VIRGINIA LAW REVIEW

VOLUME 111 DECEMBER 2025 NUMBER 8

## *ARTICLES*

# THE PRACTICE OF EXECUTIVE CONSTITUTIONALISM

*Conor Clarke* & Daniel Epps***

*The executive branch must inevitably interpret the Constitution. Although departmentalists and judicial supremacists disagree about the scope of the executive's constitutional authority, few believe the Constitution is only for the courts. But what are the practices through which the executive branch interprets the Constitution and translates those interpretations into concrete decisions? What are their histories? And what, if anything, is distinctive about them? While a rich and growing literature has examined some aspects of these questions, scholars have not broadly canvassed the most central tools by which the executive branch shapes and implements constitutional law or considered what makes them unique.*

*This Article pursues that project. Descriptively, the Article provides a thick account of executive branch constitutional interpretation, particularly in its centralized form controlled by the president and the*

* Associate Professor of Law, Washington University in St. Louis; former Attorney-Adviser, Office of Legal Counsel (2017–2023).

** Howard and Caroline Cayne Distinguished Professor of Law, Washington University in St. Louis.

For helpful feedback we thank Steve Bradbury, Garrett Epps, Lucien Ferguson, Chris Fonzone, Jack Goldsmith, Ron Levin, Alma Magaña, Shalev Roisman, Jonathan Shaub, Bijal Shah, Jed Shugerman, Mila Sohoni, Henry Whitaker, and Ilan Wurman, as well as participants at the 2024 National Conference of Constitutional Law Scholars at the University of Arizona, the Boston College Law School Junior Faculty Roundtable, and the WashU Law Faculty Workshop. For excellent research assistance, we thank Max Comer, Shiza Francis, Geremia Lizier-Zmudzinski, Sam Silverberg, and Danielle Williams. The views expressed here are our own and are based only on publicly available materials.

*Department of Justice. We describe and assess executive tools and methods for interpreting the Constitution and transmitting those interpretations to different audiences. Some of these tools are well known and have obvious judicial analogs. But this Article shows how the history and contours of these practices have not been fully understood. It also excavates some unfamiliar tools that have gone unnoticed and unexplained.*

*Our descriptive account provides a foundation for assessing executive constitutionalism. Comparing executive and judicial practices can help justify some existing arrangements while suggesting reforms for others. More broadly, a rich understanding of how executive branch constitutional interpretation has worked is critical for assessing the virtues and vices of executive constitutionalism writ large—especially in the second Trump Administration, in which expansive claims of constitutional authority loom large.*

## INTRODUCTION

The executive branch must inevitably engage in constitutional interpretation. Although departmentalists and judicial supremacists disagree over the Article II executive's constitutional authority relative to that of the Article III judiciary,[1] few would contest the basic premise that constitutional law is not only for the courts. The executive branch has asserted its own "independent constitutional obligation to interpret and apply the Constitution,"[2] which the Supreme Court has acknowledged,[3] and against which Congress has legislated.[4] This obligation comes from our national charter itself, as the president and all of the officers of the executive branch must profess their loyalty to the Constitution.[5] And this obligation matters in the everyday practice of the executive branch, which routinely must resolve questions about the scope of its constitutional powers and duties—often in situations where no judicial guidance is available, and even in many situations where it is.[6]

[1] Compare, e.g., Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev 1359 (1997) (defending judicial supremacy in constitutional interpretation), with Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217 (1994) (arguing that the executive branch and the judiciary possess equal authority to interpret the Constitution). See also Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . .").

[2] The Const. Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 128 (1996) [hereinafter Constitutional Separation of Powers].

[3] Boumediene v. Bush, 553 U.S. 723, 798 (2008) (observing that "[t]he political branches" have "independent obligations to interpret and uphold the Constitution"); see also, e.g., United States v. Nixon, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.").

[4] See, e.g., 28 U.S.C. § 530D (requiring a report from the attorney general to Congress whenever the attorney general or another officer of the Justice Department refrains from enforcing or defending a statutory provision "on the grounds that such provision is unconstitutional").

[5] The president must take an "Oath or Affirmation" that they "will to the best of [their] Ability, preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1, cl. 8. All other executive officers "shall be bound by Oath or Affirmation, to support [the] Constitution." Id. art. VI, cl. 3.

[6] See Dawn E. Johnsen, What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses, 88 B.U. L. Rev. 395, 408 (2008) (noting that the executive must often confront questions of constitutional interpretation, sometimes "without the benefit of clear judicial guidance"); Gillian E. Metzger, Administrative Constitutionalism, 91 Tex. L. Rev. 1897, 1898 (2013) ("[I]nstances of administrative constitutionalism are a frequent occurrence, reflecting the reality that most governing occurs at the administrative level and thus that is where constitutional issues often arise." (footnote omitted)); David A. Strauss,

There is thus, both in theory and reality, a robust practice of "executive constitutionalism."[7] But how, exactly, does executive constitutionalism work? More concretely, what are the tools, methods, and practices that actors within the executive branch use to interpret the Constitution and translate those interpretations into practical decisions? And what are the ways in which this form of constitutional practice systematically differs from the constitutionalism practiced by the judicial branch?

Twenty years ago, now-Judge Cornelia Pillard lamented that "[c]onstitutionalism within the executive branch has been particularly ignored."[8] Pillard sought to correct this oversight but focused her inquiry on "questions of individual rights that evade judicial review."[9] Since then, the literature on constitutionalism within the executive branch has grown. Scholars have deepened our understanding of the president's legal decision-making.[10] They have documented how constitutionalism within the executive branch has played out historically[11] and how actors in

Presidential Interpretation of the Constitution, 15 Cardozo L. Rev. 113, 113 (1993) ("Every day, officers or employees in the executive branch must interpret the Constitution.").

[7] This phrase seems to first appear in Cornelia T.L. Pillard, The Unfulfilled Promise of the Constitution in Executive Hands, 103 Mich. L. Rev. 676, 679 (2005). It has been used by several other scholars since then. See, e.g., David L. Franklin, Popular Constitutionalism as Presidential Constitutionalism?, 81 Chi.-Kent L. Rev. 1069, 1080 (2006); Trevor W. Morrison, Constitutional Alarmism, 124 Harv. L. Rev. 1688, 1692 (2011) (reviewing Bruce Ackerman, The Decline and Fall of the American Republic (2010)); Zachary S. Price, Reliance on Executive Constitutional Interpretation, 100 B.U. L. Rev. 197, 203 (2020). A similar (though slightly more unwieldy) formulation is "executive branch constitutionalism." See, e.g., Neal Kumar Katyal, Judges as Advicegivers, 50 Stan. L. Rev. 1709, 1808 (1998).

[8] Pillard, supra note 7, at 676.

[9] Id. at 677.

[10] See generally, e.g., Jack Goldsmith, Power and Constraint: The Accountable Presidency After 9/11 (2012) (discussing the ways in which the Bush and Obama Administrations made legal decisions and navigated constitutional checks on counterterrorism efforts); Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (2010) (describing "political constraints" on the executive's legal decision-making authority); Metzger, supra note 6 (assessing methods by which administrative agencies interact with and interpret the Constitution); Curtis A. Bradley & Trevor W. Morrison, Presidential Power, Historical Practice, and Legal Constraint, 113 Colum. L. Rev. 1097 (2013) (examining the practice-based nature of presidential authority and the ways in which legal dialogue constrains executive legal decision-making); Daphna Renan, The Law Presidents Make, 103 Va. L. Rev. 805 (2017) (describing the diffuse and informal structures through which the executive branch makes legal decisions); Peter M. Shane, Madison's Nightmare: How Executive Power Threatens American Democracy (2009) (arguing that the expanse of executive power, and the corresponding collapse of congressional and judicial power, have allowed the president's legal decisions to go dangerously unchecked).

[11] See, e.g., Harold H. Bruff, Untrodden Ground: How Presidents Interpret the Constitution (2015).

administrative agencies have made constitutional decisions.[12] And they have provided rich insights into many individual tools in the executive's toolkit, such as presidential signing statements,[13] Department of Justice ("DOJ") legal opinions,[14] and the constitutional "accommodation" process.[15]

But we still lack a broader descriptive account of the institutional practices by which the executive branch today identifies and implements its understanding of its constitutional powers and duties. Such an account matters. We live in an age of executive action,[16] and constitutional considerations play a meaningful role in shaping and constraining that action. Major executive actions across all recent presidential administrations have presented important constitutional issues—often issues that the courts never assess.[17] A clear-eyed assessment of

[12] See, e.g., Sophia Z. Lee, Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present, 96 Va. L. Rev. 799 (2010); Karen M. Tani, Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor, 100 Cornell L. Rev. 825 (2015).

[13] See, e.g., Curtis A. Bradley & Eric A. Posner, Presidential Signing Statements and Executive Power, 23 Const. Comment. 307 (2006); Ronald A. Cass & Peter L. Strauss, The Presidential Signing Statements Controversy, 16 Wm. & Mary Bill Rts. J. 11 (2007); Louis Fisher, Signing Statements: Constitutional and Practical Limits, 16 Wm. & Mary Bill Rts. J. 183 (2007); Christopher S. Yoo, Presidential Signing Statements: A New Perspective, 164 U. Pa. L. Rev. 1801 (2016).

[14] See, e.g., Douglas W. Kmiec, OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive, 15 Cardozo L. Rev. 337 (1993); Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 Colum. L. Rev. 1448 (2010); Rita W. Nealon, The Opinion Function of the Federal Attorney General, 25 N.Y.U. L. Rev. 825 (1950); see also Peter E. Heiser, Jr., The Opinion Writing Function of Attorneys General, 18 Idaho L. Rev. 9 (1982) (surveying legal opinions of state attorneys general, which have a similar function to those written by DOJ).

[15] See, e.g., Jonathan David Shaub, The Executive's Privilege, 70 Duke L.J. 1, 31–32 (2020).

[16] See Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2246 (2001) ("We live today in an era of presidential administration."); see also, e.g., Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, The Making of Presidential Administration, 137 Harv. L. Rev. 2131, 2133 (2024) (observing that "we live in an era of presidential primacy" and that "[c]ontrol of the White House is so central to our governance that the transition from one President to another amounts to 'regime change'" (citation omitted)); Peter M. Shane, Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking, 48 Ark. L. Rev. 161, 162 (1995) (arguing that, under the views of the Reagan and Bush Administrations, "not only was 'executive' power deemed legally impregnable, but an extraordinary amount of policy making power was argued to be 'executive'" (citation omitted)).

[17] Consider, for example, major Trump Administration opinions on the scope of the Religion Clauses that remain in effect and binding on the executive branch and that have received little

contemporary constitutional law therefore depends on understanding the processes that produce executive branch constitutional judgments.

Moreover, studying how executive constitutionalism has worked in the past provides important purchase for understanding current events. In his second Administration, President Trump and his subordinates have advanced startingly aggressive interpretations of the Constitution. (Consider, for example, Trump's executive order interpreting the Fourteenth Amendment as not requiring birthright citizenship for children born in the United States to undocumented immigrant parents.[18]) And in doing so, the Administration appears to have sidestepped normal processes of internal DOJ review for legality.[19] Although a full assessment may only be possible in retrospect, the second Trump Administration, in "seeking to effectuate radical constitutional change,"[20] may ultimately be seen as establishing an entirely new model of executive constitutionalism, relying on procedures and methods that look little like past practice. But even if so, one needs to understand how executive constitutionalism has worked in the past to know how it might be

attention or treatment in the courts. See Religious Seasonal Decorations in Fed. Gov't Bldgs., 45 Op. O.L.C. (Jan. 15, 2021) [hereinafter Religious Seasonal Decorations] (slip op.); Religious Restrictions on Cap. Fin. for Historically Black Colls. & Univs., 43 Op. O.L.C. 191 (2019). Or take major Obama Administration opinions on the scope of the take care authority and prosecutorial discretion that were challenged in court—but were never addressed by the Supreme Court before being countermanded by later executive action. See, e.g., Prioritizing & Deferring Removal of Certain Aliens Unlawfully Present in the U.S., 38 Op. O.L.C. 39 (2014) (subsequently withdrawn by Attorney General Barr); Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (failing to directly address the aforementioned Office of Legal Counsel opinion but ruling in opposition to that opinion's reasoning), *aff'd per curiam by an equally divided court*, 579 U.S. 547 (2016) (splitting 4-4 and consequently leaving the U.S. Court of Appeals for the Fifth Circuit's decision undisturbed).

