152, 174 (1990) (Scalia, J., concurring). An additional OLC opinion is cited in one opinion concurring in part and dissenting in part. *Arizona v. United States*, 132 S. Ct. 2492, 2528 (2012) (Alito, J., concurring in part and dissenting in part).

<sup>44</sup> *See New Process Steel*, 560 U.S. at 698 (Kennedy, J., dissenting); *Gonzales*, 546 U.S. at 276 (Scalia, J., dissenting).

remained.”<sup>45</sup> The Board adopted OLC’s position, believing itself “bound” since it had sought OLC’s advice.<sup>46</sup>

In overruling OLC’s opinion, the majority made no reference to OLC aside from briefly mentioning the fact that the NLRB relied on the OLC opinion. In doing so, the Court declined the opportunity to directly challenge the opinion’s reasoning or support. In contrast, the dissent pointedly described the OLC opinion as “persuasive authority,”<sup>47</sup> and cited the opinion to support its position that permitting a two-person quorum to delegate authority would not incentivize the NLRB to continue without reconstituting its boards.

Similarly in *Crandon v. United States*,<sup>48</sup> the majority and concurrence again treated OLC opinions in noticeably different ways. In this case, the concurring justices were the ones to raise questions about the opinions’ persuasive value. *Crandon* raised the question of whether a severance payment made by a private employer to an employee to encourage the employee to accept government employment violated 18 U.S.C. § 209(a), which makes it a crime for a private party to pay supplemental compensation for the employee’s government service. The Court held that § 209(a) does not apply to a severance payment that is made before the payee becomes a government employee.

Again the majority opinion made no mention of relevant OLC opinions. But the concurrence engaged what it called a “vast” body of relevant administrative guidance, including OLC opinions, and argued that the OLC opinions are not entitled to *Chevron* deference or even any persuasive effect.<sup>49</sup> In doing so, it argued that anti-deference, or a presumption running *against* agency interpretation, is appropriate when considering Department of Justice advice concerning the scope of criminal statutes.<sup>50</sup>

The concurring justices’ attack on OLC did not end there. The concurrence then proceeded to criticize the reasoning of OLC opinions concerning § 209(a).<sup>51</sup> It argued that OLC relied on faulty logic in order to approve payments to employees from nonprofit organizations for meritorious public service in seemingly clear violation of § 209(a), suggesting that “[l]ater OLC opinions and memoranda continue this essentially catch-as-catch-can approach to public-service awards, unified mostly by the extraordinary principle that this criminal statute is violated if and when its purposes seem to be offended.”<sup>52</sup>

*Gonzales v. Oregon* also demonstrated the Court’s willingness to evaluate OLC opinions under anti-deference regimes.<sup>53</sup> The case involved the le-

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<sup>45</sup> *New Process Steel*, 560 U.S. at 677.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 698.

<sup>48</sup> 494 U.S. 152 (1990).

<sup>49</sup> *Id.* at 677 (Scalia, J., concurring).

<sup>50</sup> See Eskridge & Baer, *supra* note 9, at 1115 on anti-deference.

<sup>51</sup> *Crandon*, 494 U.S. at 179–80 (Scalia, J., concurring).

<sup>52</sup> *Id.* at 180.

<sup>53</sup> *Gonzales v. Oregon*, 546 U.S. 243 (2006).

gality of physician-assisted suicide after Oregon voters passed a ballot initiative legalizing the practice in 1994. *Gonzales* questioned the validity of a subsequent interpretive rule issued by Attorney General John Ashcroft arguing (1) that physician-assisted suicide was not a legitimate medical purpose, and (2) that any physician administering federally controlled drugs for that purpose would be in violation of the Controlled Substances Act. The Court held that the Controlled Substances Act does not permit the Attorney General to prohibit doctors from prescribing drugs for use in physician-assisted suicide in accordance with a state law that permitted the procedure.

Attorney General Ashcroft's interpretive rule relied heavily on a memorandum that he had solicited from OLC.<sup>54</sup> Again, the majority and dissenters found themselves in disagreement concerning the deference due to OLC and the rule. The majority argued that the interpretive rule was not entitled to deference under *Auer* or *Chevron*.<sup>55</sup> The Court accorded the interpretive rule deference under *Skidmore*, but it quickly found its reasoning unpersuasive and thus not entitled to deference at all. In particular, the Court cited the Attorney General's lack of expertise in the area and his apparent lack of consultation with anyone outside the Department of Justice.<sup>56</sup>

Again, the dissenters disagreed and argued that the interpretive rule was entitled to deference under *Auer* and *Chevron*.<sup>57</sup> The dissenters then argued that even if the interpretive rule was not entitled to *Auer* or *Chevron* deference, it was entitled to consultative deference because virtually every relevant source of authority confirms that the phrase "legitimate medical purpose" does not include intentionally assisting suicide.<sup>58</sup> To support their point, the dissenters explicitly cited to the OLC memo that was attached with the Attorney General's interpretive rule for the following proposition:

The overwhelming weight of authority in judicial decisions, the past and present policies of nearly all of the States and of the Federal Government, and the clear, firm and unequivocal views of the leading associations within the American medical and nursing professions, establish that assisting in suicide . . . is not a legitimate medical purpose.<sup>59</sup>

To summarize, the Court cites to OLC opinions infrequently, and when it does, it rarely engages their reasoning, instead relying on the opinions as evidence of historical practice. The following Parts will consider why the Court has taken this approach and whether it is appropriate under its stated rationales for deference to agency interpretation.

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<sup>54</sup> *Id.* at 254; *id.* at 276 (Scalia, J., dissenting). *Gonzales* considered the validity of an interpretive rule that had been heavily influenced by OLC guidance.

<sup>55</sup> *Id.* at 258.

<sup>56</sup> *Id.* at 268–69.

<sup>57</sup> *See id.* at 276–77 (Scalia, J., dissenting).

<sup>58</sup> *Id.* at 285–86 (Scalia, J., dissenting).

<sup>59</sup> *Id.* at 286 (Scalia, J., dissenting).

## III. EXPLAINING THE COURT'S BEHAVIOR

Why has the Court refrained from citing OLC opinions in more than a handful of cases? And when it does cite OLC opinions, why has it resisted according them substantial deference? These are difficult questions for which there is no obvious answer.

Perhaps it is simply not worth the trouble to read into the Supreme Court's refusal to engage OLC in its decisions. As mentioned in Part I, some executive branch scholars argue that the opinions are not likely candidates for judicial review because of non-justiciability doctrines including ripeness, mootness, and standing.<sup>60</sup>

But the fact that OLC opinions may be unlikely candidates for direct judicial review *does not* explain the Supreme Court's reluctance to seriously engage them when they do find their way into court. Instead of legitimizing OLC and its vast array of legal interpretation in its decisions, the Supreme Court seems to have to silently put it aside. The Court's striking patterns of (1) not citing to OLC opinions and (2) only according them weak consultative deference when the Court cites an opinion suggests that other rationales may be at play.

