# THE WRITING ON THE WALL: A PROPOSAL FOR REFORM OF THE OFFICE OF LEGAL COUNSEL IN THE WAKE OF THE TRUMP ADMINISTRATION'S BORDER WALL

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# I. INTRODUCTION

"In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[1] In 1788, James Madison wrote that each branch of the federal government must constitutionally be able to exhibit power over the next.[2] The government cannot function without normative checks and balances. "The most difficult task," Madison wrote in a different paper, "is to provide some practical security for each, against the invasion of the others."[3] Since the ratification of the United States Constitution in 1788[4] and the establishment of the three branches of government, questions of separation of powers have become critical to the legal world in the United States.[5] These questions most notably arise within issues of congressional versus presidential powers and which branch is given the power to address various problems that arise.[6] The Supreme Court has struggled to maintain a framework to analyze these issues, although it have made several attempts throughout the centuries.[7] In recent decades, a new question has arisen in this context, specifically surrounding issues of individual rights: to what extent does Congress have the power to control or monitor how the President receives his legal advice?

The attacks against the United States on September 11, 2001, changed the foundation of the country, particularly regarding executive power in times

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1 THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

2 THE FEDERALIST NOS. 48, 51 (James Madison).

3 THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

4 NCC Staff, *The Day the Constitution was Ratified*, NAT'L CONST. CTR. (June 21, 2023), https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified.

5 *See generally* Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467 (2011).

6 *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Dames & Moore v. Regan, 453 U.S. 654 (1981).

7 *See generally Youngstown*, 343 U.S. 579; *Dames & Moore*, 453 U.S. 654.

of crisis.[8] Notably, the Bush administration's drastic efforts regarding the detention of individuals in the wake of the terrorist attacks have provided precedent for bold executive actions when the President decides such actions are needed and illuminated severe problems in the legal deference given to the President and the Office of Legal Counsel ("OLC").[9]

Since September 11, 2001, various presidents have taken intrepid steps to address issues in controversial ways, whether it be regarding the detention of suspected terrorists at Guantanamo Bay by the Bush administration,[10] unsanctioned drone strikes in the Middle East by the Obama administration,[11] or the reallocation of emergency funding for the construction of a wall between the border of the United States and Mexico by the Trump administration.[12]

This Note addresses these concerns, specifically the seemingly unchecked power of the executive branch and its legal determinations in a discussion of how such determinations relate to matters of individual rights. To illustrate the ramifications of the shortcomings of the OLC and other lawyers who offer the President advice, Part II of this Note provides a background on Trump's Border Wall ("The Wall") and the legal justifications put forth by the Trump administration regarding the reallocation of funding to build it. Part III assesses the legal frameworks through which this question is to be considered, concluding that Congress indeed has the constitutional power to reform the OLC. Having determined that such congressional power exists, Part IV suggests legislative reforms Congress can make to provide greater oversight and transparency to the executive branch's legal reasoning.

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[8] *See generally* Deborah Pearlstein, *What War Did to the Academy, What the Academy Did to War: A 20-Year Retrospective on the Effects of the Post-9/11 Wars*, 54 CASE W. RES. J. INT'L L. 171 (2022); Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017).

[9] *See generally* Pearlstein, *supra* note 8; Renan, *supra* note 8.

[10] *See generally* Katherine Hawkins, *The Lies Inside the Torture Report*, POLITICO (Jan. 20, 2015), https://www.politico.com/magazine/story/2015/01/torture-report-lies-114693; Marcia Pereira, *The "War on Terror" Slippery Slope Policy: Guantanamo Bay and the Abuse of Executive Power*, 15 U. MIAMI INT'L & COMP. L. REV. 389 (2008); Shayana Kadidal, *Does Congress Have the Power to Limit the President's Conduct of Detentions, Interrogations and Surveillance in the Context of War?*, 11 N.Y.C. L. REV. 23 (2007).

[11] Peter Bergen & Alyssa Sims, *The U.S. Counterterrorism War and Libya*, NEW AM. (June 20, 2018), https://www.newamerica.org/international-security/reports/airstrikes-and-civilian-casualties-libya/the-us-counterterrorism-war-and-libya; Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62 (2011).

[12] Matt Zapotosky & Josh Dawsey, *How President Trump Came to Declare a National Emergency to Fund His Border Wall*, WASH. POST (Feb. 15, 2019), https://www.washingtonpost.com/world/national-security/how-president-trump-came-to-declare-a-national-emergency-to-fund-his-border-wall/2019/02/15/3e9f4348-3152-11e9-8ad3-9a5b113ecd3c_story.html; Engy Abdelkader, *Immigration in the Era of Trump: Jarring Social, Political, and Legal Realities*, 44 HARBINGER 76 (2020).

## II. BACKGROUND

### *A. The Office of Legal Counsel*

In recent years, the OLC has become immensely powerful in constructing legal reasoning for presidential power within the executive branch.[13] Given the seriousness of the President's decisions, they must have a group of attorneys offering sound legal advice.[14] This process is not necessarily a problem; functionally, the President must obtain legal advice from somewhere.[15] Where this has become a critical issue, however, is in the context of individual rights.[16]

As scholars have pointed out, there is little oversight of the OLC's actions, and its opinions are generally considered binding on the Executive.[17] In many circumstances, the OLC's opinions are rarely read by anyone outside of the executive branch, and no independent body regularly reviews them.[18] Because of this, the President tends to follow what these lawyers advise in their opinions.[19] Normatively speaking, if the advising attorneys in the OLC provide guidance to the President that he does not have the legal authority to do "X", he will generally not do "X."[20]

Two main practices stem from thinking these opinions are binding on the President.[21] First, the President often compels the OLC to find legal options to support the President's way of thinking.[22] In other words, the President retroactively seeks support for their political agenda within the OLC rather than seeking support *before* taking action.[23] For example, this practice was present during the Bush administration's use of Enhanced Interrogation Techniques ("EITs") on detainees who were suspected of terrorism.[24] The Bush administration's OLC notoriously wrote that such interrogation was legal in what became known as the Torture Memos.[25]

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13 *See generally* Renan, *supra* note 8, at 805.

14 *Id.*

15 *See generally id.*

16 *See generally* Abdelkader, *supra* note 12; Pereira, *supra* note 10; Kadidal, *supra* note 10.

17 *See generally* Renan, *supra* note 8, at 805.

18 *See generally id.*

19 *See generally id.*

20 *See generally id.*

21 *Id.* at 815-48.

22 *Id.* at 835-48.

23 *Id.*

24 *A Guide to the Memos on Torture*, N.Y. TIMES (2002), https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html?_r=2 [https://perma.cc/3FCP-KWTS], (last visited Sept. 18, 2023).

25 *Id.*; *see also* Andrew Cohen, *The Torture Memos, 10 Years Later*, THE ATLANTIC (Feb. 6, 2012) https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439 [https://perma.cc/U3N5-7MLP].