[18] See Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025); see also Trump v. CASA, Inc., 145 S. Ct. 2540, 2548–49 (2025) (partially staying lower court preliminary injunctions of the birthright citizenship executive order).

[19] See Charlie Savage, Trump Sidelines Justice Dept. Legal Office, Eroding Another Check on His Power, N.Y. Times (Apr. 4, 2025), https://www.nytimes.com/2025/04/04/us/politics/trump-office-of-legal-counsel-doj.html (noting that the Office of Legal Counsel has "largely been sidelined" in the process of publishing executive orders by the Trump Administration).

[20] Bob Bauer & Jack Goldsmith, The Trump Executive Orders as "Radical Constitutionalism," Substack: Exec. Functions (Feb. 3, 2025), https://executivefunctions.substack.com/p/the-trump-executive-orders-as-radical [https://perma.cc/R55F-BXNC]; see also Russell Vought, Renewing American Purpose, Am. Mind (Sept. 29, 2022), https://americanmind.org/salvo/renewing-american-purpose/ [https://perma.cc/28CK-RHZ6] (arguing that the American Right should "become radical constitutionalists" and "throw off the precedents and legal paradigms that have wrongly developed over the last two hundred years" (emphasis omitted)).

changing today, how it might change in the future, and if those changes are desirable or troubling.

This Article's first major goal, then, is descriptive. We aim to offer a broad account—legal, institutional, and to some degree sociological—of many of the most critical ways in which the executive branch does constitutional law in the present. While some of this account may be familiar, many of the ways in which the executive branch reaches constitutional interpretations and then translates those decisions into concrete action remain obscure.

A second major goal is to connect and compare the respective practices of the executive and judicial branches. It is well known that the executive branch often—and perhaps increasingly—acts in ways that resemble judicial practice.[21] But the full extent of this familiar analogy has not been explored, and we embark on the project of exploring it. In so doing, we sidestep the existing debate about whether executive branch decision-making should become more "court-like" as a means of prioritizing legal independence[22]—or *less* court-like, on the theory that there is something dangerous about adjudication in the executive branch.[23] Instead, we begin a broad comparative inquiry to understand better and assess the institutional contrasts and needs.

Some of the ways in which the executive branch is court-like are well known. Just as courts issue opinions justifying their constitutional judgments, the executive branch explains its constitutional interpretations in presidential signing statements, executive orders, and binding DOJ legal opinions.[24] DOJ's Office of Legal Counsel ("OLC") is frequently

[21] See infra Section III.A.

[22] For example, we take no view on proposals like Bruce Ackerman's suggested "Supreme Executive Tribunal," whose members would "think of themselves as judges for the executive branch, not lawyers for the sitting president." Ackerman, supra note 7, at 143. For criticisms of this proposal, see, e.g., Morrison, supra note 7, at 1742–48; Renan, supra note 10, at 885–86. Whatever the merits of such reforms, they have limited relevance if one's goal is to understand and learn from present arrangements.

[23] See, e.g., United States v. Arthrex, Inc., 141 S. Ct. 1970, 1993 (2021) (Gorsuch, J., concurring in part and dissenting in part) ("Any suggestion that the neutrality and independence the framers guaranteed for courts could be replicated within the Executive Branch was never more than wishful thinking.").

[24] See, e.g., Ackerman, supra note 7, at 99 (noting that the Office of Legal Counsel "often generates a legal product that looks like a judicial opinion" but that "appearances are deceiving").

called a kind of internal executive branch court.[25] And the specific interpretive techniques by which the executive branch addresses constitutional questions often track judicial methods.[26]

But many less familiar executive branch practices that also have ready judicial analogs have gone unnoticed. One example is a form of severability, which (in the judicial context) refers to the analysis for determining whether the remainder of a statute survives when a portion is held unconstitutional.[27] The executive branch has long had its own version of this practice: dating back to President Jefferson, the executive branch has frequently announced a "treatment" of constitutionally questionable provisions within larger statutory regimes. "Treatment," a long-standing term of art, indicates that the executive has a constitutional objection to the text of a provision but is nevertheless committed to give the provision's policy its maximum possible constitutional effect.[28] Other underexplored executive practices include a justiciability doctrine: the executive branch has more recently developed norms and procedures for reaching disputes that resemble judicial doctrines governing cases and controversies.[29]

In some ways, however, the practice of executive constitutionalism is fundamentally dissimilar to judicial practice. For example, executive constitutionalism includes a practice akin to waiver: even when statutory law includes clear violations of Supreme Court precedent or deemed intrusions on core Article II prerogatives, the executive branch will frequently give effect to those provisions.[30] As discussed more below, one simple example of this arises with statutory provisions that violate *Immigration & Naturalization Service v. Chadha*[31]—but that the executive branch nevertheless complies with.[32] Indeed, some agency

[25] See, e.g., Kmiec, supra note 14, at 347 ("OLC practice . . . is thus highly analogous to that of the judiciary."); Pillard, supra note 7, at 737–38 (lamenting OLC's "[c]ourt-like passivity"); Renan, supra note 10, at 815 (noting that OLC's "decisional process resembles a court").

[26] As Trevor Morrison has documented, for example, the executive branch, like the judiciary, regularly engages in constitutional avoidance when interpreting federal statutes. See generally Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189 (2006).

[27] See William Baude, Severability First Principles, 109 Va. L. Rev. 1, 3–5 (2023).

[28] See infra Subsection II.A.3.

[29] See infra Subsection II.A.5.

[30] See infra Subsection II.A.4.

[31] 462 U.S. 919 (1983) (invalidating the one-house veto of executive action).

[32] See Louis Fisher, The Legislative Veto: Invalidated, It Survives, 56 Law & Contemp. Probs. 273, 288–91 (1993).

regulations actually *require* such committee approval.[33] But we know of no context in which the judiciary views itself as able to accede to violations of structural constitutional provisions.

We hope these and other descriptive efforts will contribute to basic institutional knowledge across a broad and overlapping series of recent literatures, each with a slightly different nomenclature but a related focus—including recent literature on "administrative constitutionalism,"[34] "presidential constitutionalism,"[35] "presidential administration,"[36] "executive branch legalism,"[37] and the "internal separation of powers."[38] But our descriptive and comparative efforts also provide a platform from which we can normatively assess executive constitutionalism. Most centrally, understanding how the executive branch is, and is not, like the judiciary has practical implications for how the executive should interpret the Constitution. When should the

[33] See, e.g., U.S. Dep't of Def., DoD 7000.14-R, 3 Financial Management Regulation ch. 6, § 4.1 (2015) (describing required regulatory procedures for certain Department of Defense appropriations actions "to request the prior approval of the congressional defense committees").

[34] See Metzger, supra note 6; Sophia Z. Lee, Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present, 167 U. Pa. L. Rev. 1699 (2019); Bertrall L. Ross II, Embracing Administrative Constitutionalism, 95 B.U. L. Rev. 519 (2015).

[35] See William N. Eskridge, Jr., Presidential Constitutionalism and Marriage Equality, 167 U. Pa. L. Rev. 1891 (2019); Jedediah Purdy, Presidential Popular Constitutionalism, 77 Fordham L. Rev. 1837 (2009); Franklin, supra note 7; Scott M. Matheson, Jr., Presidential Constitutionalism in Perilous Times (2009).

[36] See Kagan, supra note 16, at 2246 (arguing that President Clinton "enhanced presidential control over administration" by "exercising directive authority over [executive] agencies and asserting personal ownership of their regulatory activity"); Jessica Bulman-Pozen, Administrative States: Beyond Presidential Administration, 98 Tex. L. Rev. 265 (2019); Jerry L. Mashaw & David Berke, Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience, 35 Yale J. on Regul. 549 (2018). More recent work by Ashraf Ahmed, Lev Menand, and Noah Rosenblum has shown how such arrangements are anything but inevitable: in the second half of the last century, "the law was reshaped to make presidential dominance of the administrative state possible." Ahmed, Menand & Rosenblum, supra note 16, at 2133; see also Noah A. Rosenblum, The Antifascist Roots of Presidential Administration, 122 Colum. L. Rev. 1, 6 (2022) (noting that presidential administration "has only become more pronounced" since Justice Kagan published *Presidential Administration*).

[37] See Renan, supra note 10; David Fontana, Executive Branch Legalisms, 126 Harv. L. Rev. F. 21 (2012).

[38] See Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within, 115 Yale L.J. 2314 (2006); see also Jon D. Michaels, An Enduring, Evolving Separation of Powers, 115 Colum. L. Rev. 515 (2015) (describing the construction of a new conception of separation of powers involving the administrative state).

executive branch invoke the "passive virtues"[39] and refrain from deciding difficult constitutional questions? Sometimes, institutional or interbranch comity suggests deflecting or deferring a constitutional judgment—but the final resolution of some issues requires more active executive engagement than is commonly understood. Relatedly, the executive branch has, in some contexts, adopted court-like rules and approaches that are, in our view, poor fits for Article II—such as policies of justiciability that emphasize the desirability of a focused and concrete dispute.[40] Abstract guidance can be central to the proper functioning of executive constitutionalism.

But why "constitutionalism"? That is, why focus on constitutional decision-making specifically, as opposed to executive legal decision-making more generally? To be sure, much of our analysis has implications for how the executive branch addresses nonconstitutional questions. But constitutional decision-making also presents unique issues worthy of closer study. Most obviously, constitutional law is supreme. Among other things, constitutional objections empower the executive branch to ignore otherwise binding laws, giving the executive a powerful tool to push back on Congress that is unavailable when ordinary legal interpretation is at issue.[41]

Our account proceeds in three parts. Part I provides background for our descriptive contributions. We frame this Part around two questions: *Who* within the executive branch engages in constitutional interpretation? And *when* do constitutional issues arise for resolution? Here, we explain that our focus is largely on *top-down* and *internal* constitutionalism: constitutional determinations that are made by the president or DOJ and that are not produced in the shadow of imminent judicial resolution.

Part II offers the central descriptive contributions of the Article. We strive to offer a broad account of *how* executive constitutionalism works. We structure our account around two rough categories. First, we canvass the executive branch tools, practices, and methods for determining what the Constitution requires. What are the executive's tools for determining constitutional meaning, and how does it determine when to compromise

[39] See Alexander M. Bickel, The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 Harv. L. Rev. 40 (1961).

[40] See infra Subsection II.A.5.

[41] Indeed, on one theory the president has a *duty* to refuse to enforce unconstitutional laws. See Saikrishna Bangalore Prakash, The Executive's Duty to Disregard Unconstitutional Laws, 96 Geo. L.J. 1613, 1616–17 (2008).

on its constitutional judgments? Second, we describe the channels of executive constitutionalism. Having made its own judgment about its constitutional powers and duties, how does the executive transmit those judgments to distinct audiences?

Part III then turns from the descriptive to the theoretical and normative. We assess how well executive constitutionalism works—and offer suggestions for how it might be improved. In some contexts, executive branch lawyers may have modeled practices on judicial analogs that are poor fits for Article II decision-making. We also observe how much of executive constitutional practice has not been with us for most of our nation's history; instead, much of it was apparently invented by presidents and other executive branch actors within the last few decades. This observation suggests that different versions of executive constitutional practice—perhaps vastly different—are possible.

We conclude by reconsidering Judge Pillard's challenge, mentioned above.[42] Has executive constitutionalism failed to fulfill its promise? Our contribution, which is mostly institutional and procedural, is not intended to respond head-on to Pillard's critique—which centers on the substance of executive constitutional judgments. Nevertheless, our account reveals a core virtue of executive constitutionalism: executive constitutional practice represents a real—and in important ways, successful—attempt to implement rule of law values.

## I. BACKGROUND: THE "WHO" AND "WHEN"

The contexts in which the executive branch encounters constitutional questions are varied and numerous. While our primary focus is on the top-down constitutional decision-making of the president and DOJ, we begin with an overview that is broader and more eclectic: a survey of some of the many ways the executive branch must deal with the Constitution—recognizing that there are many ways to divide up the work of the executive branch and that we offer just one.

Virtually everything that the president and the officers and employees of the executive do implicates the Constitution at some level of generality. Our system of government requires the executive branch to do many things, and every executive act may be construed as making a constitutional judgment in some sense—that is, the judgment that the branch has the power to act and that no constitutional rule forbids it.

[42] Pillard, supra note 7, at 676–77.