A. *Competing Legal Authorities*

It is possible that the Supreme Court's reluctance to engage OLC opinions reflects hesitation to legitimize a competing source of legal authority. This concern pervades all of administrative law, and may help to explain why the Court often defers to agency interpretation without explicitly invoking a deference regime. As Eskridge and Baer have suggested,

[t]he Justices may believe that constant invocation of deference regimes would be inconsistent with the role of an independent judiciary at the heart of Article III. . . . To admit, in case after case, that they are "deferring" to agencies rather than forming their own independent judgments about the law, would announce a greatly diminished judicial role in statutory interpretation.<sup>61</sup>

OLC opinions now "comprise the largest body of official interpretation of the Constitution and statutes outside the volumes of the federal court reporters" and are published in bound volumes.<sup>62</sup> As John McGinnis notes, "the executive branch has made formal pronouncements on constitutional and statutory issues of such a substantial scope and variety that they rival the opinions of the Supreme Court."<sup>63</sup> Many casebooks now include OLC opinions and some are devoted exclusively to executive branch legal interpreta-

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<sup>60</sup> Moss, *supra* note 3, at 1304. See also Morrison, *Stare*, *supra* note 3, at 1451.

<sup>61</sup> Eskridge & Baer, *supra* note 9, at 1119.

<sup>62</sup> McGinnis, *supra* note 3, at 376.

<sup>63</sup> *Id.* at 375–76.

tion,<sup>64</sup> “encouraging students to treat them with the same high seriousness they accord to Supreme Court opinions.”<sup>65</sup> Perhaps the Court’s limited use of OLC opinions reflects reluctance to legitimize this increasingly influential source of legal authority.

### B. *Inoculating Supreme Court Opinions*

Moreover, the Court’s pattern of minimizing reliance on OLC may reflect broader debates among academics and policymakers about the role and legitimacy of the office. The Court’s consistent practice of using the opinions primarily to corroborate the existence of executive practices—intended or not—may serve to inoculate its decisions from controversy concerning OLC.

The Justices are no doubt apprised of recent debate concerning OLC. Opinions issued during the “war on terror” concerning the use of enhanced interrogation methods and targeted killings raised questions about the ability of the office to withstand strong political pressure to deliver opinions that reflect the positions of the President.<sup>66</sup> For Ackerman, “the entire set up at the OLC—its mode of recruitment, its relationship to the White House, its deference to ‘the views of the President who currently holds office’—propels its top lawyers toward presidentialist apologetics.”<sup>67</sup> While OLC alumni including Goldsmith and Morrison have argued that OLC can serve as an important constraint on executive power, Eric Posner also rejects that characterization of OLC as a constraint, arguing that it instead serves as an “enabler” or “extender” of executive power.<sup>68</sup>

Instead, the Court’s practice of citing OLC opinions as evidence of historical practice, particularly in the executive branch, serves to marshal the Office and its considerable resources in support of a well-recognized basis of judicial interpretation. As Curtis Bradley and Trevor Morrison have described in their recent work, historical practice is regularly relied upon across the executive and judicial branches to resolve key questions of presidential power.<sup>69</sup> In their view, judicial reliance on historical practice reinforces standard normative values associated with *stare decisis* and Burkean analysis, including consistency and predictability in the law.<sup>70</sup> In addition, they argue that relying on longstanding historical practice can “enhance the credibility of the decisionmaker,” mitigate the countermajoritarian nature of

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<sup>64</sup> Moss, *supra* note 3, at 1303 n.1.

<sup>65</sup> ACKERMAN, DECLINE, *supra* note 1, at 88.

<sup>66</sup> MORRISON, *Stare*, *supra* note 3, at 1451–52.

<sup>67</sup> ACKERMAN, DECLINE, *supra* note 1, at 109.

<sup>68</sup> Compare GOLDSMITH, *supra* note 3, and Morrison, *Alarmism*, *supra* note 1, with Eric A. Posner, *Deference to the Executive in the United States after 9/11: Congress, the Courts, and the Office of Legal Counsel* (The Law Sch. of Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 363, 2011), <http://perma.cc/8H8W-4F9M>.

<sup>69</sup> Bradley, *Gloss*, *supra* note 23, at 417–24; Bradley, *Constraint*, *supra* note 23, at 1103–09.

<sup>70</sup> Bradley, *Gloss*, *supra* note 23, at 427, 455.

judicial decision-making, preserve executive-legislative bargains that are only partially observable to courts, and improve the efficiency of judicial decision-making (on the ground that courts are likely to reach decisions similar to those who have considered the question before).<sup>71</sup>

However, the extent to which OLC opinions are, in fact, appropriate sources of evidence concerning historical practice—and thus whether the Court’s approach successfully inoculates its decisions from possible controversy—remains unclear. As Bradley and Morrison recognize, legal expertise across the legislative and executive branches is asymmetric and tilts in favor of the presidency—there are no congressional counterparts to OLC.<sup>72</sup> As a result, deferring to *executive* branch legal interpretation as evidence of historical practice in cases involving *presidential* power necessarily gives rise to questions of executive self-dealing.<sup>73</sup> The following Part considers this possibility in greater depth as part of a doctrinal discussion of the Court’s stated rationales for deference to agency interpretation.

#### IV. WHAT DEFERENCE IS DUE?

Applying the Court’s traditional deference regimes to OLC raises a number of important doctrinal and policy questions. Does *Chevron* apply to OLC opinions? If so, when? If not, what standard applies? The Supreme Court has not explicitly considered how deference regimes including *Chevron* or *Skidmore* apply to OLC opinions. OLC is unlike other executive agencies in that its mission is to resolve legal disputes *between* agencies. It is not a traditional agency with an area of specialized expertise, like the Department of Energy or the Securities and Exchange Commission. This Part confronts these questions and outlines a doctrinal framework for judicial deference to OLC opinions.

##### A. *Chevron? Skidmore?*

Courts and scholars have struggled to articulate when *Chevron*’s strong deference applies to OLC opinions, and agency inputs more generally.<sup>74</sup> *United States v. Mead Corp.*, a leading case on this “*Chevron* Step Zero” question (i.e. the inquiry into whether *Chevron* applies at all),<sup>75</sup> holds that *Chevron* deference applies where (1) Congress has “delegated authority to the agency generally to make rules carrying the force of law,” and (2) “the agency interpretation claiming deference was promulgated in the exercise of

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<sup>71</sup> *Id.* at 427–29, 457.

<sup>72</sup> *Id.* at 443 n.143.

<sup>73</sup> *See id.* at 460.

<sup>74</sup> *See* Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1035 (2005).