Second, another practice that comes to light in this scenario is a sort of forum shopping undertaken by the President, or the concept of seeking out different forums until finding one that will support their idea.[26] This is an exception to the thought that the OLC's opinions are considered binding. The idea is that if the OLC comes back with an opinion that is antithetical to the President's agenda, he might seek legal advice from other lawyers in the executive branch to support his agenda.[27] Most notably, this occurred during the Obama administration's 2011 airstrikes in Libya,[28] where former President Obama found a legal basis for this action not from the OLC, but from a group of lawyers pulled from various executive branch positions.[29] After the OLC told President Obama that conducting these strikes would not be legal, his administration sought legal advice from other attorneys until it found some who agreed with his position.[30]

Both of these practices illustrate how dangerous the President's power can be when legal advice provided to him is not effectively governed by oversight.[31] Without a standard process for reviewing these decisions, legal advice to the President has the potential to offer almost-unchecked power for any President to further their agenda.[32] Under the first theory of practice, the OLC works for the President almost as lawyers work for a plaintiff, manipulating laws into scenarios that support a position beneficial to them.[33] Under the latter, the President seeks lawyers who support him in whatever he wishes to do.[34] Both approaches could have dire consequences regarding the unchecked power they potentially offer the President.[35] Considering that the OLC is meant to be a clear-headed, succinct branch of lawyers who uphold constitutional law, these approaches to governance are cause for concern.[36]

To further depict these problems, legal scholar Daphna Renan has established two concepts of executive branch legalism that will be adopted in

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[26] *See generally* Renan, *supra* note 8, at 805.

[27] *See generally id.*

[28] Andrew Glass, *This Day in Politics: Obama Approves Airstrikes Against Libya, March 19, 2011*, POLITICO (Mar. 19, 2019), https://www.politico.com/story/2019/03/19/barack-obama-libya-airstrikes-1224550.

[29] Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces That Entrench Executive Power*, 110 AM. J. INT'L L. 680, 691-92 (2016).

[30] *See generally*, Morrison, *supra* note 11, at 62; Ingber, *supra* note 29, at 691-92.

[31] *See generally* Pereira, *supra* note 10; Abdelkader, *supra* note 12; Kadidal, *supra* note 10.

[32] *See generally* Renan, *supra* note 8, at 805.

[33] *Id.* at 815-35.

[34] *Id.* at 835-48.

[35] *Id.* at 815-48 (explaining the similarities and differences between the two theories of executive branch legalism).

[36] *See generally id.* at 805.

this Note.[37] The first concept is a formalistic and centralized approach, while the other is what Renan refers to as "porous legalism."[38]

According to Renan, the formalistic perspective is what the OLC has been historically linked to practicing: providing the President with legal opinions that are trustworthy and binding.[39] In writing case-specific opinions that generally align with precedent and what the current governing law is, the OLC can provide a centralized opinion for the President, who in turn tends to follow the opinion offered.[40]

The flip side of this formalistic perspective is what Renan calls "porous legalism," which occurs when the President seeks informal legal advice from various lawyers within the executive branch.[41] In essence, this kind of legal advice offers the President several courses of action with reasoning for each one, without issuing a formal opinion.[42] This, as stated above, results in a kind of forum shopping, where the President solicits different options and subsequently chooses which opinion he wishes to follow.[43] "Porous legalism" is the kind of executive branch legalism that has risen in recent decades and poses a threat to individual rights, particularly because it allows presidents to have almost unfettered discretion in their legal power.[44]

### *B. The Wall*

During Donald Trump's presidential campaign, he announced one of the central foundations of his election platform: that he would build The Wall along the border between the United States and Mexico.[45] Additionally, he promised his supporters that Mexico would be picking up the tab.[46] During Trump's campaign, plans for The Wall never materialized, but instead sat in a fog of assurances from him that it would be completed.[47] After his inauguration, the Trump administration immediately faced problems concerning how to actually complete the promises made.[48] When the time came for action, Mexico refused to pay for The Wall, and Congress was

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37 *Id.* at 805.

38 *Id.* at 815-48.

39 *Id.* at 815-35.

40 *Id.*

41 *Id.* at 835.

42 *Id.* at 835-48.

43 *Id.*

44 *See generally id.* at 805.

45 Nolan McCaskill, *Trump Promises Wall and Massive Deportation Program*, POLITICO (Aug. 31, 2016), https://www.politico.com/story/2016/08/donald-trump-immigration-address-arizona-227612.

46 *Id.*

47 Michael Albertus, *Why Trump's Border Wall Failed*, WASH. POST (Feb. 17, 2021, 6:00 AM), https://www.washingtonpost.com/politics/2021/02/17/why-trumps-border-wall-failed.

48 *See generally* Zapotosky & Dawsey, *supra* note 12.

unwilling to allocate enough funds to build it.[49] Intended to be a 722-mile-long barrier between the United States and Mexico, The Wall's total cost was estimated to be around eighteen billion dollars.[50] By 2019, only eighty-two miles of The Wall had been built or were in progress of being built, and funds directly authorized by Congress only totaled about three billion dollars–a fraction of the total needed.[51]

Working behind the scenes to lobby for congressional support, Trump's aides only managed to secure an additional 1.6 billion dollars from Congress, still far short of the funding needed to complete The Wall.[52] Trump reportedly scolded his aides that they needed to find a way to build The Wall without congressional authorization.[53] In order to deliver on Trump's campaign promises, the Trump administration made a bold move that was not supported by law: declaring the flux of immigrants from the southern border a national emergency to reallocate emergency funds to build The Wall under Proclamation No. 9844.[54] In doing so, the action would allow the administration to access an additional eight billion dollars for building The Wall.[55] The executive branch would have more funding available that had been reallocated from other parts of the federal government, including the Department of Treasury and the Department of Defense.[56] While the legal basis for the declaration of a national emergency was questioned, the OLC approved it, signing off that it had been reviewed for form and legality.[57] The Wall would face additional challenges after this declaration, including an array of lawsuits from various plaintiffs as well as actual struggles to secure these emergency funds (as much of them had already been spent elsewhere).[58] This Note's primary focus is on the legal implications of the

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[49] *Id.*

[50] *Trump's Budget Will Ask Congress for $8.6 Billion for Border Wall*, CNBC (Mar. 10, 2019, 8:23 AM), https://www.cnbc.com/2019/03/10/in-budget-trump-to-ask-congress-for-8point6-billion-for-border-wall.html.

[51] *Trump's Budget Will Ask Congress for $8.6 Billion for Border Wall*, *supra* note 50.

[52] Zapotosky & Dawsey, *supra* note 12.

[53] *Id.*

[54] Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 19, 2019) [hereinafter Proclamation No. 9844].

[55] Zapotosky & Dawsey, *supra* note 12*;* Annika Lichtenbaum, *"Form and Legality": The Office of Legal Counsel's Role in the National Emergency Declaration*, LAWFARE (Feb. 19, 2019, 4:37 PM), https://www.lawfaremedia.org/article/form-and-legality-office-legal-counsels-role-national-emergency-declaration.

[56] Zapotosky & Dawsey, *supra* note 12; *Trump's Budget Will Ask Congress for $8.6 Billion for Border Wall*, *supra* note 49 (explaining where the reallocated emergency funds came from within the federal government's budget).

[57] Zapotosky & Dawsey, *supra* note 12; *see also* Lichtenbaum, *supra* note 54.

[58] Tom Embury-Dennis, *Trump Border Wall: Third of Pentagon Money President Plans to Use for Wall Is Already Spent, Officials Say*, INDEP. (Feb. 22, 2019), https://www.independent.co.uk/news/world/americas/us-politics/trump-border-wall-mexico-emergency-powers-pentagon-money-congress-a8791951.html.

decision by the Trump administration and the OLC to declare a national emergency.