Viewed in this light, the executive branch arguably has a more inherent need to interpret the Constitution than courts do. While it is possible to imagine different versions of judicial review—or a system without it—it is much harder to imagine a system in which the executive can function without routinely making constitutional calls.[43]

In practice, the constitutional calls that the executive branch must and does make are varied. Some work raises constitutional questions internal to an agency; other work raises constitutional questions between agencies. Some work raises constitutional questions between the executive branch and the court system, or between the executive branch and Congress, or between the executive branch and the public. And there are many cases in which the president must interpret his own constitutional authorities *de novo* with little prospect of the court system having a say.

Consider a few simple (and perhaps less simple) examples:

- An FBI agent considers whether to obtain a warrant before conducting a search. She must ask whether the contemplated search requires a warrant under the Fourth Amendment or is covered by an exception.
- A DOJ trial attorney considers what arguments to make in defending a federal statute against a constitutional challenge. An appellate attorney considers what arguments to retain on appeal.
- An attorney at the Small Business Administration drafts new rules on federal contracting. He must consider whether those regulations and the contracting rules and preferences therein comply with the requirements of the Fifth Amendment's Due Process Clause.[44]
- Two agency heads disagree about whether proposed and jointly administered economic sanctions violate the Due Process Clause. They seek a way to resolve this disagreement.
- The president must decide whether to enforce or defend a federal statute against a constitutional challenge. He has doubts about the constitutionality of the law.

[43] We are grateful to Chris Fonzone for emphasizing this point to us. For some comparative perspective on this, see generally, e.g., Mark Tushnet, Alternative Forms of Judicial Review, 101 Mich. L. Rev. 2781 (2003) (describing "strong" and "weak" forms of judicial review); Mauro Cappelletti, Judicial Review in Comparative Perspective, 58 Calif. L. Rev. 1017 (1970) (providing a comparative perspective on the practice of judicial review, both internationally and historically).

[44] See Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (holding that arbitrary discrimination can be violative of due process).

- An agency must figure out how to respond to a request for information from Congress. The agency believes some of the requested material is covered by executive privilege.[45]
- The president considers whether to deploy troops to Yemen, consistent with Articles I and II.

As these examples suggest, each case will raise questions that are particular to its context. While our insights will matter for many of these contexts, our primary focus is on constitutional decision-making that is top-down and internal to the executive branch.

By *top-down*, we mean constitutional practices that flow from the White House and DOJ to the rest of the executive branch. We adopt this focus for several related reasons. The first is the recent history of centralization. Starting in the twentieth century, constitutional decision-making in the executive branch has become increasingly consolidated and formalized, and the centralized authorities have engaged in practices that are increasingly routine. Since 1789, for example, the attorney general has had the statutory authority and obligation "to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments."[46] But it is only since 1933 that attorneys general have formally delegated the process of opinion-writing to other components of the executive branch—first, curiously enough, to the Office of the Solicitor General.[47] It was only starting in the 1950s that a separate office was created for opinion writing and internal executive branch "adjudications"—an office that in 1953 became the Office of Legal Counsel.[48] And it is only since 1979 that the

[45] See generally Hist. of Refusals by Exec. Branch Offs. to Provide Info. Demanded by Cong.: Part II—Invocations of Exec. Privilege by Exec. Offs., 6 Op. O.L.C. 782 (1983) (cataloging categories of refusals to disclose information to Congress made by executive branch officials).

[46] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

[47] See Jurisdiction & Proc. of the Off. of the Assistant Solic. Gen., 1 Op. O.L.C. Supp. 421, 421 (2013) (originally issued June 1, 1939) (citing Att'y Gen. Order No. 2507 (Dec. 30, 1933) (giving, in an order from Attorney General Cummings, the Office of the Assistant Solicitor General the delegated duty to write opinions advising the executive branch)); see also 1934 Att'y Gen. Ann. Rep. 119 (describing the assistant solicitor general's initial appointment to the Office of the Attorney General's Civil Division, the abolition of the Civil Division, and the assistant solicitor general's subsequent reassignment to the new Office of the Assistant Solicitor General).

[48] The legal history is as follows. In 1949, Congress enabled certain executive branch reorganizations. See Reorganization Act of 1949, ch. 226, §§ 1–3, 63 Stat. 203, 203–04 (expired 1984). In 1950, DOJ was reorganized to abolish the assistant solicitor general and fold his duties into a new assistant attorney general. See generally Reorganization Plan No. 2

president has (by executive order) "encouraged" all agencies that "are unable to resolve a legal dispute between them . . . to submit the dispute to the Attorney General" and required such a submission of all agencies "whose heads serve at the pleasure of the President."[49] Since then, more constitutional guidance—including at least six major opinions on constitutional questions—has been issued to all general counsels in the executive branch, and not in response to any concrete legal dispute.[50] We are aware of no opinions like these before the 1980s. And many more opinions apply widely beyond the context of a particular question—for example, recent opinions on religious decorations that (while raised by a particular question from a particular federal agency) apply to all federal property.[51] This centralization is hardly complete, as some actors get the

of 1950, § 4, 64 Stat. 1261, 1261 (codified as amended at 28 U.S.C. § 510) (authorizing the attorney general to delegate his authority within DOJ; creating "in the Department of Justice one additional Assistant Attorney General . . . who shall assist the Attorney General in the performance of his duties"; abolishing "[t]he office of Assistant Solicitor General, created by section 16 (a) of the Act of June 16, 1933 (48 Stat. 307)"; and appointing the former assistant solicitor general to be "the first Assistant Attorney General in office under the provisions of this section"). On May 25, 1950, the Attorney General assigned this assistant role to a new Executive Adjudications Division. See Arthur H. Garrison, The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant, 76 Alb. L. Rev. 217, 235 & n.67 (2013) (describing this change); see also Foreword, 1 Op. O.L.C. Supp., at vii (2013) (same); 1952 Att'y Gen. Ann. Rep. 5 n.* (naming the Executive Adjudications Division for the first time); Fed. Reg. Div., Nat'l Archives & Recs. Serv., Gen. Servs. Admin., United States Government Organization Manual, 1952–53, at 177 (1952) (identifying the Executive Adjudications Division and its responsibilities). In 1953, the Executive Adjudications Division was renamed the Office of Legal Counsel. See Att'y Gen. Order No. 9-53, 18 Fed. Reg. 2162 (Apr. 16, 1953); see also 1953 Att'y Gen. Ann. Rep. 77 (naming the Office of Legal Counsel for the first time in an annual report).

[49] Exec. Order No. 12,146, 44 Fed. Reg. 42657, 42658 (July 20, 1979).

[50] See The Test for Determining "Officer" Status Under the Appointments Clause, 49 Op. O.L.C. (Jan. 16, 2025) (slip op. at 1) (an opinion produced "for the General Counsels of the Executive Branch"); Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 73 (2007) [hereinafter Officers of the United States] (same); The Constitutional Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 124 (1996) (an opinion produced "for the General Counsels of the Federal Government"); Legal Guidance on the Implications of the Sup. Ct.'s Decision in *Adarand Constructors, Inc. v. Peña*, 19 Op. O.L.C. 171, 171 (1995) [hereinafter *Adarand* Legal Guidance] (an opinion directed "to General Counsels"); Common Legis. Encroachments on Exec. Branch Auth., 13 Op. O.L.C. 248, 248 (1989) [hereinafter Common Legislative Encroachments] (an opinion "for the General Counsels' Consultative Group"); Cong. Requests for Confidential Exec. Branch Info., 13 Op. O.L.C. 153, 153 (1989) (same).

[51] See, e.g., Religious Seasonal Decorations, supra note 17, slip op. at 1 (applying its constitutional reasoning to all "federal properties under [the General Services Administration's] jurisdiction, custody, or control").

final say on matters within unique areas of jurisdiction and expertise (such as the Department of State on questions of treaty interpretation or the Department of Defense on the use of force).[52]

The procedural centralization of executive branch production of "opinions" also applies to many other tools in the presidential toolkit. For example, signing statements have been used for more than two hundred years.[53] But it is only since the Administration of President Franklin Roosevelt that they have been used routinely,[54] and it is only since 1972 that the Office of Management and Budget has coordinated a regular and ongoing process by which a presidential administration comments on pending legislation.[55] While some recent scholarship takes the view that recent years have seen some diffusion and porousness in legal decision-making within the executive branch, we think the broad sweep of administrative history points toward greater centralization, formality, and control.[56]

[52] There may also be variations from administration to administration. See Jack Goldsmith, Trump Is the Law for the Executive Branch, Substack: Exec. Functions (Feb. 24, 2025), https://executivefunctions.substack.com/p/trump-is-the-law-for-the-executive [https://perma.cc/P2AA-TLHL] (noting that "[t]he president can organize [interpretive legal] authority and the advice he receives basically however he likes").

[53] See, e.g., James Monroe, Letter to the Senate of the United States (Jan. 17, 1822), *in* 2 A Compilation of the Messages and Papers of the Presidents, 1789–1897, at 680 (James D. Richardson ed., Washington, Gov. Printing Off. 1896); James Monroe, Letter to the House of Representatives of the United States (Apr. 6, 1822), *in* 2 A Compilation of the Messages and Papers of the Presidents, 1789–1897, supra, at 697.

[54] The American Presidency Project, 47 results (Oct. 15, 2025) (on file with the *Virginia Law Review*) (filtered by "Refine by Name", "Franklin D. Roosevelt"; and "Category", "Signing Statements"), https://www.presidency.ucsb.edu/advanced-search?field-keywords=&field-keywords2=&field-keywords3=&from%5Bdate%5D=&to%5Bdate%5D=&person2=&category2%5B0%5D=68&items_per_page=25&f%5B0%5D=field_docs_category%3A69&f%5B1%5D=field_docs_person%3A200288 [https://perma.cc/NLD7-VHUF] (counting forty-seven signing statements issued in the Roosevelt Administration); see also Bradley & Posner, supra note 13, at 312 (noting that presidential statements were not widely issued until the twentieth century).

[55] See Off. of Mgmt. & Budget, Exec. Off. of the President, Circular No. A-19 (Sept. 20, 1979), https://whitehouse.gov/wp-content/uploads/2017/11/Circular-019.pdf [https://perma.cc/Z82F-QZAH].

[56] For a recent article arguing that legal decision-making in the executive branch has become more diffuse and porous in recent years, see generally Renan, supra note 10. We do not view this argument as at odds with our central point—or the general direction of scholarly commentary in recent decades—that, over the long run (decades and centuries rather than more recent years), the trend has been one toward centralization and consolidation. In addition, we think some of the data that Renan cites is amenable to several interpretations, at least some of which are consistent with growing consolidation and centralization, even in recent years. For example, Renan cites a decline in the number of published and unclassified OLC opinions

This focus means we give less attention to constitutional interpretation by independent administrative agencies. We do not mean to diminish the significance of constitutional interpretation within individual agencies; scholars such as Sophia Lee and Karen Tani have highlighted the way in which such agencies bring distinctive constitutional perspectives to bear.[57] Current executive practices leave significant autonomy for actors beneath, and not directly accountable to, the president. Nevertheless, our focus is on the executive branch as a whole, and we are interested in where the most concentrated power over executive constitutionalism resides.

Structural features of the executive branch also make a top-down approach important. The executive branch is inherently more centralized and hierarchical than other branches. Article I vests all legislative powers "in a Congress of the United States" but divides that Congress into two houses, each of which are further divided into "Members" and "Senators."[58] Article III empowers "Courts" and "Judges" in the plural, each with "[t]he judicial Power."[59] But Article II works in the singular: "The executive Power shall be vested in a President of the United States of America."[60] And while the Constitution hints at other components of an executive branch—an army, a navy, a treasury, ambassadors, cryptic "other Officers of the United States"—it describes no other constitutionally empowered Article II officers in detail.[61] One need not accept any of the more immoderate claims of the unitary executive theory to note that the text of the Constitution does describe the branches differently along this dimension.

By *internal*, meanwhile, we mean constitutional practices that are primarily concerned with the development and implementation of executive branch interpretations.[62] Thus, like some other literature in this area,[63] we do not primarily focus on what the executive branch has to say

since the Clinton Administration as evidence of less formal adjudication by that office. Id. at 842–45, 843 n.166. But this period also coincides almost perfectly with technological changes that allow for much legal advice—even formal legal advice—to be offered by email.