<sup>75</sup> *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

that authority.”<sup>76</sup> A congressional delegation of authority to make rules carrying the “force of law” can be shown in a variety of ways, including the agency’s power to engage in “adjudication or notice-and-comment rulemaking, or by some other indication of congressional intent.”<sup>77</sup>

Under *Mead*, OLC opinions likely do not carry the “force of law.” Although some might argue that OLC opinions are law-like in that they bind the executive branch, this position is not, ultimately, persuasive. OLC lacks authority to make rules or conduct hearings, and its opinions are not promulgated pursuant to notice-and-comment or formal adjudication.<sup>78</sup> In *Christensen v. Harris County*, the Court held that a Department of Labor opinion letter was not entitled to *Chevron* deference, holding that “interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”<sup>79</sup> In *Steinbach v. Federal Bureau of Prisons*, a district court refused to accord an OLC memo *Chevron* deference for this reason. “Interpretive rules such as the OLC Memo, which are not subject to notice and comment, are generally entitled to the much lower deference set forth in *Skidmore v. Swift & Co.*”<sup>80</sup>

Proponents of strong deference may argue that OLC opinions are law-like in that they are presumptively binding within the executive branch. In *Mead*, the binding force of a customs department opinion letter was central to the question of whether it enjoyed the force of law. The Court concluded that the opinion letter did not “bespeak the *legislative* type of activity that would *naturally bind more than the parties to the ruling . . .*”<sup>81</sup>

OLC opinions can bind more than the parties to the ruling in practice. They are presumptively binding on the executive branch, and are accorded some degree of *stare decisis* effect.<sup>82</sup> According to the 2010 OLC Best Practices Memorandum, “OLC’s core function . . . is to provide controlling advice to Executive Branch officials on questions of law.”<sup>83</sup>

While supporters of strong deference may point to the binding force of OLC opinions within the executive branch, there is considerable uncertainty about the origins of that force.<sup>84</sup> Even OLC’s strongest supporters ultimately ground the binding force of its opinions in historical practice and the incentives facing the office rather than any particular statute or regulation.<sup>85</sup> According to Morrison, “[a]s a formal matter, the bindingness of the Attorney General’s (or, in the modern era, OLC’s) legal advice has long been uncer-

<sup>76</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); Murphy, *supra* note 74, at 1015.

<sup>77</sup> *Mead*, 533 U.S. at 226–27; Murphy, *supra* note 74, at 1015.

<sup>78</sup> *Developments*, *supra* note 1, at 2097.

<sup>79</sup> *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

<sup>80</sup> *Steinbach v. Fed. Bureau of Prisons*, 339 F. Supp. 2d 628, 630 (D.N.J. 2004).

<sup>81</sup> *Mead*, 533 U.S. at 232 (emphasis added).

<sup>82</sup> Morrison, *Stare*, *supra* note 3, at 1455–56.

<sup>83</sup> *Id.* at 1456 n.31.

<sup>84</sup> *Id.* at 1464.

<sup>85</sup> *See id.* “The responsibility to advise agencies is assigned by statute to the Attorney General, but is delegated to OLC by regulation.” *Id.* at 1458–59.

tain. The issue has never required formal resolution, however, because by longstanding tradition the advice is *treated* as binding.”<sup>86</sup> Absent greater indications of congressional intent and the binding force of OLC opinions, courts are unlikely to find that OLC opinions carry the force of law for the purposes of *Chevron*.

### B. A “Coercion” Problem?

Although there is little indication that Congress has delegated authority to OLC to make rules carrying the force of law, proponents of strong deference seem to be on stronger ground arguing that *Chevron* deference applies to agency interpretations incorporating OLC guidance. But incorporation of OLC guidance raises several doctrinal questions. Imagine that the Environmental Protection Agency (EPA) solicits an OLC opinion concerning the meaning of a provision of the Clean Water Act, and later explicitly incorporates OLC’s position into its interpretation of the Act. Does *Chevron* apply to the EPA’s interpretation? Is the resulting interpretation really the EPA’s or OLC’s?

Courts have largely dodged the issue of whether an agency interpretation originating in OLC advice is properly considered the product of OLC or the agency.<sup>87</sup> For instance, in *Public Citizen v. Burke*, the D.C. Circuit declined to consider whether an agency interpretation relying on an OLC opinion was ultimately the agency’s or OLC’s.<sup>88</sup>

This issue emerged again in a series of cases brought by prisoners challenging a Bureau of Prisons (BOP) policy concerning the conditions of their confinement.<sup>89</sup> Prior to 2002, BOP’s usual practice was to consider prisoners for placement in Community Corrections Centers for as much as the last six months of their sentences. In 2002, OLC issued an opinion declaring BOP’s practice unlawful.<sup>90</sup> A week later BOP released a memorandum adopting the OLC’s position and several prisoners challenged the revised BOP policy.

For courts involved in this litigation, the key question was how much to defer to the revised BOP/OLC policy. As a result, courts directly confronted the questions of (1) whether the revised policy was really BOP’s or OLC’s and (2) how much deference was due.<sup>91</sup> In *Zucker v. Menifee*, the plaintiff argued that the BOP/OLC policy was not entitled to deference because BOP had been “coerced” by OLC into adopting the new policy. The court rejected the petitioner’s argument, finding that BOP had expressly adopted this interpretation by changing its policy in response, making it reasonable to attribute the interpretation to BOP. “Therefore, this court concludes that def-

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<sup>86</sup> *Id.* at 1464.

<sup>87</sup> *See* *Jarrard v. Dep’t of Justice*, 669 F.3d 1320, 1325 (Fed. Cir. 2012).

<sup>88</sup> *Pub. Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988).

<sup>89</sup> *Zucker v. Menifee*, No. 03 Civ. 100077(RJH), 2004 WL 102779, at \*1 (S.D.N.Y. Jan. 21, 2004).

<sup>90</sup> *Id.* at \*2.

<sup>91</sup> *Id.*



erence is due to the OLC Opinion to the same extent as would be proper had the BOP itself issued it.”<sup>92</sup> Another court found a different way around the “coercion” issue, hinging its analysis on the fact that both BOP and OLC were part of the DOJ. “[I]t is difficult to see how the Department of Justice can coerce itself, if indeed that happened. The Attorney General is the head of the entire department.”<sup>93</sup>

The possibility of “coercion” raised in the BOP/OLC litigation merits further attention. When agencies solicit OLC advice, they realize that they are bound by it—suggesting that they may in some way have been “coerced” to adopt advice they disagree with. OLC generally refuses “to provide advice if there is any doubt about whether the requesting entity will follow it. . . . An agency displeased with OLC’s advice cannot simply ignore the advice.”<sup>94</sup> It can be difficult to see how an agency’s interpretation can be regarded as fully its own if it is compelled to adopt OLC’s advice.