It is crucial, however, to be aware of the effects that this declaration of a national emergency had on individual rights.[59] The Wall, even in the limited capacity in which it ended up being built, poses serious risks to individual rights.[60] First, The Wall, most notably, had an impact—both practically and symbolically—on immigrants traveling from Central and South America to the United States.[61] While the effectiveness of The Wall in keeping people from entering the United States was faulty and hard to assess, its symbolic effect was deeply and profoundly felt.[62] By building The Wall between the United States and Mexico, the United States effectively told immigrants, refugees, and asylum-seekers that they were not wanted or needed in the country.[63] On top of upturning the foundational pillar of the United States of America, The Wall was, and still remains, a dire symbol to those fleeing their homes for various reasons.[64]

Another group of people whose rights are infringed upon by The Wall are indigenous communities.[65] The state of Texas alone had "at least three Native American communities, two of them federally recognized, liv[ing] in areas affected by [The] [W]all['s] construction."[66] Thousands of people living on Mexican lands are barred from living their regular lifestyles, including migrating back and forth from Mexico to the United States.[67] "'If someone came into your house and built a wall in your living room, tell me, how would you feel about that?'[,]" Verlon Jose, Vice Chairman of the Tohono O'odham Nation, told the New York Times.[68]

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[59] Susannah Crockford, *Why Building a Wall on the US-Mexico Border Is a Symbolic Monument, Not Sensible Immigration Policy*, LONDON SCH. ECON. & POL. SCI. BLOG (Feb. 21, 2017), https://blogs.lse.ac.uk/usappblog/2017/02/21/why-building-a-wall-on-the-us-mexico-border-is-a-symbolic-monument-not-sensible-immigration-policy.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *The Texas-Mexico Border Wall: Affected Communities*, U. TEX. AUSTIN SCH. L., https://law.utexas.edu/humanrights/borderwall/communities/#:~:text=Members%20of%20at%20least%20three,Paso%20area%20of%20west%20Texas (last visited Sept. 18, 2023).

[66] *Id.*

[67] Christina Leza, *How a Border Wall Would Separate Indigenous Communities*, PAC. STANDARD (Mar. 19, 2019), https://psmag.com/social-justice/a-border-wall-would-separate-indigenous-communities.

[68] Fernando Santos, *Border Wall Would Cleave Tribe, and Its Connection to Ancestral Land*, N.Y. TIMES (Feb. 20, 2017), https://www.nytimes.com/2017/02/20/us/border-wall-tribe.html (writing about the impacts the wall would have on the Tohono O'odham Nation).

Additionally, there are serious impacts on private landowners whose land runs along The Wall's construction path.[69] The prospect of losing their land resulted in many lawsuits and extended litigation for the Trump administration.[70] The government is allowed to take private land for public good under eminent domain laws,[71] but doing so results in extremely tedious litigation, and owners demand high prices for their land that the government may not want to pay.[72] From a constitutional perspective, on top of these issues, the Fifth Amendment's Takings Clause is supposed to protect landowners from precisely this type of taking.[73] The Wall's impact on individual rights is clearly felt, and the problems it poses in that context are plain to see.

## III. LEGAL ANALYSIS

### *A. Constitutional Framework*

#### 1. Congressional Article I Powers

The Constitution grants both Congress and the President extensive authority, much of which overlaps, blurring the lines between congressional power and executive power.[74] While some powers suggest stronger arguments than others, it is clear that Congress can exert at least some control over the President's actions through the plain text of the Constitution.[75] In Article I of the Constitution, the writers expressed what powers are vested in the legislative branch.[76] Article I § 8 contains the language most on point for this issue: "Congress shall have the power to…" (a) constitute tribunals inferior to the Supreme Court,[77] (b) make rules for the government,[78] and (c) declare war.[79] From this language, one could craft arguments about broad congressional power in this context: Congress has the power to regulate the OLC under its tribunal powers, as the OLC can be construed as a "tribunal[] inferior to the Supreme Court."[80] The OLC crafts opinions that are generally

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69 *The Texas-Mexico Border Wall: Affected Communities*, *supra* note 65.

70 Michael Albertus, *supra* note 47.

71 *See generally* U.S. CONST. amend. V.

72 Albertus, *supra* note 47.

73 *Id.*; *see also* U.S. CONST. amend. V.

74 *See* U.S. CONST. art. I; *see also* U.S. CONST. art. II.

75 *See generally* U.S. CONST. art. I.

76 *See generally id.*

77 U.S. CONST. art. I, § 8, cl. 9.

78 U.S. CONST. art. I, § 8, cl. 14.

79 U.S. CONST. art. I, § 8, cl. 11.

80 U.S. CONST. art. I, § 8, cl. 9.

considered binding upon the Executive.[81] Because of this, the OLC is, by some construction of language, an inferior judicial body to the Supreme Court.[82] Article I provides Congress with a very straightforward textual argument in this way.[83] However, the counterargument is simply that, with the word "tribunals," the Founding Fathers meant courts or other kinds of judicial proceedings rather than a body that operates simply by generating legal advice.[84]

Also stemming from the Constitution, Congress has power over the OLC as evidenced by the Article I language that Congress shall be able to "make rules for the government."[85] Here, the Founding Fathers decided to paint broad strokes and grant Congress the power to create rules for the government.[86] Using this power, Congress has the ability to make rules for the operation of the OLC since it is, if nothing else, a form of government.[87] Although Congress has the power to make rules for the government, one could argue that it does not have the power to unconstitutionally impede the executive branch from carrying out its powers.[88] This debate falls under a separation of powers framework, balancing the interests and procedures of how each branch of government has the power to restrain another.[89]

Under Article I, Congress also has the power to declare war.[90] War powers give Congress broad control over issues involving national security.[91] Generally, these powers allow Congress to actively participate in national security decisions.[92] Using this framework, it is not difficult to imagine that outcomes in different factual scenarios–Guantanamo Bay detentions, Libyan airstrikes, and The Wall–would likely have turned out differently had Congress been given an active role in the decision

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[81] *See* Renan, *supra* note 8, at 815.

[82] *See generally Office of Legal Counsel*, U.S. DEP'T JUST., https://www.justice.gov/olc (last visited Feb. 21, 2023).

[83] *See generally* U.S. CONST. art. I.

[84] *See generally id.*

[85] U.S. CONST. art. I, § 8, cl. 14.

[86] *Id.*

[87] *See generally Office of Legal Counsel*, *supra* note 82.

[88] *See generally* U.S. CONST. art. I.

[89] *See generally id.*; U.S. CONST. art. II.

[90] U.S. CONST. art. I, § 8, cl. 11.

[91] *Id.*

[92] *Id.*

making.[93] However, war powers are complicated on their own.[94] Congress does not have unilateral power when it comes to issues regarding war and military action: the President is the constitutionally-designated Commander in Chief.[95] As Commander in Chief, the President also has broad discretion in times of war.[96] The differing assignments of war powers by the Constitution provide a clear example of the complexities arising from separation of powers issues.[97]

Congress is also constitutionally granted the power of the purse,[98] meaning that it wields funds within the federal government under its Article I powers.[99] This power is broad, as the government requires congressionally-approved funding to do almost anything.[100] By appropriating funds, Congress is granted constitutional power to decide where the government's funding should be spent.[101] In sum, Congress is granted powers to perform a vast variety of duties under the Constitution.[102]

### 2. Presidential Article II Powers

The President is granted several powers in Article II of the Constitution that support their power to make decisions.[103] In addition to the Commander in Chief Clause,[104] which was used as justification for the Bush administration's detention and EITs,[105] as well as the Obama administration's

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[93] *See generally* Tim Lau, *Trump Vetoes After Congress Rejects Border Emergency*, BRENNAN CTR. FOR JUST. (Mar. 14, 2019), https://www.brennancenter.org/our-work/analysis-opinion/trump-vetoes-after-congress-rejects-border-emergency. The deep skepticism in the Senate suggests that congressional involvement might have rejected the proposal in the first place.

[94] *War Powers*, *Legal Information Institute*, CORNELL L. SCH., https://www.law.cornell.edu/wex/war_powers (last visited Dec. 21, 2022).