[57] See Lee, supra note 12; Tani, supra note 12; Karen M. Tani, Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens, 167 U. Pa. L. Rev. 1603 (2019).

[58] U.S. Const. art. I, §§ 1–3.

[59] Id. art. III, § 1.

[60] Id. art II, § 1.

[61] Id. art. II, §§ 1–2.

[62] Cf. Katyal, supra note 38, at 2317 (distinguishing internal divisions of power within the executive branch from interbranch separation of powers).

[63] See generally Morrison, supra note 26.

in litigation. That is because the executive's choice to resolve a constitutional question using a particular method "*only* because a reviewing court will later use that [method] stand[s] on a different normative footing than cases in which there is an institutionally relevant justification" for the practice.[64] Often, the executive branch will have no realistic choice but to accede to judicial understandings of constitutional meaning if it hopes to effectively advocate its views. Many non-originalist executive branch lawyers have excellent strategic reasons for writing briefs that sound in originalism. But we can understand how the executive branch really thinks about the Constitution when it does not fear second-guessing by courts.

Finally, the executive branch faces unique obligations in the context of litigation. Federal litigation authority (other than for the agencies that exercise so-called independent litigation authority[65]) is "reserved to officers of the Department of Justice, under the direction of the Attorney General,"[66] and much of this function is broadly delegated by regulation to the solicitor general.[67] But, as that office's own materials note, the solicitor general "is one of only two people (the other being the Vice President) with formal offices in two branches of government," and the office, "perhaps more than any other position in government, . . . has important traditions of deference to all three branches."[68] Such deference

[64] Id. at 1198.

[65] For two classic (and critical) overviews of independent litigating authority and DOJ control, see Neal Devins & Michael Herz, The Uneasy Case for Department of Justice Control of Federal Litigation, 5 U. Pa. J. Const. L. 558 (2003); Neal Devins, Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation, 82 Calif. L. Rev. 255 (1994).

[66] 28 U.S.C. § 516; see also id. § 519 ("[T]he Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party . . . .").

[67] See generally 28 C.F.R. § 0.20(a)–(b) (2024) (tasking the solicitor general with "[c]onducting, or assigning and supervising, all Supreme Court cases, including appeals," as well as "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts").

[68] Seth P. Waxman, Solic. Gen. of the U.S., Address to the Supreme Court Historical Society: "Presenting the Case of the United States as It Should Be": The Solicitor General in Historical Context (June 1, 1998), https://www.justice.gov/osg/solicitor-general-historical-context [https://perma.cc/G2EL-5456]. An office for the solicitor general appears in the building's original floor plan and was contemplated by Congress in the Act authorizing construction. See Hearing on H.R. 3864 and H.R. 6120 Before the H. Comm. on Pub. Bldgs. & Grounds, 71st Cong. 6 (1929) (statement of Cass Gilbert) ("The westerly section of the main floor is assigned to the rooms for the Attorney General, the Solicitor General, the clerk of the Supreme Court, the marshal, and for the use of lawyers doing business with the court and for the press and telegraph."); see also id. (statement of Cass Gilbert) (containing the

is not obviously appropriate, however, when the executive branch is deciding how to conduct its own affairs. (At the same time, one aspect of executive branch behavior in litigation remains within our scope: the executive's decisions about when to defend statutes that it believes are unconstitutional. The "duty to defend" presents issues about the executive branch's relationship with Congress, not just with the judicial branch.[69]) For all these reasons, what the executive branch says in litigation is a weaker signal—arguably less useful—for studying executive constitutionalism.

## II. EXECUTIVE CONSTITUTIONALISM IN MODERN PRACTICE

Having explained the "who" and "when" of executive constitutionalism, we now turn to the "how." This Part, the descriptive heart of the Article, describes the modern tools and methods by which the executive branch engages in constitutionalism. Section II.A describes the tools, methods, and practices by which the executive branch determines constitutional meaning—and determines when to compromise when other branches disagree. Section II.B outlines the different channels by which the executive branch and through which executive branch actors make their constitutional judgments known to various audiences.

### *A. Interpretive Tools and Norms*

How does the executive branch reach its views of constitutional meaning? And how does it translate those judgments into practical decisions about its powers and obligations? This Section surveys interpretive tools and norms that guide and constrain executive constitutionalism.

#### *1. Methodological Pluralism in the Executive Branch*

One important aspect of any answer to these questions concerns interpretive method. Does the executive branch have a method of constitutional interpretation? The primary argument of this Subsection is that the executive branch relies on what we call *methodological pluralism*. That is, the executive branch follows no distinctive approach to

original floor plan and displaying offices for the Solicitor General immediately after page eight).

[69] See infra Subsection II.A.2.

constitutional interpretation, such as originalism, but instead considers all traditionally legitimate modalities of constitutional reasoning.

Viewed from one angle, this may be surprising. Presidents and other executive branch actors have certainly expressed views on constitutional methodology. In 2007, President Bush stated that he approved of the notion that "[o]ur written Constitution means what it says" and advocated that we "respect" the Constitution "enough to adhere to its words."[70] President Obama (unsurprisingly, given his professional background) had much to say about constitutional interpretation, arguing before his election that the Constitution "is not a static but rather a living document, and must be read in the context of an ever-changing world," and noting that "our understanding of many of its most important provisions . . . has evolved greatly over time."[71] More recently, President Biden argued that "the Constitution is always evolving slightly in terms of additional rights or curtailing rights."[72]

Despite such pronouncements, the executive branch has never firmly committed itself to any one interpretive method. There have been some purported efforts. During the Reagan Administration, for example, DOJ officially endorsed originalism; Attorney General Edwin Meese declared that "[i]t has been and will continue to be the policy of this administration

[70] President Bush Delivers Remarks at Federalist Society's 25th Annual Gala, George W. Bush White House Archives (Nov. 15, 2007, 7:00 PM), https://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071115-14.html [https://perma.cc/6YDM-ZXQM].

[71] Barack Obama, The Audacity of Hope: Thoughts on Reclaiming the American Dream 90 (2006); see also Inaugural Address by President Barack Obama, Barack Obama White House Archives (Jan. 21, 2013, 11:55 AM), https://obamawhitehouse.archives.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama [https://perma.cc/ZR8U-4J7G] ("[W]e have always understood that when times change, so must we; that fidelity to our founding principles requires new responses to new challenges . . . ."); Remarks by the President in a Conversation on the Supreme Court Nomination, Barack Obama White House Archives (Apr. 8, 2016, 2:43 PM), https://obamawhitehouse.archives.gov/the-press-office/2016/04/08/remarks-president-conversation-supreme-court-nomination [https://perma.cc/XRJ4-L834] (expressing a desire for Justices who, "when they're looking at a tough case in which statute or the Constitution does not provide an immediate, ready answer, . . . can apply judgment, grounded in how we actually live").

[72] Remarks by President Biden in Meeting with Senate Judiciary Committee Chair Dick Durbin and Ranking Member Chuck Grassley on the Forthcoming Supreme Court Vacancy, Joseph R. Biden White House Archives (Feb. 1, 2022, 1:57 PM), https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2022/02/01/remarks-by-president-biden-in-meeting-with-senate-judiciary-committee-chair-dick-durbin-and-ranking-member-chuck-grassley-on-the-forthcoming-supreme-court-vacancy/ [https://perma.cc/9FYK-99BH].

to press for a Jurisprudence of Original Intention."[73] Notably, Meese meant this as more than a principle for judicial appointments, stating that "[i]n the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment."[74]

But, contrary to Meese's stated vision, the executive branch's practices have been far more static and ecumenical. It has long used, and continues to use, all of the traditional modalities of constitutional interpretation.[75] This includes major OLC opinions issued during Republican administrations, such as Attorney General William Barr's brief but broad opinion, *Common Legislative Encroachments on Executive Branch Authority*,[76] which makes no mention of originalism and leans heavily on both judicial precedent and practice.[77] The executive branch's failure fully to embrace originalism during Republican administrations is particularly striking when one observes how many avowedly originalist Justices once worked in the executive branch.[78]

[73] Edwin Meese III, Att'y Gen., U.S. Dep't of Just., Speech to the American Bar Association 7 (July 9, 1985), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf [https://perma.cc/B8TP-AAD2]; see also Peter M. Shane, Independent Policymaking and Presidential Power: A Constitutional Analysis, 57 Geo. Wash. L. Rev. 596, 597 (1989) (identifying a tension between the Reagan Administration's endorsement of constitutional originalism and the separation of powers rhetoric employed by Meese to defend unilateral presidential initiatives).

[74] Meese, supra note 73, at 7; see also id. at 8 (claiming that the Administration would "pursue [its] agenda within the context of our written Constitution of limited yet energetic powers," because only "the sense in which the Constitution was accepted and ratified by the nation" provides "a solid foundation for adjudication").

[75] See Philip Bobbitt, Constitutional Fate: Theory of the Constitution 3–8 (1982) (cataloging various modalities); see also David E. Pozen & Adam M. Samaha, Anti-Modalities, 119 Mich. L. Rev. 729 (2021) (describing "anti-modalities" of constitutional interpretation, such as policy arguments and emotional arguments).

[76] Common Legislative Encroachments, supra note 50.

[77] *Common Legislative Encroachments on Executive Branch Authority* notes, for example, that the Court's broad definition of "officer" in *Buckley v. Valeo* mandates that the Appointments Clause governs the appointment of any official performing executive functions. Common Legislative Encroachments, supra note 50, at 249 (quoting Buckley v. Valeo, 424 U.S. 1, 126, 141 (1976) (per curiam)). Accordingly, in response to Congress's establishing and directing commissions which performed executive responsibilities and whose members were appointed "in a manner incompatible with the Appointments Clause," President Reagan repeatedly engaged in the practice of "stress[ing], in signing bills into law, that such commissions . . . may not perform . . . executive responsibilities." Id.

[78] See Jed Handelsman Shugerman, The Bi-Partisan Enabling of Presidential Power: A Review of David Driesen's *The Specter of Dictatorship: Judicial Enabling of Presidential Power* (2021), 72 Syracuse L. Rev. 1521, 1528–29 (2022).

Indeed, methodological pluralism is now officially memorialized in OLC practice. As OLC's 2010 Best Practices memorandum puts it, "On any issue involving a constitutional question, OLC's analysis should focus on traditional sources of constitutional meaning, including the text of the Constitution, the historical record illuminating the text's meaning, the Constitution's structure and purpose, and judicial and Executive Branch precedents interpreting relevant constitutional provisions."[79]

Major OLC opinions across changes in presidential administration and party control continue to reflect a pluralistic approach. Opinions from Democratic administrations, including perhaps most centrally Walter Dellinger's treatise-like opinion, *The Constitutional Separation of Powers Between the President and Congress*, do not reject the importance of text and history: "[I]t is important in addressing separation of powers matters to give careful consideration to the views of our predecessors and . . . the import of the Constitution's text, history, and structure."[80] Indeed, the Dellinger opinion expressly relies on "the original understanding and early practice of the separation of powers under the United States Constitution."[81] Yet later opinions, including those from the Bush and first Trump Administrations, continue to rely on the structure and authority of the Dellinger memorandum,[82] as well as a pluralistic approach to method—including, scandalously, legislative history (albeit

[79] Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Just., to Att'ys of the Off. of Legal Couns. 2 (July 16, 2010) [hereinafter 2010 Best Practices Memorandum], http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf [https://perma.cc/7DF9-Q99H]. Earlier Office guidance was slightly different in focus but not inconsistent: "On any issue involving a constitutional question, OLC's analysis should focus principally on the text of the Constitution and the historical record illuminating the original meaning of the text and should be faithful to that historical understanding," but "[w]here the question relates to the authorities of the President or other executive officers or the separation of powers between the Branches of the Government, past precedents and historical practice are often highly relevant." Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Just., to Att'ys of the Off. of Legal Couns. 2 (May 16, 2005) [hereinafter 2005 Best Practices Memorandum], https://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/olc-best-practices-2005.pdf [https://perma.cc/2ALQ-M3SZ].

[80] Constitutional Separation of Powers, supra note 2, at 128.

[81] Id. at 134.

[82] See, e.g., Application of the Appointments Clause to a Statutory Provision Concerning the Inspector Gen. Position at the Chem. Safety & Hazard Investigation Bd., 30 Op. O.L.C. 92, 95–96, 100 (2006); Mandatory Disclosure of C.R. Cold Case Recs., 43 Op. O.L.C. 17, 35, 38, 40 (2019).

with occasional gentle snark).[83] While, at various points in time, OLC has acknowledged that "certain differences in approach to the issues make it appropriate to revisit and update the Office's general advice," the actual approach to the issues does not seem to vary much.[84] That approach continues to be pluralistic.