However, as the court in *Zucker* recognized, coercion may not present a substantial problem if the agency expressly adopts OLC’s advice or declines to advance a rule after receiving OLC guidance. To reinforce the point, consider the example above of the EPA soliciting and adopting OLC guidance on the meaning of the Clean Water Act. Even if a court were to consider the antecedent OLC opinion on the Clean Water Act, EPA’s rule would regardless still exist and require separate review. Moreover, agencies routinely rely on (and could even be thought to be “bound” by) other controversial sources of information and guidance that produce no particular suspicion in courts.

Finally—and most problematically—courts often are unaware of the extent to which a case presents a potential coercion problem. OLC advice is often informal and many opinions remain unpublished. In these cases, it will be difficult, if not impossible, for courts to fully understand the extent to which an agency is bound by OLC guidance. The following Parts will consider the implications of unpublished opinions for judicial deference at greater length.

### C. Deference on Constitutional Interpretation

In addition, OLC opinions engaging in constitutional interpretation are generally not entitled to special deference under the Court’s deference regimes. The executive branch regularly interprets the Constitution as it discharges its duties, particularly in light of Article III’s restriction on advisory opinions. But lower courts have held that OLC opinions grounded in constitutional interpretation are not entitled to judicial deference. In *Public Citizen*, the D.C. Circuit failed to accord an OLC memorandum concerning the disposition of President Nixon’s presidential papers deference because it re-

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<sup>92</sup> *Id.* at \*5.

<sup>93</sup> *Adler v. Menifee*, 293 F. Supp. 2d 363, 369 (S.D.N.Y. 2003).

<sup>94</sup> The extent to which OLC opinions are legally binding within the executive branch remains clear. See *Morrison*, *Stare*, *supra* note 3, at 1464–65.

flected the office's interpretation of the Constitution as opposed to its interpretation of a statute. In the court's estimation,

[t]he OLC memorandum [wa]s driven entirely by its constitutional reasoning; it ma[de] no effort to ground its view of the statute on congressional purpose, even if such purpose [wa]s understood very broadly. . . . The Federal Judiciary does not, however, owe deference to the Executive Branch's interpretation of the Constitution.<sup>95</sup>

In fact, anti-deference may be appropriate when OLC opinions present serious constitutional problems or extend criminal liability.<sup>96</sup> Recall Part II's discussion of the concurrence in *Crandon v. U.S.* There, the concurring justices evaluated an OLC opinion under a regime of anti-deference because it extended criminal liability—concluding that OLC's interpretation of 18 U.S.C. § 209(a) would “turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.”<sup>97</sup>

## V. POLICIES COUNSELING AGAINST DEFERENCE TO OLC

The previous Part suggests that OLC guidance is likely not entitled to *Chevron* deference. So what standard does apply? As discussed in Part II, the Supreme Court formally accorded an OLC opinion *Skidmore* deference in one case: *Bragdon v. Abbott*. Lower courts have occasionally signaled their willingness to evaluate OLC opinions under *Skidmore* as well.<sup>98</sup> But applying *Skidmore* is not the same thing as deferring under it. Courts grant agency interpretations deference under *Skidmore* proportionate to their power to persuade.<sup>99</sup> As a result, a court may apply *Skidmore* to an agency interpretation, and then accord it little deference because it finds the interpretation unpersuasive. How much deference is OLC really due under *Skidmore* or unannounced deference regimes? Answering this question requires an analysis of the policies underlying the Court's deference decisions.

Confronting the policy question is all the more important given the fact that the Supreme Court may apply deference regimes inconsistently. Several empirical studies suggest that the Court uses deference regimes more like “canons of statutory construction, rather than as precedents formally binding on future Courts.”<sup>100</sup> According to Eskridge and Baer, “whatever approach the Court *says* it is following, the Justices will tend to be ad hoc in their

<sup>95</sup> Pub. Citizen v. Burke, 843 F.2d 1473, 1478 (D.C. Cir. 1988).

<sup>96</sup> Eskridge & Baer, *supra* note 9, at 1092.

<sup>97</sup> *Crandon v. United States*, 494 U.S. 152, 177–80 (1990) (Scalia, J., concurring).

<sup>98</sup> See, e.g., *Steinbach v. Fed. Bureau of Prisons*, 339 F. Supp. 2d 628, 629–30 (D.N.J. 2004).

<sup>99</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>100</sup> Connor N. Raso & William N. Eskridge, *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1734 (2010).

actual practice.”<sup>101</sup> For instance, the Supreme Court may not apply *Chevron* when it is applicable, and it often relies on agency inputs without applying a deference regime.<sup>102</sup> In addition, it tends to accord more deference to agency inputs when interpreting highly technical or complex statutes, such as those commonly regulating intellectual property and securities.<sup>103</sup> Moreover, justices themselves may disagree on the appropriate scope of *Chevron* and *Skidmore*.<sup>104</sup>

Nevertheless, common themes and policies underlie the Court's deference decisions. The Court's deference decisions hinge on an assessment of the relative competencies of agencies and the courts. Does the agency in question have special expertise relative to courts? Are the procedures that agencies use sufficiently transparent? Empirical studies suggest that rule-of-law considerations including comparative institutional competence and consistent agency interpretation influence the Supreme Court's likelihood of deferring to an agency interpretation.<sup>105</sup>

This Part considers whether substantial deference to OLC is appropriate in light of the policies that ground the Supreme Court's deference decisions. Perhaps the strongest factor weighing in favor of deference to OLC opinions is political accountability. A traditional rationale for judicial deference to agency interpretation is the agency's relative accountability to the public. In Justice Stevens's opinion in *Chevron*,

[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.<sup>106</sup>

OLC, as an executive agency whose leadership changes with each administration,<sup>107</sup> may appear more accountable to the people than unelected judges. As OLC alumnus Randolph Moss puts it, “the public may elect a President based, in part, on his view of the law, and that view should appropriately influence legal interpretation in that President's administration.”<sup>108</sup>

But OLC's case for substantial deference is not as strong when one considers other major policies underlying the Court's deference decisions. The following sections will evaluate the OLC's case for deference in light of: (1) agency expertise, (2) consistency of interpretation, (3) proximity to the

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<sup>101</sup> Eskridge & Baer, *supra* note 9, at 1157.

<sup>102</sup> *Id.* at 1086.

<sup>103</sup> See Raso & Eskridge, *supra* note 100, at 1783.

<sup>104</sup> See *id.* at 1752–53.

<sup>105</sup> *Id.* at 1734.

<sup>106</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

<sup>107</sup> Ackerman, *DECLINE*, *supra* note 1, at 97.

<sup>108</sup> Morrison, *Stare*, *supra* note 3, at 1511.

President, (4) agency procedure, and (5) transparency and public participation.