[95] U.S. CONST. art. II, § 2, cl. 1.

[96] *Id.*

[97] *See generally War Powers*, *supra* note 94.

[98] U.S. CONST. art. I, § 9, cl. 7; *see also* U.S. CONST. art. I, § 8, cl. 18. Taken together, the Appropriations Clause, in conjunction with the Necessary and Proper Clause, has been understood to give Congress the power to wield and regulate funding throughout the federal government. *See generally* Kate Stith, *Appropriations Clause: Common Interpretation*, CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-i/clauses/756 (last visited Nov. 20, 2023).

[99] U.S. CONST. art. I, § 9, cl. 7; *see also* U.S. CONST. art. I. § 8, cl. 18; *see supra* text accompanying note 98.

[100] U.S. CONST. art. I, § 9, cl. 7; *see also* U.S. CONST. art. I. § 8, cl. 18; *see supra* text accompanying note 98.

[101] U.S. CONST. art. I, § 9, cl. 7.

[102] *See* U.S. CONST. art. I.

[103] *See generally* U.S. CONST. art. II.

[104] U.S. CONST. art. II, § 2, cl. 1.

[105] Marcia Pereira, *supra* note 10.

airstrikes,[106] the President also retains appointment and foreign powers.[107] Under the Appointments Clause, the President is allowed to appoint executive officers.[108] Opponents of stricter congressional oversight claim that, while it is true that the Senate has confirmation power over those that the President appoints to executive officer positions, including the Assistant Attorney General ("AAG"), the Senate does not choose who gets nominated for the position; that power remains with the President.[109] In other words, opponents of stricter congressional oversight essentially claim that congressional confirmation powers are merely procedural checks and balances, but the substantive decision regarding who becomes AAG is made by the President.[110] Lastly, it is important to note that the Supreme Court has generally construed the appointment power of the President broadly, meaning that the President's appointment powers are robust and not often constrained.[111]

Additionally, presidential foreign powers are quite broad.[112] Article II provides that "the President shall have the power to receive Ambassadors and other Public Ministers."[113] This power has been interpreted to mean that when it comes to foreign powers, courts will defer to the Executive, as that power is "pre-constitutional."[114] In this context, "pre-constitutional" powers means that, if the Constitution had not existed, the Executive would still have the power.[115] With this explanation, opponents of congressional oversight of executive legal advice can argue that this broad, pre-constitutional power should give the President exclusive legal authority over any issue regarding foreign affairs.[116]

After a review of the relevant constitutional provisions that vests power in either Congress or the President, two things become clear. First, the question of separation of powers continues to be ambiguous because the Constitution provides for both branches to have significant amounts of

[106] *See generally* Morrison, *supra* note 11, at 62; Ingber, *supra* note 29.

[107] U.S. Const. art. II, § 2, cl. 2.

[108] *Id.* (writing that the President may appoint government officials with "Advice and Consent" of the Senate).

[109] *Id.*

[110] *See generally Office of Legal Counsel*, supra note 82.

[111] *See generally* Myers v. United States, 272 U.S. 52 (1926); Morrison v. Olson, 487 U.S. 654 (1988); Edmond v. United States, 520 U.S. 651 (1997).

[112] *See generally* U.S. CONST. art. II; United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936); Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1 (2015).

[113] U.S. CONST. art. II, § 3, cl. 3.

[114] *Curtiss-Wright*, 299 U.S. at 318-19.

[115] *Id.*

[116] *See generally id.* at 304; *see also* U.S. CONST. art. II, § 3, cl. 3.

power.[117] The second, however, is that Congress does, in fact, have some power.[118] The question that remains is how Congress should wield that power.

### *B. Statutory Framework to Provide Historical Support for Proponents of Stricter Congressional Oversight of Executive Legal Advice*

#### 1. The Creation of the OLC

When addressing the power Congress holds, statutory frameworks might provide guidance regarding who has control over the OLC. To begin, because Congress created the OLC, Congress must have *some* control over the OLC (and, by extension, general presidential lawyering).[119] Congress authorized the Attorney General ("AG") to issue legal opinions to the President under the Judiciary Act of 1789.[120] It is from this that the OLC, the primary issuer of these opinions, derives its power.[121] Under 28 U.S.C. §§ 510, 511, 512, and 513,[122] Congress created the OLC as part of an assignment of the AG to issue opinions on legal questions by executive branch officials.[123] As a result, the OLC became part of the Department of Justice ("DOJ").[124]

#### 2. Confirmation Powers of Congress

The Senate is charged with confirming the AAG, who is the head of the OLC.[125] This gives the Senate, at the very least, broad power over the leader of the OLC, theoretically extending their power to control how legal advice is given to the President.[126] In other words, if Congress is unhappy with the AAG who the President wishes to run the OLC and does not approve of them for any reason, Congress can refuse to confirm them and stop their appointment, thus reshaping how the OLC is built.[127] Such disapproval may arise for several reasons, with some examples being actual or perceived

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[117] *See generally* U.S. CONST. art. I; U.S. CONST. art. II.

[118] *See infra* Part III(B); *see generally* U.S. CONST. art. I.

[119] *See generally* 28 U.S.C. §§ 510-13; *see generally* RONALD D. ROTUNDA & JOHN E. NOWAK, 6 TREATISE ON CONSTITUTIONAL LAW, Appendix D (arguing that since Congress created the OLC with these statutes, it should retain some control).

[120] *Id.*

[121] *See generally id.*; 28 U.S.C. §§ 510-13; *see also Office of Legal Counsel*, *supra* note 82.

[122] 28 U.S.C. §§ 510-13.

[123] *Id.*; *see also Office of Legal Counsel*, *supra* note 82.

[124] *Office of Legal Counsel*, *supra* note 82.

[125] 28 U.S.C. § 506.

[126] *Id.*

[127] *See generally* U.S. CONST. art. I; *see also* 28 U.S.C. § 506 (The Constitution and the statute require the President to appoint AAGs with the "Advice and Consent of the Senate.").

under-qualification, a lack of trust in opinions, or a disagreement on interpretations of the Constitution.[128] This gives Congress some control over the makeup of the OLC during any administration.[129] If the Senate is charged with such power over the AAG, and therefore the person acting as the head of the OLC, what other aspects of the OLC can Congress be charged with controlling?

### 3. Previous Reform: Practice and Acquiescence

In 2014 Congress passed a reform to the OLC in the Intelligence Authorization Act for Fiscal Year 2014 ("the Act").[130] The Act required the AG to establish a process for Congress to regularly review OLC-issued opinions that have been provided to an element of the intelligence community.[131] While not directly addressing the extent of congressional power of the legal advice of the executive branch, the Act suggests that oversight through the legislature regarding the OLC's practices and procedures can and does exist, as Congress has legislatively directed reform for the OLC within the last decade.[132] Therefore, since Congress has established ways to grant review over the OLC's decisions in the past, Congress should also have the power to reform the OLC's procedures and operations to provide more oversight and keep legislators more informed about the opinions that the OLC issues.[133]

While none of these examples of congressional legislation over the OLC provide an exact guidebook for the scope of power Congress has over presidential legal advice, they do shed some light on how to think about the power of Congress in this context. Congress has exerted power over the OLC in many instances over the years, whether it is the fact that the OLC was born out of an act of Congress,[134] the Senate's confirmation power of the AAG,[135] or the fact that legislative reform over the OLC has been passed in recent history with the Act.[136] These instances suggest that Congress can exert more

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[128] *See generally* U.S. CONST. art. I.

[129] U.S. CONST. art. II, § 2, cl. 2.

[130] Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, 128 Stat. 1390 (July 7, 2014).