What explains this? To some extent, this approach might be a product of working in the shadow of the judiciary: many OLC opinions concern issues that will end up in litigation before judges with diverse and varied methodological views.

But that cannot be a complete explanation. For starters, many OLC opinions concern issues that will never be litigated. And the puzzle of why the executive branch has never pursued a single method might be thought to extend to litigation. (After all, Meese's endorsement of originalism covered court filings, too.[85]) Finally, administrations *do* vary in their express willingness to respect judicial interpretations of law—with recent Republican administrations somewhat more willing to question whether the executive branch is bound by the Supreme Court's views on a constitutional issue and more decisive in answering the question of whether the executive branch's independent authority to interpret the Constitution allows for conflicting views between the branches.[86]

[83] See Whether Appropriations May Be Used for Informational Video News Releases, 29 Op. O.L.C. 74, 75 (2005) ("This view is supported by the legislative history, which indicates that informing the public of the facts about a federal program is not the type of evil with which Congress was concerned in enacting the 'publicity or propaganda' riders."); Comm. Resols. Under 40 U.S.C. § 3307(a) & the Availability of Enacted Appropriations, 42 Op. O.L.C. 1, 8 (2018) ("To the extent that it sheds light on the question, the legislative history of the Public Buildings Act is consistent with our view . . . ."); Designating an Acting Dir. of Nat'l Intel., 43 Op. O.L.C. 291, 296 n.2 (2019) ("The legislative history of section 3025(e) does not indicate that Congress believed the exclusion of the [Director of National Intelligence] from the tailored expansion of section 3345(a)(3) would prevent the President from using the Vacancies Reform Act.").

[84] Constitutional Separation of Powers, supra note 2, at 124 n.*. The long editor's note to the Dellinger opinion offers an interesting glimpse into the shifts. See id. The published opinion supersedes *Common Legislative Encroachments on Executive Branch Authority*, supra note 50, and then is severely circumscribed via a later editor's note. Yet both opinions remain cited in many later OLC precedents. See, e.g., Exec. Branch Participation in the Cyberspace Solarium Comm'n, 44 Op. O.L.C. 238, 245 (2020) (citing both the 1989 Barr opinion and the 1996 Dellinger opinion).

[85] See supra note 73 and accompanying text.

[86] Compare Constitutional Separation of Powers, supra note 2, at 127 ("We believe that the constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power. While the Supreme Court's decisions interpreting the Constitution cannot simply be *equated* with the Constitution, we are mindful of the special

A better explanation for the durability of methodological pluralism, despite sharp disagreement about approaches to constitutional interpretation across administrations, is the long-term institutional interest of DOJ in maintaining legitimacy over time. Methodological pluralism reflects a need for legitimacy and a desire for rule of law values within the executive branch. Those values are reasons why, as Trevor Morrison has suggested, there is a practice of stare decisis in the executive branch: it helps ensure consistency, predictability, efficiency, and credibility.[87]

*2. Nonenforcement and the Duty to Defend*

One of the most hotly contested interpretive norms in the executive branch is the idea that the president has the discretion—and perhaps even the duty—to decline to enforce or defend unconstitutional laws. This issue has recurred in controversial cases in recent years and decades. President Obama famously made the decision not to defend in litigation—though to continue to enforce—provisions of the Defense of Marriage Act that prevented the federal government from recognizing same-sex marriages.[88] More recently, President Biden told the press that if Congress failed to send him legislation raising the debt limit, he had the authority to invoke the Public Debt Clause of the Fourteenth Amendment to exceed the existing statutory limit.[89] And, as detailed in the next Section,

role of the courts in the interpretation of the law of the Constitution."), with 2005 Best Practices Memorandum, supra note 79, at 2–3 ("Decisions of the Supreme Court and courts of appeals directly on point often provide guiding authority and should be thoroughly addressed, particularly where the issue is one that is likely to become the subject of litigation."). This language from the 2005 memorandum is omitted from the 2010 update, though much of the rest of the advice on "[r]esearching, outlining, and drafting" opinions is reported word for word. See generally 2010 Best Practices Memorandum, supra note 79.

[87] Morrison, supra note 14, at 1496.

[88] See Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Just., to John A. Boehner, Speaker, U.S. House of Reps. (Feb. 23, 2011), https://www.justice.gov/archives/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act [https://perma.cc/H7LF-MH2X] (informing Congress that "the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that . . . Section 3 of [the Defense of Marriage Act] is unconstitutional" but also informing Congress that "[n]otwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch").

[89] See Conor Clarke, The Debt Limit, 101 Wash. U. L. Rev. 1417, 1421 (2024) (discussing this episode and related history); Brett Samuels, Biden Says He Thinks He Has Authority to Use 14th Amendment on Debt Ceiling, The Hill (May 21, 2023, 6:54 AM), https://thehill.com/homenews/administration/4014068-biden-says-he-thinks-he-has-authority-to-use-14th-amendment-on-debt-ceiling/ [https://perma.cc/EFQ3-MYGF].

presidents have for many decades signed laws while issuing statements that offer constitutional objections and put Congress and the public on notice of possible nonenforcement.[90]

The idea that the president may decline to enforce or defend a law he or she believes is unconstitutional is not a new one. As described more fully below, President Jefferson asserted his authority to decline to enforce provisions of the Alien and Sedition Acts that he believed unconstitutional.[91] In 1860, an opinion by Attorney General Jeremiah Black memorialized a similar view: the president can disregard an unconstitutional statute because "[e]very law is to be carried out so far forth as is consistent with the Constitution, and no further."[92] In 1865, Attorney General James Speed offered a similar opinion, stating that an act vesting the appointment power was unconstitutionally "void" and thus could and should be ignored by President Johnson[93] (an issue closely tied to Johnson's eventual unsuccessful impeachment[94]). More recent history is replete with similar examples.[95]

And yet the idea that the president must or may decline to enforce laws deemed unconstitutional sits in a delicate equipoise with an offsetting norm: the president's supposed duty to enforce and defend acts of Congress, even in the face of doubt as to their constitutionality. That latter norm has a more complicated history.[96] According to Neal Devins and

[90] See infra Subsection II.A.3.

[91] See infra notes 110–14 (discussing Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), *in* 35 The Papers of Thomas Jefferson 543 (Barbara B. Oberg ed., 2008)).

[92] Mem'l of Captain Meigs, 9 Op. Att'ys Gen. 462, 469 (1860).

[93] See Appointment of Assistant Assessors of Internal Revenue, 11 Op. Att'ys Gen. 209, 212–14 (1865) (arguing that the vesting act was unconstitutional). At the same time, Speed suggested that once a court had offered an "authoritative exposition" of the law, President Johnson may have had to relent. Id. at 214.

[94] See Impeachment Trial of President Andrew Johnson, 1868, U.S. Senate, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm [https://perma.cc/5NBK-GRN9] (last visited Oct. 15, 2025) (noting that President Johnson's appointment of an executive branch official without the advice and consent of the Senate motivated Congress's attempt to impeach him).

[95] Some historical materials on this issue are described in Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 203–08 (1994) [hereinafter Presidential Authority].

[96] See Neal Devins & Saikrishna Prakash, The Indefensible Duty to Defend, 112 Colum. L. Rev. 507, 513–21 (2012) (retelling the basic history of the view that the executive branch has a duty to enforce and defend statutes). Occasionally, as Devins and Prakash note, the executive has treated the two duties as separable—enforcing a statute might be different from defending it in litigation—though we do not consider such details in our short description of the practice here. Id. at 513.

Saikrishna Prakash, DOJ first discussed a duty to defend in 1980, though some earlier references suggest that a nascent form of the practice may have preceded that point in time.[97] One way or another, it seems uncontroversial that a "duty to defend"—even in circumstances where the president or other officers of the executive branch have reason to think a statutory provision is unconstitutional—is an interpretive norm of more recent vintage than the executive's discretion not to enforce unconstitutional laws. And, since 1980, that norm has been firmly entrenched in executive branch practice. As Attorney General Benjamin Civiletti put it (describing his own role as the executive branch's chief legal officer), "The Attorney General has a duty to defend and enforce the Acts of Congress," and even when the attorney general faces constitutional doubts, "it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress."[98]

The theory that the president has a duty to defend statutes—even when the president's best view of the law is that the statute is unconstitutional—has been subject to heavy criticism.[99] And those criticisms have some force. The idea that the president must enforce statutes flows obviously from the Take Care Clause: "[H]e shall take Care that the Laws be faithfully executed . . . ."[100] But the notion that the president must enforce statutes even in the face of constitutional doubts may also appear to conflict with the Take Care Clause—after all, the Constitution is the highest law of which the Take Care Clause requires faithful execution, and the president takes a specific constitutional oath to "preserve, protect and defend the Constitution of the United States."[101] One might

[97] Id. at 517 ("In 1980, the phrase 'duty to defend' found its way into DOJ opinions. Prior to that time, there seems to have been no case where Attorneys General or other officials used that term or discussed the concept." (footnote omitted)). But see Presidential Authority, supra note 95, at 204 (referencing an earlier OLC memorandum that stated that "[u]nless the unconstitutionality of a statute is clear, the President should attempt to resolve his doubts in a way that favors the statute, and he should not decline to enforce it unless he concludes that he is compelled to do so under the circumstances" (alteration in original) (citing Memorandum from John M. Harmon, Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Just., to Robert J. Lipshutz, Couns. to the President (Sept. 27, 1977))).

[98] The Att'y Gen.'s Duty to Def. & Enforce Constitutionally Objectionable Legis., 4A Op. O.L.C. 55, 55 (1980) [hereinafter Attorney General's Duty].

[99] See generally Devins & Prakash, supra note 96 (arguing, as the title of their article suggests, that the duty to defend cannot be defended).

[100] U.S. Const. art. II, § 3.

[101] Id. art. II, § 1, cl. 8.

reasonably think that the Take Care Clause requires that the president ignore a statute he or she deems unconstitutional.

So where does the more recent norm—the presumptive duty to defend—come from? Civiletti's view seems to flow primarily from what might be described as certain separation of powers policy concerns. In Civiletti's telling, the judiciary "is ordinarily in a position to protect both the government and the citizenry from unconstitutional action," yet "only the Executive Branch can execute the statutes of the United States."[102] For that reason, Civiletti continued, "a policy of [executive officials'] ignoring . . . Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitution" would often deny the judiciary an opportunity to review constitutional questions entirely and might "jeopardize the equilibrium established within our constitutional system."[103] In Civiletti's telling, proper respect for the judiciary's role in "say[ing] what the law is"[104] requires a presumption that the executive enforce acts and provide a fulsome opportunity for the judiciary to weigh in on constitutionality.

While our goal here is not to delve deeply into the merits of the duty to defend, two observations are in order. First, the combination of these doctrines—that the president may decline to enforce some statutes and purportedly must enforce others—naturally leaves a degree of judgment and choice. How much statutory unconstitutionality is too much? An important background premise of these doctrines (and especially Civiletti's classic view of the duty to defend) seems to be that there can be differences in the intensity of an official's constitutional concerns—with some views more weakhearted than others, or some provisions more obviously unconstitutional than others. For this reason, the doctrines are perhaps best regarded not as duties but as norms or presumptions. For constitutional policy reasons, the executive branch applies a presumption that statutes are constitutional and should be enforced—a presumption that is rebuttable in particularly extreme cases.

Second, the combination of these two norms—the executive branch in some circumstances must defend acts of Congress and in other circumstances is duty-bound *not* to defend them—allows the executive branch to speak in different legal voices. (One can contrast, for instance, the solicitor general's longstanding view that it has "the responsibility,

[102] Attorney General's Duty, supra note 98, at 56.
[103] Id.
[104] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

except in rare instances, of defending the constitutionality of enactments, so long as a defense can reasonably be made,"[105] with OLC's longstanding view that it must "provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration's or an agency's pursuit of desired practices or policy objectives."[106]) Indeed, the combination of these norms—and the discretion and flexibility they suggest—leads to the surprising result that the executive branch does not always offer its best view of the law. Indeed, in some contexts, it apparently views itself as obligated to offer something other than its best view.