### A. Agency Expertise

Agency expertise is perhaps the most commonly cited reason for judicial deference to agency interpretation. *Chevron*, *Skidmore*, and *Mead* each contrast the specialized expertise of agencies with judges who “are not experts in the field.”<sup>109</sup> Each opinion grounds judicial deference in agencies’ “[specialized] knowledge respecting the matters subjected to agency regulations.”<sup>110</sup> As *Skidmore* famously notes, agency interpretations “constitute a body of experience and judgment to which courts and litigants may properly resort for guidance.”<sup>111</sup>

But what does the Supreme Court mean when it refers to agencies’ specialized expertise and experience? The Court’s decisions in *Chevron*, *Skidmore*, and *Mead* are grounded in agencies’ *technocratic* and *subject-area* expertise. OLC certainly has substantial legal capacity.<sup>112</sup> OLC lawyers are well trained and have the capacity to produce extensively researched opinions. But OLC’s considerable legal expertise does not seem to count for very much in the deference debate. As Eskridge and Baer note, deference relies on the fact that agencies generally know much more about the areas they regulate than courts.

The agency typically provides the Court with *useful* information—including the legislative history and background of the statute; pertinent regulatory history and notation of agency actions that might be relevant; data and facts relating to the regulatory regime and the issue before the Court; and experience-based analysis of how different interpretations fit with the purpose and evolution of the statutory scheme.<sup>113</sup>

The Supreme Court seems to agree, and it highlights the importance of deference to agency interpretations of “technical and complex” statutes.<sup>114</sup> While the Court is very familiar with areas such as federal jurisdiction and procedure, it is less familiar with the details of energy, securities, and intellectual property regulation. For instance, Eskridge and Baer’s empirical study found far more deference to agencies in areas such as “environmental science, energy regulation, intellectual property, pension regulation, and bankruptcy”—i.e., areas in which the Court has no particular expertise.<sup>115</sup>

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<sup>109</sup> *Chevron*, 467 U.S. at 865.

<sup>110</sup> *Id.* at 844.

<sup>111</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>112</sup> Morrison, *Stare*, *supra* note 3, at 1448.

<sup>113</sup> Eskridge & Baer, *supra* note 9, at 1114.

<sup>114</sup> See, e.g., *Chevron*, 467 U.S. at 865.

<sup>115</sup> Eskridge & Baer, *supra* note 9, at 1173–74.

OLC's expertise is legal and political, not technocratic and subject-oriented. The office is long on political acumen and legal talent, and relatively short on technical expertise. The office is staffed by only two-dozen generalist lawyers, many of whom leave after a few years.<sup>116</sup> Although lawyers in the office may develop specialized backgrounds in certain areas, such as interpretation of the Geneva Conventions, they are not "specialized" experts under the Court's meaning of the term. In fact, Goldsmith goes so far as to suggest that the office's lack of technical expertise influenced the publication of the interrogation opinions. "Yoo's superiors probably failed to supervise him adequately for two reasons: under pressure to push the envelope, they liked the answers he gave; and *lacking relevant expertise*, they deferred to his judgment."<sup>117</sup> Although the office solicits advice from relevant expert agencies prior to issuing opinions, solicitation is unlikely to substitute for technical expertise within the office itself.

Lower courts have repeatedly cited OLC's lack of technical expertise as a reason to withhold deference. In *Overstreet v. Western Professional Hockey League*, a district court in Arizona failed to defer to a National Labor Relations Board's interpretation of the National Labor Relations Act that had been influenced by OLC guidance because OLC lacked expertise in labor issues.<sup>118</sup> According to the court, "[t]he interpretive analysis was limited to the Board's *ipse dixit* construction of § 3(b) and reliance on the analysis of the Office of Legal Counsel, which obviously has no expertise or experience in labor matters."<sup>119</sup> Likewise, in *Crowley v. Federal Bureau of Prisons*, the court similarly refused to defer to a Bureau of Prison interpretation that had been shaped by OLC.<sup>120</sup> The court based its decision on the fact that BOP's new procedure was not based on its experience or expertise—rather it was grounded in statutory interpretation.<sup>121</sup> In the words of the court in *Zucker*,

[t]he BOP is clearly the agency with the body of specialized information and experience in administering sentencing procedures; the OLC, however knowledgeable it may be about the federal prison system, does not have the same direct expertise that courts ordinarily have treated deferentially.<sup>122</sup>

A district court in Connecticut put the point bluntly, "OLC does not have the kind of 'direct expertise' that prompts courts to treat agency rules deferentially."<sup>123</sup>

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<sup>116</sup> Morrison, *Alarmism*, *supra* note 1, at 1710.

<sup>117</sup> Goldsmith, *supra* note 3, at 169 (emphasis added).

<sup>118</sup> *Overstreet v. W. Prof'l Hockey League*, 656 F. Supp. 2d 1114 (D. Ariz. 2009).

<sup>119</sup> *Id.* at 1125.

<sup>120</sup> *Crowley v. Fed. Bureau of Prisons*, 312 F. Supp. 2d 453 (S.D.N.Y. 2004).

<sup>121</sup> *Id.* at 459.

<sup>122</sup> *Zucker v. Menifee*, No. 03 Civ. 100077(RJH), 2004 WL 102779, at \*5 (S.D.N.Y. Jan. 21, 2004).

<sup>123</sup> *Baker v. Willingham*, No. 3:04CV1923(PCD), 2005 WL 2276040, at \*4 (D. Conn. Sept. 19, 2005).

### B. Consistency of Interpretation

The Supreme Court also identifies consistency of agency interpretation as a key rationale for judicial deference.<sup>124</sup> The Court's deference decisions suggest that consistent agency interpretation protects important reliance interests and improves the efficiency of decision-making.<sup>125</sup> Most importantly, consistent agency interpretation is a signal of the integrity of the agency's interpretive process because consistency reduces the likelihood that an agency is "manipulating its interpretive discretion for arbitrary, momentary ends."<sup>126</sup> The Court's policy favoring consistent agency interpretation also appears to be borne out in practice. Raso and Eskridge's study of the Court's application of deference regimes finds a statistically significant relationship between deference and longstanding agency policy.<sup>127</sup>

Agencies can demonstrate their commitment to consistent interpretation in two ways. First, they can demonstrate that they have maintained a particular interpretation in the past. Second, they can demonstrate that the interpretation is unlikely to change in the future because there are significant barriers to doing so. In other words, they can create credible commitments to preserving the interpretation.<sup>128</sup>

OLC has struggled to demonstrate both the consistency of its opinions in the past and its commitment to consistent interpretation in the future. Supporters and critics alike have identified the importance of strengthening the *stare decisis* effect of OLC opinions. And courts have taken note when OLC opinions depart significantly from prior interpretations. OLC's lack of expertise was not the only thing that courts looked to when evaluating whether to defer to the BOP/OLC interpretation regarding the Community Corrections Centers. One court argued that OLC's interpretation was inconsistent with earlier understandings of the statute, and went so far as to suggest that OLC's interpretation was "not a change based on experience, but rather a tendentious interpretation."<sup>129</sup>

Here too, the fact that OLC opinions remain unpublished undermines the case for deference. Harold Koh has drawn attention to the problems that oral advice and unpublished opinions pose for the perceived consistency of OLC interpretation, sharply criticizing OLC's *sub silentio* overruling of its own opinions concerning the *Alvarez-Machain* case. The case involved the United States government's kidnapping of a criminal suspect from Mexico.<sup>130</sup> As Koh describes, a 1980 OLC opinion held that only the FBI had lawful authority to engage in "extraterritorial apprehension," but a subsequent secret 1989 opinion abruptly overruled the earlier opinion. OLC then

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<sup>124</sup> Murphy, *supra* note 74, at 1015, 1022, 1048.