[131] *Id.*

[132] *Id.*

[133] *See generally id.*

[134] 28 U.S.C. §§ 510-13; *see also* ROTUNDA & NOWAK, *supra* note 119. Congress authorized the Assistant Attorneys General to assist the Executive Branch with legal opinions and guidance. *See generally Office of Legal Counsel*, supra note 82.

[135] U.S. CONST. art. II § 2, cl. 2.

[136] Intelligence Authorization Act for Fiscal Year 2014, Pub. L. 113-126, 128 Stat. 1390 (July 7, 2014).

power over the legal advice of the President in a more assertive way than they have done before.[137]

### *C. The United States Supreme Court Precedent – Decisions Regarding the Framework of the Separation of Powers*

The Supreme Court has an extensive common law history on separation of powers, with these issues first arising centuries ago.[138] While the Court has changed the standard several times, the general framework that has remained through the years comes from Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[139] In *Youngstown*, Jackson's concurrence identified that executive power must either come from the Constitution or an act of Congress.[140] If from an act of Congress, the executive power will fall into one of three categories: (1) where there is congressional authorization of the action, thereby giving the executive action its maximum amount of power;[141] (2) where Congress has been silent or unclear, meaning the Court must look to "imperatives of events and contemporary imponderables" to determine whether there is a prevailing modern interest at stake which provides the President the authority;[142] and (3) where Congress has prohibited the action, therefore giving the President the lowest amount of authority.[143]

Applying the framework from Justice Jackson's concurrence, the legal advice given to the President from official offices such as the OLC falls into the second category.[144] This does not fall into the first category in the sense that Justice Jackson intended.[145] The law which created the OLC was the Judiciary Act of 1789.[146] This law was, more than anything, a procedural law

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[137] *See generally id.*; *see generally Office of Legal Counsel*, supra note 82; *see generally* ROTUNDA & NOWAK, *supra* note 119 (illustrating Congress' previous actions show that more opportunities for oversight are available to them).

[138] *See e.g.,* Marbury v. Madison, 5 U.S. 137 (1803); United States v. Klein, 80 U.S. 128 (1871); Myers v. United States, 272 U.S. 52 (1926); Buckley v. Valeo, 424 U.S. 1 (1976); Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

[139] *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring).

[140] *Id.* at 645.

[141] *Id.* at 635; *see also* Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*").

[142] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

[143] *Id.*

[144] *See generally id.*

[145] *Id.* at 635.

[146] Memorandum for Att'ys of the Off.: Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) (available at https://www.justice.gov/media/1226496/dl?inline).

that shaped the federal court system.[147] While Congress did pass a law in 1789 that was to be the foundation of the OLC and other bodies which provide legal advice to the President, the fact that it was passed within this sweeping legislation which sought to establish a comprehensive federal court system in the newly-created United States, suggests that Congress was more concerned with the federal court system than the specifics with which a President was to receive legal advice.[148] Additionally, Congress has authorized such an office within the executive branch through legislation, but Congress does not explicitly authorize the decisions made by these bodies.[149] Because of this, the legal advice also does not fall into the third category,[150] as there has been some authorization by Congress over the centuries since the passage of the Judiciary Act.[151]

Since this issue of presidential legal advice likely falls into the second category, Justice Jackson's concurrence in *Youngstown* directs the analysis toward "imperatives of events and contemporary imponderables": what are the current affairs in the polity that are happening now that would not have been happening at the time the law was passed?[152] Here, the analysis must turn to a balancing test of (1) supporting the goals of separation of powers and maintaining the checks and balances, and (2) wanting to reign in the President from taking too much unchecked power and using it for their own gain and political agenda.[153]

While Jackson's concurrence provides guidance, this standard is malleable.[154] The idea of "imperatives of events and contemporary imponderables" is theoretical, and while it assists in providing some semblance of what is needed to reach this standard, this balancing test is, more than anything else, a debate of policy.[155] Supporters of congressional oversight have several arguments that support a contemporary need for more insight into executive branch legal reasoning. There have been clear abuses of power from the past three presidents: Bush's detention and use of EITs on individuals suspected of terrorism in the extraterritorial prison of Guantanamo Bay,[156] civilian casualties as a result of Obama's deployment of

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[147] Richard D. Freer, *The Judiciary Act of 1789*, *in* 13 FED. PRAC. & PROC. JURIS. § 3503 (Wright & Miller 3d ed., April 2023).

[148] *See generally id.*

[149] *See generally Office of Legal Counsel*, *supra* note 82.

[150] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

[151] Intelligence Authorization Act for Fiscal Year 2014, Pub. L. 113-126, 128 Stat. 1390 (July 7, 2014).

[152] *Youngstown*, 343 U.S. 579 (Jackson, J., concurring).

[153] *Id.*

[154] *See generally id.* at 579.

[155] *See generally id.* at 637.

[156] *See generally* Hawkins, *supra* note 10; Marcia Pereira, *supra* note 10; Kadidal, *supra* note 10.

drone strikes after the OLC informed him that he did not have the power to conduct such strikes,[157] and, most notably, Trump's national emergency declaration to reallocate emergency funds to build The Wall.[158]

Proponents of stricter congressional controls can use these instances as factors of contemporary polity to support the position that the Constitution supports congressional oversight; in recent years, presidents have taken to more egregious disregards of legal thinking and acted with indifference to precedent or legal justification.[159] While the acts by the Bush and Obama administrations were at least partially guided by wartime efforts of the War on Terror, and therefore supported in part by the Article II Commander in Chief Clause,[160] the Trump administration's funding of The Wall is arguably the most flagrant example of disregard for the law. While Trump's declaration of a national emergency to reallocate funding for The Wall was an attempt to insulate the administration from liability and oversight by providing legal justification for such reallocation,[161] the action caused many scholars and policymakers to question the decision.[162] Proponents of stricter oversight can argue that executive power is more unchecked than it ever has been before[163] and that in contemporary American politics, it is important and indeed necessary for stricter congressional oversight of the President.[164]

While Jackson's concurrence in *Youngstown* supports stronger oversight, the case law does not all support Congress's position on these issues. In *Dames & Moore v. Regan*, the Supreme Court found that functional considerations matter when determining the existence or absence of congressional authorization.[165] In *Dames & Moore*, the fact that Congress had what the Court referred to as a "general tenor" toward presidential foreign power signaled that it approved of the President having this power.[166] This type of reasoning has implications for this Note in two ways. First, the "general tenor" standard can broadly affect the deference courts give to presidential actions. Congress has, over the years, authorized several

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157 *See generally* Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), https://www.nytimes.com/2011/06/18/world/africa/18powers.html#:~:text=WASHINGTON%20%E2%80%94%20President%20Obama%20rejected%20the,officials%20familiar%20with%20internal%20administration.

158 Zapotosky & Dawsey, *supra* note 12; *see generally* Abdelkader, *supra* note 12, at 85-86.

159 *See* Zapotosky & Dawsey, *supra* note 12; see McCaskill, *supra* note 45 for examples.

160 U.S. CONST. art. II, § 2, cl. 2; *see* Hawkins, *supra* note 10; *see also* Pereira, *supra* note 10.

161 *See* Zapotosky & Dawsey, *supra* note 12.

162 *See generally* Abdelkader, *supra* note 12.

163 *See generally* Savage, *supra* note 157.

164 *See generally* Abdelkader, *supra* note 12.