*3. Statutory "Treatment": Executive Branch Severance*

In some cases, as noted above, the executive branch may encounter a statutory provision that it believes is unconstitutional and decline to enforce it. In others, the executive branch may have constitutional doubts about a statute yet nevertheless feel constitutionally compelled to defend it. In yet others still, as Trevor Morrison has carefully documented, the executive branch may believe a statute is amenable to a savings construction and thus apply principles of constitutional avoidance.[107] But that list has not exhausted the possibilities. The primary purpose of this Subsection is to excavate, describe, and theorize an underappreciated member of this interpretive family: the practice of executive branch "treatment"—a term of art with a consistent customary usage within the executive branch that has gone largely unnoticed outside of it.

The executive branch frequently concludes and announces that it will treat a constitutionally objectionable statute in a particular way. Announcing a treatment of a statute is typically something more than simply announcing a decision not to enforce a statute or provision. Nor is it a savings construction—or any kind of interpretation of the statutory text. A statutory treatment proceeds from the conclusion that the text of the provision would be unconstitutional as applied and can be read in no other way *but should nevertheless be given some effect*—typically in the interest of interbranch comity—toward achieving Congress's intended but unconstitutional aims. Treatment lies at the border between statutory nonenforcement and statutory interpretation: the executive branch

[105] Waxman, supra note 68.
[106] 2010 Best Practices Memorandum, supra note 79, at 1.
[107] See generally Morrison, supra note 26.

announces a constitutional objection yet nevertheless states a plan to give the policy desires of that provision the maximum possible constitutional effect.

While unfamiliar to many lawyers outside the government, the executive branch practice of applying a treatment to a statute has a lineage that goes back to John Adams, Thomas Jefferson, and the debate over the Alien and Sedition Acts—the infamous 1798 laws that empowered the president to detain and deport immigrants and that criminalized malicious statements against the federal government.[108] Jefferson's opposition to the Acts, which helped him win the election of 1800, has been recounted many times.[109] But it is perhaps President Jefferson's 1801 letter to Edward Livingston, then-recently appointed mayor of New York City (and previous U.S. Attorney for the District of New York), that has had the most influence over the language and categories of modern executive branch practice.[110]

Jefferson's letter to Livingston offers the then-President's views on how the decision to drop a federal prosecution under the Sedition Act should be presented to the public. Jefferson's letter begins by offering a general theory of presidential control over criminal enforcement: if the president "sees a prosecution put into a train which is not lawful, he may order it to be discontinued and put into legal train."[111] In the case at hand, the prosecution was one "for an offence against the Senate, founded on the Sedition act," which Jefferson declared "to be no law, because [it was] in opposition to the Constitution."[112] He thus announced that he would "treat it as a nullity wherever it comes in the way of my functions."[113] Jefferson accordingly "directed that prosecution to be discontinued [and] a new one to be commenced, founded on whatsoever other law might be in existence against the offence."[114]

Jefferson's statement on the Sedition Act is notable for its use of the delightful word "nullity," but it is in fact the less conspicuous term "treat" that has endured in executive branch practice—or has at least been revived in the modern presidential era. Today, presidents frequently assert

[108] See Gordon S. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, at 247 (2009).
[109] See id. at 434–35.
[110] See Letter from Thomas Jefferson to Edward Livingston, supra note 91, at 543–44.
[111] Id. at 544.
[112] Id.
[113] Id.
[114] Id.

the power to treat provisions of acts of Congress as nonbinding suggestions rather than unconstitutional encroachments on executive authority.

The modern era of presidential treatment began when President Lyndon B. Johnson signed the Public Works Appropriation Act of 1964.[115] President Johnson appended a signing statement making clear that his signature "[did] not mean approval of that provision in the act which preclude[d] the Panama Canal Company"—a federal government corporation that ran the Canal between 1951 and 1979—"from disposing of any real property or any rights to the use of real property without first obtaining the approval of the appropriate legislative committees of the House and Senate."[116] In other words, the provision would appear to give individual committees of the House and Senate control over the execution of the law outside the formal constitutional process of bicameralism and presentment. President Johnson's statement continued that he concurred in the views of various attorneys general who had concluded that such a provision is "either an unconstitutional delegation to Congressional committees of powers which reside only in the Congress as a whole, or an attempt to confer executive powers on the committees in violation of the principle of separation of powers set forth in the Constitution."[117]

But Johnson's statement did not end in objection. He concluded that it was "entirely proper for the committees to request information with respect to the disposal of property" and further recognized "the desirability of consultations between officials of the executive branch and the Congress."[118] "Therefore," he declared his "intention to treat the provision as a request for information and to direct that the appropriate legislative committees be kept fully informed with respect to disposal and transfer actions taken by the Panama Canal Company."[119]

The Jefferson and Johnson statements have at least two things in common. First, they announce that Congress has done something unconstitutional and offer the president's view that he cannot execute the law in question consistent with his own constitutional obligations. No savings construction is available, so questions of constitutional avoidance

[115] See Public Works Appropriation Act, 1964, Pub. L. No. 88-257, 77 Stat. 844 (1963).

[116] Statement by the President Upon Approving the Public Works Appropriation Act, 1 Pub. Papers 104 (Dec. 31, 1963).

[117] Id.

[118] Id.

[119] Id.

do not apply. Second, they announce a proposed course of action to be taken that may still advance the objectives of statutory law but that complies with the Constitution—a course of action (borrowing Jefferson's phrase) meant to "put into legal train" laws and actions that would otherwise be unconstitutional.[120] In the case of the Sedition Act, it was not just that the prosecution be ended, but that "a new one . . . be commenced, founded on whatsoever other law might be in existence against the offence."[121] In Johnson's case, it was to "treat the provision as a request for information and to direct that the appropriate legislative committees be kept fully informed with respect to disposal and transfer actions taken by the Panama Canal Company."[122]

Since 1964, more than one hundred presidential signing statements have announced a treatment of a statutory provision.[123] Presidents who have regularly announced treatments include Ford, Carter, George H.W. Bush, Clinton, George W. Bush, Obama, Trump, and Biden.[124] (Presidents Nixon and Reagan seemed not to have used the magic words

[120] See Letter from Thomas Jefferson to Edward Livingston, supra note 91, at 544.

[121] Id.

[122] Statement by the President Upon Approving the Public Works Appropriation Act, supra note 116, at 104.

[123] The American Presidency Project, 131 results (Oct. 15, 2025) (on file with the *Virginia Law Review*) (filtered by "From Date", "01-01-1964"; and "To Date", "09-12-2025"; and "Document Category", "Signing Statements"), https://www.presidency.ucsb.edu/advanced-search?field-keywords=&field-keywords2=treat&field-keywords3=&from%5Bdate%5D=01-01-1964&to%5Bdate%5D=09-12-2025&person2=&category2%5B%5D=69&items_per_page=100 [https://perma.cc/87JS-FN2A] (counting 131 signing statements issued since 1964).

[124] See, e.g., Presidential Statement on Signing Department of Defense Appropriation Act, 1976, 12 Weekly Comp. Pres. Doc. 172, 172 (Feb. 10, 1976) [hereinafter Statement on Defense Appropriation Act] (President Ford); Presidential Statement on Signing the Outer Continental Shelf Lands Act Amendments of 1978, 14 Weekly Comp. Pres. Doc. 1530, 1531 (Sept. 18, 1978) [hereinafter Statement on Outer Continental Shelf Lands Act] (President Carter); Presidential Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, 27 Weekly Comp. Pres. Doc. 1526, 1527–28 (Oct. 28, 1991) (President George H.W. Bush); Presidential Statement on Signing Legislation on Funding for the Disposition of Depleted Uranium Hexafluoride, 34 Weekly Comp. Pres. Doc. 1448, 1448 (July 21, 1998) [hereinafter Statement on Disposition of Depleted Uranium Hexafluoride] (President Clinton); Presidential Statement on Signing the District of Columbia Appropriations Act, 2005, 40 Weekly Comp. Pres. Doc. 2454, 2454 (Oct. 18, 2004) (President George W. Bush); Presidential Statement on Signing the Omnibus Appropriations Act, 2009, 2009 Daily Comp. Pres. Doc. 145 (Mar. 11, 2009) [hereinafter Statement on Omnibus Appropriations Act] (President Obama); Presidential Statement on Signing the Countering America's Adversaries Through Sanctions Act, 2017 Daily Comp. Pres. Doc. 558 (Aug. 2, 2017) (President Trump); Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2024, 2023 Daily Comp. Pres. Doc. 1145 (Dec. 22, 2023) (President Biden).

but suggested on various occasions that they would engage in the substance of treatment.[125]) In homage to the origins of this practice, several twentieth-century presidential treatments also use the distinctive Jeffersonian "nullity" language.[126]

Statutory treatment is thus a distinct and consistent variation on themes that have been picked up before. It is widely known that signing statements are a mechanism by which a president may announce constitutional objections to a statute and decisions not to enforce a provision as written: during the Bush Administration, the use of signing statements garnered substantial national press and academic attention for this very reason.[127] And, as described above, it is likewise well known that the executive branch makes use of avoidance techniques.[128] But treatment is different. It combines a limited statement of nonenforcement with an affirmative statement of comity: a provision presents a constitutional difficulty, so the president will take some action that is constitutional while advancing the statute's policy goals.

In the average case, the action the president takes is simply to treat a mandatory provision as advisory (or, in the occasional standardized-test language that pervades government documents, "precatory"[129] or "hortatory"[130]). But sometimes a provision is more ambitiously rewritten by a presidential treatment. A relatively early statement from President Carter did so by treating provisions that would allow congressional committees to veto executive action as provisions that instead require the president to notify the congressional committee of an intended action and

[125] See, e.g., Presidential Statement on Signing the Public Buildings Amendments of 1972, 8 Weekly Comp. Pres. Doc. 1076, 1076 (June 16, 1972) (President Nixon) ("I cannot act under such a provision."); Presidential Statement on Signing the Columbia River Gorge National Scenic Area Act, 22 Weekly Comp. Pres. Doc. 1576, 1576 (Nov. 17, 1986) (President Reagan) (stating that one provision in the Columbia River Gorge National Scenic Area Act "will be merely advisory").

[126] See, e.g., Statement on Defense Appropriation Act, supra note 124, at 172 (President Ford); Presidential Statement on Signing the Veterans' Education and Employment Assistance Act of 1976, 12 Weekly Comp. Pres. Doc. 1519, 1519 (Oct. 15, 1976) (President Ford).

[127] For the original and influential media report on this, see Charlie Savage, Bush Challenges Hundreds of Laws, Bos. Globe, Apr. 30, 2006, at A1; see also Am. Bar Ass'n, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine 1 (2006) (opposing, among other things, presidential signing statements declaring the intention to "disregard or decline to enforce" a statute).

[128] See Morrison, supra note 26.

[129] Statement on Omnibus Appropriations Act, supra note 124 (President Obama).

[130] Statement on Disposition of Depleted Uranium Hexafluoride, supra note 124 (President Clinton).

then wait before executing on the intended policy—so-called "report and wait" provisions.[131] Treating a purported congressional approval requirement or veto power as a notification requirement remains common.[132]

Nor is the executive branch's use of the treatment device limited to signing statements. In a November 27, 2019 letter on the National Defense Authorization Act, for example, DOJ used the treatment device no fewer than three times, notifying Congress that, if certain provisions were not changed, the Department would advise the president and the executive branch as a whole to treat them as nonbinding.[133] Regulations and other documents published in the *Federal Register* likewise make occasional use of the treatment tool.[134]

In both signing statements and other communications, the use of treatment seems generally—though not universally[135]—confined to laws that affect the separation of powers between the president and Congress, rather than laws that implicate the rights of the public. There are several reasons for this. First, provisions that affect the rights of the public can be vindicated and challenged in court without the executive branch's adoption of a limiting treatment—and thus implicate the principles of

[131] Statement on Outer Continental Shelf Lands Act, supra note 124, at 1531 (President Carter) ("I intend to treat . . . these provisions as 'report and wait' requirements.").

[132] See, e.g., Presidential Statement on Signing the Consolidated Appropriations Act, 2017, 2017 Daily Comp. Pres. Doc. 312 (May 5, 2017) [hereinafter Statement on Consolidated Appropriations Act] (President Trump) ("My Administration will notify the relevant committees before taking the specified actions . . . but it will not treat spending decisions as dependent on the approval of congressional committees.").