<sup>125</sup> *Id.* at 1026.

<sup>126</sup> *Id.* at 1019.

<sup>127</sup> Raso & Eskridge, *supra* note 100, at 1781–82.

<sup>128</sup> Murphy, *supra* note 74, at 1067.

<sup>129</sup> Crowley v. Fed. Bureau of Prisons, 312 F. Supp. 2d 453, 462 (S.D.N.Y. 2004).

<sup>130</sup> Koh, *Protecting*, *supra* note 3, at 518.

rebuffed congressional attempts to obtain the 1989 opinion, leaving observers unable to ascertain why the office's position changed.<sup>131</sup> Koh's analysis highlights the problems that unpublished opinions pose for the perceived consistency of OLC interpretation. How can courts and the public at large evaluate the consistency of OLC interpretation if certain opinions are unpublished or only published after considerable delay?

Morrison has gone the furthest to advocate for greater *stare decisis* in the office. He and other defenders of OLC suggest that it has a strong tradition of adhering to its past opinions.<sup>132</sup> Goldsmith writes that the office's "superstrong *stare decisis* presumption" weighed heavily against his ultimate decision to withdraw the interrogation opinions.<sup>133</sup> According to the 2010 OLC Best Practices Memorandum, "OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address a point in question . . . ." <sup>134</sup> In addition, the OLC Guidelines call for "due respect for the precedential value of OLC opinions from administrations of both parties."<sup>135</sup>

However, as Morrison acknowledges, what it means to provide "due respect" remains unclear. Giving due respect could simply mean consulting relevant precedents. Or it could mean treating precedents as binding in all cases. Or something in between. Morrison himself defends a middle position acknowledging the importance of *stare decisis* values to the work of OLC while continuing to permit the President to overrule its opinions.<sup>136</sup> However, as Morrison recognizes, this position is problematic. Permitting the President to overrule opinions inevitably threatens the consistency of OLC interpretation.<sup>137</sup> Morrison addresses this problem by arguing for public notice of decisions to overrule OLC and ultimately, by relying on the democratic accountability of the President and the reputational harm that ostensibly faces OLC staff who are perceived to unjustifiably depart from precedent.<sup>138</sup>

The *stare decisis* effect of OLC opinions remains uncertain. Following Morrison's advice to articulate a clear rule of *stare decisis* and clear factors for overruling OLC precedents would go some distance towards improving judicial perceptions of inconsistency. While public notice of changes in OLC positions may mitigate questions about the President's power to overrule OLC opinions, it will do so less convincingly if opinions remain unpublished.

But even a strong *stare decisis* rule will not promote deference to OLC opinions in all cases. OLC's position within the executive branch suggests that it will regularly interpret statutes in ways that will support executive

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<sup>131</sup> *Id.*

<sup>132</sup> See GOLDSMITH, *supra* note 3, at 145.

<sup>133</sup> *Id.* at 146.

<sup>134</sup> Morrison, *Stare*, *supra* note 3, at 1453.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1455.

<sup>137</sup> *Id.* at 1458.

<sup>138</sup> *Id.* at 1494.

power. Even supporters of OLC concede that “[a]s a descriptive matter, OLC’s written opinions are generally quite friendly to executive power.”<sup>139</sup> Promoting and advertising a strong *stare decisis* rule does little to address this issue.

Executive interpretations favoring presidential power often appear in the area of foreign affairs. According to Morrison, OLC has “consistently resisted” limitations on the executive branch’s conduct of diplomacy.<sup>140</sup> In fact, Morrison argues that OLC opinions concerning executive power and separation of powers merit special *stare decisis* effect. “Like other executive branch officials, OLC lawyers are players in the scheme envisioned by Madison, wherein each branch defends its institutional prerogatives against incursions by the other two.”<sup>141</sup> As a result, such opinions form especially important executive precedents that help to shape the meaning of executive power.

But as Morrison recognizes, the executive’s right to consistently defend its prerogatives in a departmental system does not mean that the Court should or will defer to the OLC on these issues.<sup>142</sup> Under Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, courts have looked not only to the consistency of executive practice but to Congress’s acquiescence when considering deference to the President in foreign affairs.<sup>143</sup> When OLC explicates its understanding of the law in light of its best view of executive power, the consistency of its interpretation is unlikely to ultimately save it from judicial scrutiny.

### C. Proximity to the President

The previous Part suggests that OLC’s position within the executive branch may discourage courts from according substantial deference to opinions expanding executive power, particularly in foreign affairs. All agencies operate with a “tunnel vision” or reflect some degree of “partisan perspective.”<sup>144</sup> The value of judicial review comes in part from being able to counteract these tendencies. Ultimately, the extent to which an agency’s expertise will persuade courts to defer depends on how the agency’s expertise is used. Courts will be less likely to defer to agencies whose interpretations they believe reflect strongly partisan priorities and perspectives.

OLC’s seemingly unusual and privileged relationship with the White House also weighs against substantial deference. OLC lawyers are generally not career civil servants. In *The Terror Presidency*, Jack Goldsmith argues that he was hired as the head of OLC “in large part because [he] shared the

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<sup>139</sup> *Id.* at 1501.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1502.

<sup>142</sup> *Id.*

<sup>143</sup> Bradley, *Gloss*, *supra* note 23, at 432–61.

<sup>144</sup> Eskridge & Baer, *supra* note 9, at 1180.



basic assumptions, outlook, and goals of top administration officials.”<sup>145</sup> According to some, talented young lawyers do not get to the office on academic credentials alone.<sup>146</sup> Their legal views often broadly correspond with those of the President.<sup>147</sup>

Moreover, White House lawyers appear to have more access to OLC than other executive branch officials.<sup>148</sup> In *Decline and Fall of the American Republic*, Bruce Ackerman describes then White House Counsel Elena Kagan's unusual access to OLC.<sup>149</sup> Perceptions of this sort are unlikely to improve OLC's prospects for substantial judicial deference.

#### D. Agency Procedure

Courts carefully scrutinize an agency's interpretive procedures when deciding whether to give deference.<sup>150</sup> What steps has an agency taken to ensure that its interpretations are the result of an open and deliberative process? Under the *Mead* line of cases, agency interpretations produced pursuant to public notice-and-comment, formal adjudication, or similar procedures are particularly worthy of deference.