165 Dames & Moore v. Regan, 453 U.S. 654, 678 (1981).

166 *Id.* at 678.

presidential actions regarding military and foreign affairs, particularly in the wake of September 11, 2001, most notably the Authorization for Use of Military Force of 2001.[167] This could be enough for the Court to determine Congress's tenor as approving of broad presidential actions.[168] Second, the Court's decision to leave foreign power almost entirely in the hands of the President could weaken the claim that Congress should have oversight over these issues.[169] However, this standard can also be applied contrarily and support the position that Congress should have more supervision; the passage of the Intelligence Authorization Act in 2014 suggests that Congress has *not* had a generally-approving stance on the OLC in recent years. On the contrary, it has requested more insight into it, specifically regarding instances of intelligence–generally a topic that falls into foreign affairs.[170]

As in the other two subsections of Part III of this Note, the legal analysis sheds light on how Congress can exert control over the Executive in the context of legal reasoning using Supreme Court precedent. The following part of this Note will take the analysis above and apply it as part of a proposal for constitutionally reasonable legislative reforms Congress can undertake to remedy this problem.

## IV. PROPOSAL

### *A. A New Joint Congressional Committee on Presidential Lawyering*

#### 1. The Joint Committee

Congress must constitutionally wield the power it has to reform the procedure for the executive branch legal analysis. To fix the problem of unchecked executive power, there must be broad reform of the OLC by Congress. Congress should create a new Joint Congressional Committee on the Oversight of Presidential Lawyering ("the Committee"). In this reform, Congress should require every OLC-issued opinion to the President to be provided to the Committee for official record and review. While most issued opinions are expected to be legally sound,[171] providing notice to Congress on what is happening in the executive branch's group of lawyers is imperative. In the creation of the Committee, both the Senate and the House could participate in the general review of the OLC decisions. In other words, both houses of Congress would appoint members to review these decisions on a

[167] 115 U.S.C. § 224.

[168] *Id.*

[169] *Dames & Moore*, 453 U.S. at 678.

[170] Intelligence Authorization Act for Fiscal Year 2014, Pub. L. 113-126, 128 Stat. 1390 (July 7, 2014).

[171] *See generally Office of Legal Counsel*, *supra* note 82.

regular basis as part of their committee assignments. If a decision is questionable, the Committee would be able to challenge the decision, thus sending it to the tribunal outlined in the next subsection.

Like existing congressional committees, these reviews would be made in confidentiality,[172] thus maintaining the President's autonomy while providing adequate checks and balances over their legal decision making. Additionally, the language of this legislation could also provide for an occasional withholding of the OLC's opinions out of national security concerns, as written in the Act.[173] Maintaining confidentiality serves separation of powers concerns while addressing functional considerations that the President can make executive decisions without crippling oversight and publicity.

Committees have long been recognized as a part of the normative operations of Congress.[174] Since the first committee was created centuries ago,[175] committees have become central to the performance of Congress.[176] It is unlikely that the constitutionality of such committees would ever be challenged due to their importance in American polity as well as such long practice and acquiescence of their existence.[177] From a textual perspective, under Article I, Congress has the power to make rules for the government.[178] Congress has the power to create such a committee for itself,[179] and doing so would be of incredible importance to the future oversight and regulation of the executive branch.

### 2. A Hypothetical Analysis in Context

It is helpful to ponder such a proposal as the one set out here as if it were in effect during the promise of The Wall. If this proposal were enacted at the time in which this proclamation was made, the Trump administration would have sent the proposal to the OLC for review. As is standard in the OLC's review of national emergency declarations, the OLC attorneys would

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[172] *See generally* MILDRED AMER, CONG. RSCH. SERV., SECRET SESSIONS OF CONGRESS: A BRIEF HISTORICAL OVERVIEW (Mar. 27, 2008).

[173] Intelligence Authorization Act for Fiscal Year 2014, Pub. L. 113-126, 128 Stat. 1390 (July 7, 2014).

[174] *See generally House Committees*, HIST., ART & ARCHIVES, U.S. HOUSE REPS., https://history.house.gov/Education/Fact-Sheets/Committees-Fact-Sheet2/#:~:text=The (last visited Oct. 2, 2023).

[175] *About the Committee System: Historical Overview*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/committee-system/overview.htm (last visited Sept. 18, 2023).

[176] *Id.*

[177] *Id.*

[178] U.S. CONST. art. I § 8, cl. 14.

[179] *See generally id.*

have reviewed the document for form and legality.[180] After signing the proclamation for form and legality, as it did in 2019,[181] OLC would have then sent its opinion to both the White House and the Committee. This would have at the very least, mandated an additional review of the decision, which many may have immediately deemed problematic.

### *B. A New Judicial Tribunal*

Congress should create a new tribunal of three judges to review OLC-issued opinions which are deemed questionable. The jurisdiction of this tribunal would begin and end with legal issues arising out of the OLC and appeals of its decisions would have a direct route to Supreme Court review. Congress should create this tribunal specifically to review the OLC's opinions. The tribunal would have strictly limited jurisdiction to only be reviewing these opinions. To ensure fairness and avoid becoming a political entity, the tribunal should consist of three judges. Having three of these judges would ensure there are no split decisions, but also would keep the number small enough to keep the tribunal from becoming too big of an entity or a substitute for the Supreme Court.

#### 1. Appointments

Instead of being appointed by the President and confirmed with the advice and consent of the Senate like Article III judges,[182] these judges would be appointed through a different process: by the Supreme Court Justices. A judicial appointment process using a similar procedure can be seen in the appointment of bankruptcy judges.[183] Much like how bankruptcy judges are appointed by circuit court judges in their respective jurisdictions, the Supreme Court would be charged with determining which judges to trust with analyzing and answering these legal questions.[184] Having the Supreme Court appoint these judges would maintain a sense of neutrality. While potential remains for a President's Supreme Court appointees to put judges on this tribunal that would be favorable to that President, the idea is that all the Supreme Court Justices (from presumably several different presidents) would be involved in these appointments, thus theoretically promoting a more diverse array of judicial minds.

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[180] Lichtenbaum, *supra* note 55.

[181] Zapotosky & Dawsey, *supra* note 12 (writing that the OLC had signed off on the declaration according to inside sources).

[182] US CONST. art. II, § 2, cl. 2.

[183] *See* Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233 (2008) (discussing the procedure and constitutionality of Federal Bankruptcy Judges).

[184] *See generally id.*

While the President constitutionally gets to appoint federal judges,[185] allowing this tribunal to also be appointed by the President would be counterintuitive. The purpose of the tribunal is to provide oversight and checks on the legal reasoning that comes from the DOJ and the White House. If the President were to have a hand in appointing those who review his decisions, such review could not be expected to be neutral. Additionally, allowing Supreme Court Justices to appoint these judges serves the interest of the separation of powers. All Justices on the Supreme Court have been appointed by a President and confirmed with the advice and consent of the Senate pursuant to the procedure laid out in Article II.[186] Anyone the Justices appoint, therefore, has been transitively approved by both the executive and legislative branches.[187] Appointing judges to this tribunal using a similar process to bankruptcy courts serves the goals of this tribunal in an effective way.

Unlike the Justices on the Supreme Court, the judges on this tribunal would not have lifetime appointments. To once again analogize to bankruptcy judges, these judges would be appointed for fourteen-year terms.[188] This way, the tribunal would stay current. If one of these judges were to retire or pass away during tenure, the Supreme Court would fill the spot. With that said, a required age of retirement would not be in play here in order to allow the Supreme Court to appoint the most qualified judges for the job. Term limits present an opportunity for this court to be able to see changing goals in the legislature and the White House. Limits also add another layer of neutrality, as these judges will not have a perceived loyalty to the President whose decisions they are reviewing.[189] Notably, no judge on this court would be reviewing the decisions of a President who appointed them.