[133] See Letter from Prim F. Escalona, Principal Deputy Assistant Att'y Gen., Off. of Legis. Affs., U.S. Dep't of Just., to Sen. James Inhofe, Chairman, Comm. on Armed Servs. 22 (Nov. 27, 2019) [hereinafter 2019 Views Letter] ("[T]he Department would advise executive agencies to treat demands for Executive Branch resources and information as non-binding . . . ."); id. at 17 (same); id. at 15 ("[T]he Department would treat such commissions to be legislative entities . . . .").

[134] See, e.g., Atlantic Bluefish Fishery; Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic; Stone Crab Fishery of the Gulf of Mexico; Northern Anchovy Fishery; Salmon Fisheries Off the Coast of Alaska; Removal of Regulations, 61 Fed. Reg. 60254, 60254 (Nov. 27, 1996) ("[T]he President stated . . . that the Secretary is to treat this provision as advisory, not mandatory.").

[135] An example of one that touches individual rights is Statement on Consolidated Appropriations Act, supra note 132 (President Trump) ("My Administration shall treat provisions that allocate benefits on the basis of race . . . in a manner consistent with the requirement to afford equal protection of the laws under the Due Process Clause of the Constitution's Fifth Amendment.").

nonenforcement and the duty to defend described above.[136] In contrast, statutes that implicate the prerogatives of the executive branch are more naturally vindicated by the executive branch. Second, while the executive branch has the means and the incentive to oppose congressional action that it believes violates the constitutional separation of powers, it is also not without an incentive to pursue comity with Congress. Treatment can be understood as a tool that balances these objectives—sticking up for executive branch prerogatives while acknowledging that congressional goals are entitled to respect. Statutory treatment may thus serve normative values similar to those served by uses of executive branch constitutional avoidance—enforcing the Constitution while also pursuing interbranch comity.[137]

*4. Waivers, Accommodations, and Interbranch Comity*

Statutory treatment exists between interpretation and nonenforcement. A treatment acknowledges that the text of the law cannot bear a savings construction but nevertheless announces a commitment that gives the provision in question *some* meaning, albeit one not intended by Congress.

A closely related concept is that the executive branch can simply *waive* the constitutional difficulty—and, indeed, often does.[138] Consider the example of *Immigration & Naturalization Service v. Chadha* violations. In that case, the Supreme Court held in no uncertain terms that statutes that purport to permit one house of Congress to veto decisions by the executive branch are unconstitutional.[139] Congress's attempt to aggrandize itself through the "legislative veto" represented an impermissible end-run around the Constitution's required process for legislation involving bicameralism and presentment.[140]

Though the Court left no ambiguity, Congress seems not to have gotten the memo. In recent years, the Consolidated Appropriations Acts have contained dozens of flagrantly unconstitutional provisions that condition executive branch action on approval from a congressional committee.

[136] See supra Subsection II.A.2.

[137] See Morrison, supra note 26, at 1220 ("[A]s a matter of interbranch comity, it is just as appropriate for the executive branch to presume congressional fidelity to the Constitution as it is for the courts to do so.").

[138] Waiver can be conceptualized as a treatment that enforces a provision notwithstanding its unconstitutionality.

[139] See INS v. Chadha, 462 U.S. 919, 944–59 (1983).

[140] See id. at 956–58.

Often, these provisions condition transfer of funds on approval from the House and Senate Appropriations Committees.[141]

For example, the Consolidated Appropriations Act of 2023[142] contained a bonanza of *Chadha* violations.[143] Nor is that Act unique; Congress regularly includes purported approval requirements. The executive branch also frequently objects to such provisions. Since the beginning of the Clinton Administration, a president has objected to a bill provision citing or referencing *Chadha* at least forty-nine times.[144] Those objections are also bipartisan, occurring regularly in both Democratic and Republican presidencies.[145] And they do not reflect some exotic or far-

[141] See, e.g., Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. A, tit. I, 134 Stat. 1182, 1193 (2020) ("[T]he agency may exceed this limitation by up to 10 percent with notification to the Committees on Appropriations of both Houses of Congress."); id. div. D, tit. II, § 201(a), 134 Stat. at 1361–62 (providing that none of the funds appropriated to the Department of Interior for water and related resources "shall be available . . . through a reprogramming of funds that . . . increases funds for any program . . . unless prior approval is received from the Committees on Appropriations of both Houses of Congress"); id. div. D, tit. III, § 301(e), 134 Stat. at 1374 ("[T]he Department [of Energy] shall notify, and obtain the prior approval of, the Committees on Appropriations of both Houses of Congress at least 30 days prior to the use of any proposed reprogramming that would cause [a funding level] to increase or decrease . . . ."); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. B, tit. II, 133 Stat. 13, 54 ("[N]ot more than 50 percent of the funding made available under this heading . . . may be obligated until . . . [funding has been] approved by the Committees on Appropriations of both Houses of Congress . . . ."); id. div. E, tit. III, 133 Stat. at 245 ("[N]one of the funds transferred pursuant to this section shall be available for obligation without written notification to and the prior approval of the Committees on Appropriations of both Houses of Congress . . . .").

[142] See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022).

[143] See, e.g., id. div. A, tit. VI, 136 Stat. at 4493 ("[F]unds may be transferred from one specified activity to another with the prior approval of the Committees on Appropriations of both Houses of Congress.").

[144] The American Presidency Project, "Chadha", 49 results (Oct. 15, 2025) (on file with the *Virginia Law Review*) (filtered by "From Date", "01-20-1993"; and "To Date", "09-12-2025"; and "Document Category", "Signing Statements"; and "Refine by Name", "Donald J. Trump (1st Term)", "George W. Bush", "William J. Clinton"; and "Category", "Presidential Signing Statements"; and "Attribute", "Bill Signing"), https://www.presidency.ucsb.edu/advanced-search?field-keywords=&field-keywords2=Chadha&field-keywords3=&from%5Bdate%5D=01-20-1993&to%5Bdate%5D=09-12-2025&person2=&category2%5B%5D=69&items_per_page=100 [https://perma.cc/MAD5-KL2H]. Because these search results only contain signing statements that refer to *Chadha* by name, they likely undercount the true number of executive objections.

[145] Id.; see also, e.g., Presidential Statement on Signing the United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, 2023 Daily Comp. Pres. Doc. 676 (Aug. 7, 2023) [hereinafter Statement on United States-Taiwan Initiative] (President Biden); Presidential Statement on Signing the Countering America's Adversaries Through Sanctions Act, 2017 Daily Comp. Pres. Doc. 559 (Aug. 2, 2017) [hereinafter Statement on

fetched executive branch position; they flow directly from *Chadha*'s clear holding. Strikingly, these objections are also in cases where the legislative branch often agrees with the constitutional objection; the Government Accountability Office ("GAO"), which is an agent of Congress, generally concedes the unconstitutionality of these provisions.[146]

A typical practice in signing statements that respond to these provisions is to treat the *Chadha* violation as a *notification* requirement.[147] That courtesy is arguably more than Congress deserves, given that the executive branch has no obligation to comply with plainly unconstitutional provisions. But the executive branch frequently goes even further and treats these congressional approval provisions *as binding*, notwithstanding their plain unconstitutionality. The most common context in which this arises is appropriations. For example, the Department of Defense's Financial Management Regulations require "approval by appropriate congressional committees" when the Department seeks to "[r]eprogram[]" funds—that is, to use "funds in an appropriation account for purposes other than those contemplated at the time of appropriation."[148] Congress itself has acknowledged this oddity, noting that "[w]hile [Department of Defense] Financial Management Regulation requires congressional prior approval of certain reprogramming actions, the department does not view the requirement as

Countering America's Adversaries Through Sanctions Act] (President Trump); Presidential Statement on Signing the Energy and Water Development Appropriations Act, 2002, 37 Weekly Comp. Pres. Doc. 1650, 1650 (Nov. 12, 2001) [hereinafter Statement on Energy and Water Development Appropriations Act] (President George W. Bush); Presidential Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 2001, 36 Weekly Comp. Pres. Doc. 2434, 2435 (Oct. 11, 2000) (President Clinton).

[146] See U.S. Gov't Accountability Off., B-334306, Department of Agriculture—Application of Statutory Notification Requirement 9 (2023), https://www.gao.gov/assets/830/828269.pdf [https://perma.cc/ZHB5-C4UV] (noting that an appropriations provision violates *Chadha*).

[147] See, e.g., Presidential Statement on Signing the Treasury, Postal Service, and General Government Appropriations Act, 1994, 29 Weekly Comp. Pres. Doc. 2203, 2204 (Oct. 28, 1993) (President Clinton) (treating *Chadha*-violating provisions "to require notification only"). Similar language appears in various Bush-era signing statements. See, e.g., Statement on Energy and Water Development Appropriations Act, supra note 145. President Obama did the same. See, e.g., Statement on Omnibus Appropriations Act, supra note 124. So did President Trump. See, e.g., Statement on Countering America's Adversaries Through Sanctions Act, supra note 145 (suggesting that President Trump would honor the bill's extended waiting period to give Congress time to act). President Biden did too, though less frequently than his predecessors. See, e.g., Statement on United States-Taiwan Initiative, supra note 145 (noting a *Chadha* violation).

[148] U.S. Dep't of Def., DoD 7000.14-R, 2A Financial Management Regulation ch. 1, § 1.7.2.51 (2008).

legally binding."[149] But of course, agencies are bound by their own regulations.[150]

Consider another example: Section 156(b) of the Education Sciences Reform Act of 2002[151] requires the National Center for Education Statistics ("NCES") to furnish special statistical compilations and surveys at the request of congressional committees.[152] President Bush objected to this provision in his signing statement.[153] Nevertheless, NCES provides annual reports to Congress and has stated that its reports are published pursuant to a "Congressional mandate."[154]

These cases all represent an extreme form of comity between the branches: the executive branch believes a requirement is unconstitutional yet nevertheless complies with it. We think this happens for several reasons. One reason is simply that the executive branch may not object to the substance of what Congress is asking for in a particular case. For example, a 1998 law required the Secretary of Energy to prepare and the President to put forward "a plan and proposed legislation" to ensure that certain appropriated funds would be spent constructing a facility for handling depleted uranium.[155] President Clinton signed the bill. While noting that "by virtue of the Recommendations Clause of the Constitution, Article II, section 3, the Congress may not require the President to recommend legislation to the Congress," he nonetheless concluded that he would comply with it because he "believe[d] that the development of proposed legislation by the Secretary of Energy furthers important and valuable objectives."[156]

[149] Brendan W. McGarry, Cong. Rsch. Serv., R46421, DOD Transfer and Reprogramming Authorities: Background, Status, and Issues for Congress 34 (2020).

[150] See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266–67 (1954) (holding that the attorney general is bound by regulations granting discretion to the Board of Immigration Appeals).

[151] Education Sciences Reform Act of 2002, Pub. L. No. 107-279, 116 Stat. 1940.

[152] Id. § 156(b), 116 Stat. at 1961.

[153] See Statement on Signing Legislation to Provide for Improvement of Federal Education Research, Statistics, Evaluation, Information, and Dissemination, and for Other Purposes, 38 Weekly Comp. Pres. Doc. 1995, 1995 (Nov. 5, 2002) ("[T]he executive branch shall construe section 156(b) . . . in a manner consistent with the principles enunciated by the U.S. Supreme Court in 1983 in *INS v. Chadha* . . . .").

[154] See Nat'l Ctr. for Educ. Stat.: Who We Are, https://nces.ed.gov/about/?sec=congress [https://perma.cc/BZ9S-JUUU] (last visited Oct. 16, 2025).

[155] Act of July 21, 1998, Pub. L. No. 105-204, § 1(a), 112 Stat. 681, 681.

[156] Statement on Disposition of Depleted Uranium Hexafluoride, supra note 124 (President Clinton).

But another reason may reflect the realpolitik of the separation of powers. Even if Congress cannot legally enforce approval requirements and other unconstitutional provisions, it has other tools at its disposal. The relevant committee may remember an agency's refusal to play ball in the next appropriations season. And the executive branch may go along to keep the committee happy. Congress itself has acknowledged this dynamic. A GAO report noted constitutional concerns about "approval requirements in the context of appropriations provisions" but went on to suggest that "agencies ignore such expressions of intent at the peril of strained congressional relations."[157]

From one perspective, this is unobjectionable. Congress uses its constitutional powers (such as appropriations) to persuade the executive branch to do something it cannot constitutionally demand (preapproval for certain executive actions). Yet one could ask whether such a compromise conflicts with constitutional values. The Supreme Court has frequently declared in major separation of powers cases that an impermissible transfer of power is unconstitutional regardless of whether the branch ceding power has done so voluntarily.[158] If one believes that constitutional requirements such as bicameralism and presentment serve an important purpose, one may wonder whether the executive branch should willingly go along with Congress's attempt to circumvent them.