Supporters of OLC argue that strong norms and procedural constraints protect the office from succumbing to the ever-present temptation to please the president. OLC typically requests that agencies submit their requests for advice in writing and the office generally solicits a variety of views from interested agencies before issuing an opinion.<sup>151</sup> Moreover, OLC opinions are treated as binding within the executive branch until overruled or withdrawn.<sup>152</sup> This procedure prevents agencies from shopping for advice or merely using OLC as an additional source of legal research for an issue that it intends to resolve on its own.<sup>153</sup>

The norms and constraints Goldsmith and Morrison describe are no doubt important, but they do not resemble the formal notice-and-comment and adjudicative procedures privileged by the Supreme Court under *Mead*. Many issues submitted to OLC are resolved informally.<sup>154</sup> Moreover, the public is not offered an opportunity to comment on questions before OLC.

While OLC's opinion-writing process shares some features with formal adjudication, even supporters admit that the process of developing the opinions is more “advisory” than “adversarial.”<sup>155</sup> “OLC rarely has the benefit

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<sup>145</sup> GOLDSMITH, *supra* note 3, at 34.

<sup>146</sup> *Id.* at 20.

<sup>147</sup> ACKERMAN, DECLINE, *supra* note 1, at 105.

<sup>148</sup> *Developments*, *supra* note 1, at 2093.

<sup>149</sup> ACKERMAN, DECLINE, *supra* note 1, at 231 n.43.

<sup>150</sup> Murphy, *supra* note 74, at 1052.

<sup>151</sup> ACKERMAN, DECLINE, *supra* note 1, at 98–99; Morrison, *Stare*, *supra* note 3, at 1463–64.

<sup>152</sup> Morrison, *Stare*, *supra* note 3, at 1464.

<sup>153</sup> *Id.*; Pillard, *Unfulfilled*, *supra* note 1, at 711.

<sup>154</sup> ACKERMAN, DECLINE, *supra* note 1, at 98.

<sup>155</sup> Morrison, *Stare*, *supra* note 3, at 1493.

of true adversarial testing, and operates in more of an advisory mode.”<sup>156</sup> Under the Administrative Procedure Act template, parties to an administrative law proceeding typically have the right to present evidence, argue before an administrative law judge, and appeal the judge’s decision to the agency itself and eventually to a federal court.<sup>157</sup> Although interested agencies share their views with OLC, these views are not refined and explored through comparable procedures of formal argumentation and appeal.

Even more problematically, the White House may be exempt from some of the existing norms and procedures that safeguard OLC’s integrity and independence. As Morrison acknowledges, White House counsel “need not specify their requests in writing, and they are often afforded greater informal access to OLC while it is considering their requests.”<sup>158</sup> According to Ackerman, the Obama Administration seemingly bypassed OLC in determining the constitutionality of its military action in Libya when OLC’s head, Caroline Krass, took the position that the Administration would need to seek congressional approval for the action. Rather than involving OLC, the White House instructed government lawyers from agencies including the State and Defense departments to submit their views directly to the White House.<sup>159</sup>

Indeed, Ackerman’s primary criticism is that although OLC creates products that resemble fair-minded judicial opinions, it in fact creates a “superpoliticized jurisprudence” that ruthlessly aggrandizes executive power.<sup>160</sup> The sharp differences between OLC’s procedures and the formal notice-and-comment and adjudicative processes privileged in *Mead* suggest that courts will be reluctant to confer OLC substantial deference on the basis of procedure alone.

### E. Transparency and Public Participation

Along with procedure, a concern for transparency underlies *Mead*’s approach to judicial deference. Courts ask whether agencies have taken steps to ensure that their interpretations are the result of “careful, politically transparent deliberation.”<sup>161</sup>

Supporters and critics alike have pushed for prompt and full publication of OLC opinions and greater transparency with regard to the opinion writing process more generally.<sup>162</sup> Many OLC opinions are unpublished, and some are released years after they were written.<sup>163</sup> According to some, the published opinions merely represent “the tip of the iceberg.”<sup>164</sup> Although some

<sup>156</sup> *Id.*

<sup>157</sup> Murphy, *supra* note 74, at 1053–54.

<sup>158</sup> Morrison, *Alarmism*, *supra* note 1, at 1710.

<sup>159</sup> Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 20, 2011, <http://perma.cc/GDJ6-RTMW>.

<sup>160</sup> Morrison, *Alarmism*, *supra* note 1, at 1707.

<sup>161</sup> Murphy, *supra* note 75, at 1052.

<sup>162</sup> See Koh, *Protecting*, *supra* note 3, at 523; Morrison, *Stare*, *supra* note 3, at 1525.

<sup>163</sup> ACKERMAN, *DECLINE*, *supra* note 1, at 95; Morrison, *Alarmism*, *supra* note 1, at 1711.

<sup>164</sup> McGinnis, *supra* note 3, at 376.

opinions must remain classified, Morrison acknowledges that much of the office's work is not classified and could be disclosed with redactions.<sup>165</sup> For instance, in 2010 OLC issued a secret memorandum justifying the killing of U.S. citizen Anwar Al-Awlaki in Yemen using a drone. Portions of the opinion were leaked to the press and later shared with members of the House and Senate Intelligence Committees.<sup>166</sup> A federal appeals court publicly released a redacted version of the opinion in June 2014 over the Obama Administration's objections.<sup>167</sup>

The fact that OLC opinions remain unpublished undoubtedly weakens the case for deferring to published opinions—especially because it is difficult to know which opinions are published and which are not. This poses challenges even for courts merely seeking to cite OLC opinions as evidence of historical practice. In *Noel Canning*, for instance, the Court relies on “publicly” available executive branch opinions concerning the meaning of the Recess Appointments Clause.<sup>168</sup> But courts face interpretive problems in relying on only a partial set of published OLC opinions. How can courts assess the quality and consistency of OLC opinions on a given issue when they do not know whether they have access to all relevant opinions?

A variety of proposals have emerged to address the issue, including a Congressional bill to increase OLC's reporting requirement and a retroactive trigger requiring publication within 30 days.<sup>169</sup> In addition, OLC has taken some actions to improve its transparency. For instance, OLC's 2010 Best Practices Memorandum adopts a general presumption in favor of publishing its opinions.<sup>170</sup>

But, as leading executive branch scholars have recognized, OLC's case for deference would be stronger if more of its opinions were published, and quickly. Publishing OLC opinions serves a variety of purposes. As Morrison notes, publishing OLC opinions deters lawyers, mindful of their professional reputations, from relying on extreme or poorly reasoned arguments.<sup>171</sup> “The fear of reputational harm from being seen to depart from OLC's best practices should itself encourage OLC lawyers not just to observe minimal standards of professional responsibility but to strive for the highest standards of professional excellence.”<sup>172</sup> Equally importantly, Koh argues that publication deters client agencies and the White House from “stripping a carefully nuanced opinion of all its subtleties and thereby reducing it to the simplistic

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<sup>165</sup> Morrison, *Alarmism*, *supra* note 1, at 1725.