These proposed limitations on the judges of this tribunal serve several purposes. First, providing for the Supreme Court to choose the judges on this tribunal serves neutrality purposes and presents an opportunity for the most qualified judges to sit on the bench. Instead of the President appointing judges whose ideology aligns with their political goals, they will instead have to convince this tribunal to find their decisions legal and constitutional. If the President were able to appoint all three judges on this tribunal, the tribunal would be nothing more than an extension of the legalism that exists in the OLC today where it would work to simply affirm the position which the

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[185] *See generally* U.S. CONST. art. II, § 2, cl. 2; *see also* U.S. CONST. art. III.

[186] U.S. CONST. art. II, § 2, cl. 2.

[187] *See generally* U.S. CONST. art. II, § 2, cl. 2.

[188] *See* Samahon, *supra* note 183, at 234 (explaining the tenure of Bankruptcy Judges).

[189] *See generally* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006).

President wishes to take.[190] By allowing the Supreme Court as a whole to appoint the judges on this tribunal, there will likely be some diversity in terms of the judge's ideologies, and this tribunal could reasonably be expected to reflect the ideology of the Supreme Court itself. This solution takes a constitutionally-sound approach to the appointment process of this tribunal while accounting for functional concerns about the purpose of this kind of OLC reform.

### 2. Removals

Next, the removal process of these judges would be the same as it is of every federal judge.[191] To remove an Article III judge, the judge must be impeached by the House and convicted by the Senate.[192] Because premature removal is difficult, this is an effective way to keep stability in this tribunal. If the President was able to remove these judges through his Article II removal powers,[193] this tribunal would be no more neutral than had the President appointed the judges themself. However, the proposed impeachment process holds open the possibility that a judge may still be removed should they take actions that are inconsistent with the Constitution or commit otherwise-enumerated impeachable offenses.

Finally, the term limits on these judges serves two purposes: (1) to avoid having any member of this tribunal making decisions on executive legal reasoning indefinitely and (2) to allow for continuity in the decisions of a tribunal such as this. A fourteen-year service on this tribunal allows for clear and concise standards for attorneys to follow instead of a shorter service. Much like the justifications for the lifetime appointments given to Supreme Court Justices,[194] these judges would be able to establish and create consistent legal reasoning throughout their terms.[195] This provides stability and soundness in the decisions issued, and much like how the OLC's opinions are considered to be binding now, the law produced by this tribunal would be considered binding authority for the President to follow, unless the Supreme

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[190] *See generally* Renan, *supra* note 8, at 805.

[191] *The Judicial Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/#:~:text=Federal%20judges%20can%20only%20be,or%20conviction%20by%20the%20Senate (last visited Feb. 28, 2023).

[192] *Id.*

[193] U.S. CONST. art. II, § 2, cl. 2.

[194] *The Court as an Institution*, SUP. CT. U.S., https://www.supremecourt.gov/about/institution.aspx#:~:text=Members%20of%20the%20Supreme%20Court,has%20generally%20meant%20life%20terms (last visited Feb. 28, 2023) ("Members of the Supreme Court are appointed by the President subject to the approval of the Senate. To ensure an independent Judiciary and protect judges from partisan pressures, the Constitution provides that judges serve during 'good Behaviour,' which has generally meant life terms").

[195] *See generally id.*

Court were to overrule a decision. This would also assist in solving the problem of "porous legalism" within the executive branch, as presidents would no longer be able to forum shop within departments for legal reasoning supporting their plans. The reasoning itself would be reviewed by the Committee and potentially challenged in this tribunal, making the process more consistent and transparent.

### 3. Jurisdiction

Additionally, the jurisdiction of a tribunal like the one detailed above would be strictly limited pursuant to congressional Article I powers.[196] This tribunal's sole job would be to review decisions issued by the OLC which are controversial or potentially questionable and to determine the strength of their reasoning. With an understanding that many of the opinions issued by the OLC are sensitive and have potentially momentous consequences, the tribunal's review may also be limited with the use of *in-camera* decision making, meaning that many of the decisions would be considered in private by the judges. This type of judicial review is an appropriate remedy to any argument that the President needs confidentiality to make many of his decisions. By doing this, the tribunal would not lessen the confidentiality of the President's legal reasoning nor threaten to expose the Nation's secrets but would instead allow more legally trained and competent eyes to review those opinions before bold decisions with important consequences are made.

In terms of judicial review and jurisdiction, Congress can include legislation to provide this tribunal with a direct route to the Supreme Court if the President or the OLC wishes to appeal a decision made.[197] Doing so would resolve these issues quickly and answer many constitutional law questions that reasonable judicial minds could differ on. With the same jurisdictional legislation, Congress could also *require* the Supreme Court to issue opinions on these cases during the next term.[198] Instead of appealing the decisions by the tribunal and hoping that the Supreme Court chooses to hear the case, the Court would be mandated to hear and review it.

### 4. Congressional Power to Create Such a Tribunal

If Congress were to pass a law that created a new tribunal such as the one proposed, it would need constitutional authority to do so. In Article I § 8, the Constitution provides that Congress shall have the power "[t]o constitute tribunals inferior to the Supreme Court."[199] Citing this provision

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[196] U.S. CONST. art. I, § 8, cl. 9.

[197] U.S. CONST. art. III, § 2, cl. 2.

[198] *Id.*

[199] U.S. CONST. art. I, § 8, cl. 9.

expressly, Congress can create any tribunal or court which is inferior to the Supreme Court.[200] Given that this tribunal's decisions would be appealable to the Supreme Court, they would be by nature inferior to it. This provision in the proposal would be constitutional without much argument.[201]

In requiring that the Supreme Court must hear and review cases appealable by this tribunal, Congress can cite to Article III, § 2, Clause 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[202]

Here, the Framers of the Constitution wrote in plain terms that Congress shall have the power to create regulations and exceptions for the jurisdiction of the Supreme Court.[203] As a result, Congress has the power to require the Court to take up these OLC opinions and the judgment of the tribunal to resolve the legal issues they raise.[204] Much like Congress's power to create a new tribunal,[205] Congress's power to regulate the Supreme Court's jurisdiction on these issues would likely not be challenged by any opponent, and if Congress were to take this action, it would be constitutionally sound.[206]

At first glance, the judges making decisions on this tribunal would be federal judges and therefore would have the protections given to Article III judges, namely lifetime appointments.[207] However, given that this tribunal would specifically not provide these judges with lifetime appointments, they would also not receive Article III protection.[208] More importantly, if they were Article III judges, pursuant to the Constitution, they would have to be appointed by the President and then confirmed by the Senate.[209] For this tribunal to effectively restrain the OLC's unchecked legal power, it is imperative that this tribunal have judges with different ideologies and therefore not be appointed by the President. Doing so allows for this tribunal to possess a more neutral and detached approach to the legal questions that arise.

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[200] *Id.*

[201] *Id.*

[202] U.S. CONST. art. III, § 2, cl. 2.

[203] *Id.*

[204] *Id.*

[205] U.S. CONST. art. I, § 8 cl. 9.

[206] *See generally* U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 2, cl. 2.

[207] U.S. CONST. art. III, § 1.

[208] *Id.*

[209] U.S. CONST. art. III, § 2, cl. 2.

5. Power to Appoint

Congress may, pursuant to the Exception Clause in the Appointments Clause of Article II of the Constitution, "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[210] Exercising this power, Congress may shift the appointments of these judges from the traditional Article II appointments procedure, and instead vest the power into the "Courts of Law" as they see fit.[211] The last blockade for this is in the question of whether or not the judges on this tribunal would be inferior officers pursuant to the Exception Clause, as only inferior officers can be appointed by entities other than the President.[212] While the Court has used several standards over the years in interpreting whether an officer is "inferior" for purposes of the Constitution,[213] two different bases for determining whether an officer is principle or inferior have lasted: (1) the standard from *Morrison v. Olson* and (2) the standard from *Edmond v. United States*.[214]

In *Morrison*, the Court specifically avoided drawing a bright line between which officers were inferior and which were superior.[215] Instead, the Court identified several factors that can be looked at to make such a determination.[216] These factors include limits in jurisdiction, limits in tenure, limits in duties, and whether they are subject to removal by a higher power.[217] Taken individually and as a whole, each of these factors suggests further that the judges on this tribunal would be inferior officers for the purposes of the Constitution. First, these judges would be limited in jurisdiction. The only jurisdiction available to these judges would be to the review of OLC opinions regarding executive power. They would not have the ability to adjudicate any other disputes or review any other decisions. Second, these judges would have limited tenure. As explained earlier in this Note, the terms of these judges would have specific lengths, reflective of the term limits of bankruptcy judges.[218] Third, like its limited jurisdiction, this court would be limited in duties. Their duties would begin and end with the periodic review of executive branch legal decisions, and they would be unable to posit any other dispute. Finally, they would be subject to removal by Congress and the

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[210] U.S. CONST. art. II, § 2, cl. 2.

[211] *Id.*

[212] *Id.*

[213] *See generally* Morrison v. Olson, 487 U.S. 654, 671-72 (1988); Edmond v. United States, 520 U.S. 651, 662.

[214] *See generally Morrison,* 487 U.S. at 671-72; *Edmond*, 520 U.S. at 662.

[215] *Morrison*, 487 U.S. at 671-72.

[216] *Id.*

[217] *Id.*

[218] *See supra* Part III(B)(1).

President via the enumerated removal reasons laid out in the legislation establishing the tribunal. As a result of these reasons, the *Morrison* factors point to the understanding that the judges on this tribunal would be inferior officers.

In *Edmond v. United States*, Justice Scalia's majority opinion explained that determining whether an officer is inferior is about "whether he has a superior."[219] Using this standard, for the appointments to be constitutional under Article II, these judges must be subordinate to a superior.[220] In this analysis, *Edmond* suggested that the control over the inferior officer need not be complete to sufficiently establish subordination.[221] Furthermore, reading *Edmond* as written, an appellate review can constitute supervision for determining whether an officer is subordinate.[222] Even using the stricter *Edmond* standard, there is strong support for the position that these judges would be inferior officers, thus allowing their appointments to be effectuated through the Exception Clause rather than the traditional process of the Appointments Clause.

Because of the foregoing reasoning, Congress could constitutionally vest the power of appointment of these judges into the Supreme Court Justices pursuant to the Exception Clause of Article II's Appointments Clause.[223]

#### 6. A Hypothetical Analysis in Context

Considering the hypothetical analysis of this proposal in the context of The Wall, Trump would make the announcement, as he did in 2019, that he would be declaring a national emergency to generate more funding.[224] At this point, the OLC would have already given Trump the green light on the declaration.[225] Around this time, several legal groups would begin preparing lawsuits challenging the constitutionality of the declaration, as they did in 2019.[226] While it cannot be known for certain, it can be reasonably assumed from the general dissatisfaction of policymakers at the time of the

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219 *Edmond*, 520 U.S. at 662.

220 *Id.*

221 *Id.* at 665.

222 *See generally id.*

223 U.S. CONST. art. II, § 2, cl. 2.

224 Proclamation No. 9844, *supra* note 54.

225 Zapotosky & Dawsey, *supra* note 12 (writing that the OLC had signed off on the declaration according to inside sources).

226 *See generally* Border Wall Emergency Declaration Litigation, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/court-cases/border-wall-emergency-declaration-litigation (last updated Oct. 16, 2020) (detailing the lawsuits which the Brennan Center for Justice joined in the wake of the emergency declaration).

Proclamation,[227] the Committee would likely challenge such Proclamation before the tribunal. Whatever the decision, the legal question would be resolved much faster than the suits from the various plaintiffs throughout the country. It would save the government time and expense by avoiding litigation with numerous plaintiffs. Additionally, if the tribunal's decision were to be appealed by either the Committee or the President, the challenge would be on the Supreme Court's docket at the next session. The question would be resolved with much more expediency than it was.[228]

### *C. Changing the Understanding of the Office of Legal Counsel's Opinions*

Congress should redefine the role of the OLC, lessening the power of its opinions and changing the scope of its advice by using legislation like the Judiciary Act of 1789.[229] In such legislation, opinions issued by the OLC could be considered "legally persuasive" as opposed to "legally binding" as many policymakers and scholars understand OLC opinions today.[230] By passing such legislation, Congress could statutorily reduce the unfettered power wielded today by the OLC. Additionally, such legislation would result in a clear pathway to judicial review of the OLC reasoning and provide greater transparency in how the executive branch makes its legal decisions. Changing this understanding shifts the rhetoric and the power of the OLC away from being the dispositive authority on these issues and provides for the potential of more regular judicial review.

Congress can pass legislation changing this understanding through the Necessary and Proper Clause of Article I.[231] Much like congressional power to pass legislation reforming and managing the judiciary in 28 U.S.C. §§ 510, 511, 512 and 513,[232] Congress can amend the legislation to specify exactly how such decisions are to be treated by executive branch officials. By simply defining how these opinions should be taken, Congress can provide significant oversight of the OLC, particularly if this measure is taken in addition to the other parts of this proposal.

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[227] Lau, *supra* note 93 (detailing the Senate rejection of the emergency declaration and Trump's veto of the rejection).

[228] *See generally* Amy Howe, *Court Allows Border-Wall Construction to Continue*, SCOTUSBLOG (Jul. 31, 2020, 6:16 PM), https://www.scotusblog.com/2020/07/court-allows-border-wall-construction-to-continue (detailing a one sentence order from the Supreme Court on construction of the wall. This short order took over one year for the Court to issue anything on it).

[229] *See generally* Freer, *supra* note 147.

[230] *See generally* Renan, *supra* note 8.

[231] U.S. CONST. art. I, § 8, cl. 18.

[232] *See generally* 28 U.S.C. §§ 510-13.

## V. CONCLUSION

Change is necessary in the federal government. The President has been wielding unfettered power through the OLC's seemingly bulletproof legal opinions since September 11, 2001.[233] If the government fails to address these issues, countless individuals' rights may be infringed upon, both domestically and internationally.[234] It is imperative to provide effective checks on the President and their power to avoid such infringements.[235] The Supreme Court is ill-suited to address these power dynamics because, as the law is now, it may only review lower court decisions through appellate jurisdiction,[236] and litigating these cases through the courts is extremely challenging.[237]

On the contrary, Congress is well-suited to act. Congress should pass sweeping legislation to reform this problem through its constitutional powers as outlined in Part II of this Note. In establishing the Committee, creating a new tribunal to review these decisions, and rewriting the current understanding of the OLC's role, Congress can finally obtain the significant but necessary oversight over how the President makes his decisions. As James Madison wrote in Federalist 48, "unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."[238] As Madison recognized almost two-hundred-fifty years ago, we must allow constitutional checks between the branches of government if the American experiment is ever to work as intended.[239]

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[233] *See generally* Renan, *supra* note 8.

[234] *See generally* Pereira, *supra* note 10.

[235] *Id.*

[236] U.S. CONST. art. III, § 2, cl. 2.

[237] *See generally* U.S. CONST. art. III.

[238] THE FEDERALIST NO. 48, *supra* note 3, at 308 (James Madison).

[239] *Id.*