<sup>166</sup> Michael D. Shear & Scott Shane, *Congress to See Memo Backing Drone Attacks on Americans*, N.Y. TIMES, Feb. 6, 2013, <http://perma.cc/U2TJ-U385>.

<sup>167</sup> Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, N.Y. TIMES, June 23, 2014, <http://perma.cc/XF8E-G7HF>; Benjamin Weiser, *U.S. Ordered to Release Memo in Awlaki Killing*, N.Y. TIMES, Apr. 21, 2014, <http://perma.cc/3T9K-EABF>.

<sup>168</sup> N.L.R.B. v. Noel Canning, 134 S. Ct. 2550, 2562 (2014).

<sup>169</sup> Cluchey, *supra* note 3, at 57.

<sup>170</sup> Morrison, *Alarmism*, *supra* note 1, at 1725.

<sup>171</sup> *Id.*

<sup>172</sup> Morrison, *Stare*, *supra* note 3, at 1519.

conclusion that ‘OLC says we can do it.’”<sup>173</sup> Within the context of deference, prompt publication may (1) strengthen the case for using executive legal interpretation as evidence of historical practice and (2) enhance judicial perceptions of the quality of OLC products.

To summarize, this Part has argued that OLC’s case for substantial deference is diminished when one considers traditional policies underlying the Court’s deference decisions, including expertise and transparency. The following Part explores how this insight may and should figure into the considerations of agency general counsel weighing whether to seek advice from OLC.

## VI. THE AGENCY GENERAL COUNSEL’S DILEMMA

The binding force of OLC’s advice within the executive branch and judicial reluctance to defer to that advice creates a peculiar dilemma for agency counsel. Should agency counsel solicit OLC advice or not? If they do, they are effectively bound by the advice they receive. But under the Court’s stated rationales for deference, agency interpretations relying heavily on OLC advice may receive less deference than agency interpretations that do not.

Agency general counsel turn to OLC for a variety of reasons: because they lack the resources and/or time to research complex questions, or to enhance the legitimacy of their positions vis-à-vis other agencies. “Legal advice obtained from an office other than OLC—especially an agency’s own general counsel—is unlikely to command the same respect as OLC advice.”<sup>174</sup>

But agency counsel’s decision to solicit OLC advice and incorporate it into an agency interpretation may affect how it is considered in court. As the BOP litigation discussed in Part IV demonstrates, courts could conceivably find—explicitly or implicitly—that the resulting agency interpretation is effectively the interpretation of OLC, not the agency itself. And courts may be less likely to defer to an agency interpretation that relies on OLC advice than one that does not. Many of the policies justifying judicial deference to agency interpretation—particularly expertise, consistency of interpretation, and transparency and public participation—favor according stronger deference to expert agencies. Such agencies often have formal adjudicative and notice-and-comment procedures that entitle their opinions to *Chevron* deference. And they often have specialized and technical expertise. Indeed, when it comes to courting judicial deference, agency general counsel may ask: what is to be gained by turning to OLC?

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<sup>173</sup> Koh, *Protecting*, *supra* note 3, at 517.

<sup>174</sup> Morrison, *Stare*, *supra* note 3, at 1465.

## CONCLUSION

Why has the growing literature on executive branch legal interpretation failed to explore the Supreme Court's treatment of OLC opinions? The primary answer seems to lie in the fact that leading proponents of OLC generally do not anticipate its opinions to be immediate candidates for judicial review.

This article argues that the literature's reluctance to engage the Supreme Court's treatment of OLC opinions is misguided. Arguments concerning the importance of doctrines of non-justiciability have not been tested, and as a result the extent to which OLC opinions are actually precluded from judicial review is unclear. Moreover, by focusing on the likelihood that OLC opinions appear as the immediate subjects of judicial review, executive branch scholars fail to consider the many other ways in which courts engage OLC.

More importantly, the literature's reluctance to seriously consider OLC opinions as candidates for judicial review directs attention away from strong patterns of Supreme Court behavior and thorny doctrinal problems once the opinions do find themselves in court. As a descriptive matter, the Supreme Court has not accorded OLC substantial deference. It declines to cite to the opinions in cases where they are relevant, and often uses the opinions only to support its understanding of historical practice.

As a doctrinal matter, OLC guidance is likely not entitled to *Chevron* deference. In addition, Part IV identifies a possible "coercion" problem that may be implicated when agencies with rulemaking authority adopt OLC positions. Finally, the article suggests that OLC opinions should not be granted substantial deference under the Supreme Court's stated rationales for agency deference including: (1) agency expertise, (2) consistency of interpretation, (3) proximity to the president, (4) agency procedures, and (5) transparency and public participation.

More generally the article raises longstanding questions of judicial-executive relations. How should courts engage with executive branch legal interpretation? What deference is due? Even the Court's current practice of citing to OLC opinions as evidence of historical practice, best demonstrated in *National Labor Relations Board v. Noel Canning*, remains problematic in light of the fact that many opinions remain unpublished.

Looking forward, how might OLC respond to the Court's approach? Should OLC actively seek to have its products cited in judicial opinions, and does it matter whether its opinions receive substantial deference? While beyond the scope of this article, greater reliance on OLC opinions in judicial opinions may enhance the legitimacy of the office—in the eyes of the judiciary, the public, and perhaps even the executive branch itself.

However, this article suggests several obstacles to according OLC opinions substantial deference in the future. Perhaps more stringent checks and balances on OLC or what Neal Katyal calls "internal separation of powers" within OLC may incline the Court to accord OLC opinions greater *Skidmore*

and consultative deference.<sup>175</sup> What would internal checks and balances within OLC look like? A wide variety of proposals for reform emerged in the wake of the controversy surrounding the interrogation opinions.<sup>176</sup> For instance, Ackerman advocates the creation of what he calls a Supreme Executive Tribunal, which would review OLC and other executive opinions subject to the intervention of the Supreme Court.<sup>177</sup>

But such reforms are not designed to respond to the problem of judicial deference *per se*. While implementing such reforms may enhance perceptions of the legitimacy of OLC, they are unlikely to substantially alter the Supreme Court's patterns of engagement with the office's opinions. Ultimately, judicial deference to OLC likely requires greater conformity with the policies underlying the Supreme Court's deference decisions—particularly those regarding transparency and consistency of interpretation.

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<sup>175</sup> See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2319 (2006).

<sup>176</sup> See, e.g., Cluchey, *supra* note 3.

<sup>177</sup> ACKERMAN, DECLINE, *supra* note 1, at 143–52.