Nor are these issues limited to *Chadha*. They recur, for example, in the well-known constitutional accommodation process, by which the executive branch and Congress resolve requests for executive information.[159] The executive branch will occasionally take the position that Congress has no constitutional entitlement to some information and then nevertheless decide to waive those objections and release it.[160] And in principle these issues can, and likely have, occurred in other areas of the law too.

---

[157] See U.S. Gov't Accountability Off., supra note 146, at 9.

[158] See, e.g., Clinton v. City of New York, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("That a congressional cession of power is voluntary does not make it innocuous.").

[159] See generally Shaub, supra note 15, at 31–32 (describing the process by which the branches negotiate requests for information).

[160] Louis Fisher, The Politics of Executive Privilege 245–46 (2004) ("In the 1970s and 1980s, Congress and the executive branch clashed repeatedly over access to 'national security' and 'foreign affairs' documents. On each occasion the Justice Department insisted that the documents could not be shared with a congressional committee. In the end, the administration had to drop its pretensions to having an exclusive role in determining what to release to Congress.").

*5. Jurisdictional Considerations*

The executive branch articulates and utilizes jurisdictional-like limitations on its power and obligation to opine on constitutional questions. For example, OLC represents that it will only answer certain legal questions under certain circumstances.[161] The expressed rules and practices in this area have clear analogs in judicial practice.

Precisely identifying and evaluating the jurisdictional limits internal to the executive branch poses challenges. There is no way for the public to observe the full set of constitutional questions that are asked internally but not answered.[162] Nevertheless, a few jurisdictional practices can be derived from the publicly available guidance and materials. We focus on such guidance and on areas where there has been agreement across administrations.

*Discretionary Jurisdiction.* Perhaps the most consequential component of jurisdictional considerations within the executive branch is the degree to which it represents that it has discretion in what questions it considers and decides. The Supreme Court has some mandatory jurisdiction (cases it must hear) and a great deal of discretionary jurisdiction (cases it may choose to hear).[163] OLC's view, however, is that it has broad discretion over what questions it opines on—there is nothing explicitly mandatory.[164] As a practical matter, of course, advice requested by OLC's superiors—the president or the attorney general—will typically be provided.[165] But OLC's general view is that it always reserves discretion in whether to provide an answer. And, in making that determination, OLC considers whether there is "a practical need for the opinion; OLC particularly should avoid giving unnecessary advice where it appears that policymakers are likely to move in a different direction."[166]

[161] See 2005 Best Practices Memorandum, supra note 79, at 1–2.

[162] Nor, for that matter, is there a way for the public to observe the full set of questions that *are* answered—given that a great deal of OLC's work is confidential. See id. at 4 ("It is critical to the discharge of the President's constitutional responsibilities that he and the officials under his supervision are able to receive confidential legal advice from OLC.").

[163] U.S. Const. art. III, § 2.

[164] See, e.g., 2005 Best Practices Memorandum, supra note 79, at 1–2.

[165] OLC gives special treatment to such requests. For example, if a request comes "from the Counsel to the President, the Attorney General, or one of the other senior management offices of the Department of Justice," OLC does not request a "detailed analysis" of the requester's view of the law before issuing an opinion. 2010 Best Practices Memorandum, supra note 79, at 3.

[166] 2005 Best Practices Memorandum, supra note 79, at 1.

OLC's (and by extension DOJ's) view of its power over its docket presents a bit of a puzzle. The statutory framework and the regulations appear to speak in mandatory language in various respects. For example, a statute provides that "[t]he head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."[167] But, if for no other reason than that statutory obligations have no enforcement mechanism, OLC does not seem to consider itself bound by them.

This theme of unusual discretion extends to several other aspects of OLC's jurisdictional work. For example, OLC has a method for resolving questions for independent agencies that resembles binding arbitration:

> If we are asked to provide an opinion to an executive agency whose head does not serve at the pleasure of the President (i.e., an agency whose head is subject to a "for cause" removal restriction), our practice is to receive in writing from that agency an agreement to be bound by our opinion.[168]

OLC also generally decides what briefing it wants to receive. OLC's general practice is, in the case of an interagency dispute, to "ask each side to submit . . . a memorandum" with views, and for "each side of a dispute to share their memoranda with the other side" so that OLC may get the benefit of something like reply briefing.[169] But OLC also reserves more general discretion to solicit the views of any interested or expert component of the executive branch when "appropriate and helpful" and consistent with relevant confidentiality interests.[170]

*Original Versus Appellate Jurisdiction.* OLC has a preference for the executive branch equivalent of appellate jurisdiction. The 2010 Best Practices memorandum explains that

> [b]efore we proceed with an opinion, our general practice is to ask the requesting agency for a detailed memorandum setting forth the agency's own analysis of the question; in many cases, we will have preliminary discussions with the requesting agency before it submits a

[167] 28 U.S.C. § 512.

[168] 2005 Best Practices Memorandum, supra note 79, at 1.

[169] 2010 Best Practices Memorandum, supra note 79, at 3.

[170] Id. ("When appropriate and helpful, and consistent with the confidentiality interests of the requesting agency, we will also solicit the views of other agencies . . . .").

> formal opinion request to OLC, and the agency will be able to provide its analysis along with the opinion request.[171]

This process presumably provides OLC with advantages similar to those enjoyed by appellate courts; having a preliminary analysis of the question by an agency with particular expertise in the relevant area can make it easier for OLC to get up to speed on the legal issues and to focus on the most critical issues.

*Concreteness.* The case-or-controversy requirement means that federal courts are supposed to refuse to weigh in on "abstract" questions.[172] The executive branch purports to follow a somewhat similar rule. OLC guidance suggests that the Office should only address legal issues that are "focused and concrete" and that the Office "generally avoids undertaking a general survey of an area of law or a broad, abstract legal opinion."[173] Focusing on issues with "concrete grounding" is thought to "help focus legal analysis."[174] The roots of this practice can be traced back more than a century, when attorneys general declined to give opinions on "mere moot questions of law"[175] or "hypothetical"[176] issues.

However, the supposed "concreteness" requirement is obviously incorrect as a description of what OLC does. As noted above, a number of important OLC opinions provide surveys of an area of law—such as then-acting OLC head Steven Bradbury's memorandum on the Constitution's Appointments Clause,[177] Dellinger's memorandum on the separation of powers,[178] and then-OLC head Barr's memorandum on legislative encroachments on the separation of powers.[179] As noted above, all of these opinions (among others) were directed to the general counsels of executive agencies as a whole and were produced on broad constitutional subjects with no apparent connection to any particular

[171] Id.

[172] See Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297 (1979).

[173] 2005 Best Practices Memorandum, supra note 79, at 1.

[174] 2010 Best Practices Memorandum, supra note 79, at 2.

[175] Hazing—Summary Dismissal of Cadet—Sec'y of the Navy, 25 Op. Att'ys Gen. 543, 547 (1905).

[176] Att'y-Gen.—Op., 25 Op. Att'ys Gen. 369, 370 (1905) ("[T]he question is entirely a hypothetical one. It is not considered proper for me to deliver opinions under such circumstances.").

[177] Officers of the United States, supra note 50.

[178] Constitutional Separation of Powers, supra note 2.

[179] Common Legislative Encroachments, supra note 50.

controversy.[180] So, "concreteness" appears to be not a strict jurisdictional requirement, but rather a discretionary factor that allows OLC, guided by the attorney general and the White House, to choose when to weigh in.

*Prospectivity.* OLC guidance provides that its opinions "should address legal questions prospectively; OLC avoids opining on the legality of past conduct (though from time to time [it] may issue prospective opinions that confirm or memorialize past advice or that necessarily bear on past conduct)."[181] This is in stark contrast to the work of the judiciary, much of which concerns addressing past conduct.

Interestingly, the prospectivity policy is not justified or rationalized in any public documents of which we are aware. But it may stem from two related practical justifications. The first is liability. If OLC considers the lawfulness of past conduct and concludes that it was not lawful, that will create a record that could be used in future litigation against the federal government. The second is political pressure on the legal work. If important decisions have already been made and executed—and then the government asks itself whether those decisions are lawful—one might reasonably fear that there would be irresistible pressure to bless what has already taken place.

### *B. The Channels of Executive Constitutionalism*

Having determined its view of constitutional meaning—or, at least, the view that it feels it needs to follow, as in contexts where the executive branch accedes for institutional reasons to what it believes to be a mistaken view—how does the executive branch effectuate that determination? How does it communicate and seek compliance with that judgment? The executive branch has multiple channels that it uses, depending on its goals and intended audience.

#### *1. Executive Orders, Memoranda, and Proclamations*

Executive orders and presidential proclamations are some of the oldest forms—perhaps even the oldest—of executive constitutionalism. In early 1791, in what is sometimes regarded as the first executive order, George Washington appointed commissioners to survey lands for what would

[180] See supra note 50.

[181] 2005 Best Practices Memorandum, supra note 79, at 1–2; 2010 Best Practices Memorandum, supra note 79, at 3.

eventually become the District of Columbia.[182] A few days later, President Washington issued what was perhaps the first proclamation, setting the boundaries of the District of Columbia and ensuring that they complied with the Constitution's limitation of being "[ten] miles square."[183] Intermittent orders and proclamations continued throughout the Washington presidency. In 1792, for example, he issued a national proclamation scolding westerners for their resistance to the 1791 excise tax upon spirits distilled within the United States.[184] And, in 1794, he called forth the military to quash the Whiskey Rebellion, proclaiming that his move was "in obedience to that high and irresistible duty consigned to me by the Constitution 'to take care that the laws be faithfully executed'" and "deploring that the American name should be sullied by the outrages of citizens on their own Government."[185] Intermittent proclamations and orders for similar purposes continued throughout the presidencies to come, too.[186]

But, despite their early pedigree, the formal legal basis of proclamations and executive orders is not obvious. They are not mentioned in the Constitution. The genre was not created by statute, unlike attorney general opinions, which seem to flow from both the Opinions Clause and the Judiciary Act of 1789.[187] In short, both proclamations and executive orders were invented as a form of executive legalism—though invented early, and apparently now accepted as a tool

[182] Commission (Jan. 22, 1791), *in* 7 The Papers of George Washington: Presidential Series 258, 258–59 (Jack D. Warren, Jr., ed., 1998). This is the first executive order listed in the U.C. Santa Barbara database of presidential documents. The American Presidency Project (Nov. 16, 2025) (on file with the *Virginia Law Review*) (filtered by "Category", "Executive Orders"), https://www.presidency.ucsb.edu/advanced-search?field-keywords=&field-keywords2=&field-keywords3=&from%5Bdate%5D=&to%5Bdate%5D=&person2=&category2%5B%5D=58&items_per_page=25 [https://perma.cc/FD6D-X7VA].

[183] George Washington, Special Message to the Senate and House of Representatives (Jan. 24, 1791), *in* 1 A Compilation of the Messages and Papers of the Presidents, 1789–1897, supra note 53, at 94, 94.

[184] George Washington, By the President of the United States: A Proclamation, Nat'l Gazette, Sept. 29, 1792.

[185] George Washington, Proclamation (Sept. 25, 1794), *reprinted in* 1 A Compilation of the Messages and Papers of the Presidents, 1789–1897, supra note 53, at 161, 161.

[186] For example, in 1799, President John Adams declared in a proclamation that he was "by the Constitution and laws of the United States . . . authorized . . . to call forth military force to . . . cause the laws to be duly executed." John Adams, Proclamation (Mar. 12, 1799), *in* 1 A Compilation of the Messages and Papers of the Presidents, 1789–1897, supra note 53, at 286, 287.

[187] See infra note 224 and accompanying text.

of executive action. And, despite their historical pedigree, their degrees of usage have changed. George Washington issued eight executive orders; John Adams issued just one.[188] Franklin Roosevelt issued more than 3,500.[189] And, since the twentieth century, no president has issued fewer than one hundred.[190]

Today, executive orders and proclamations are defined and routed through the government by both statute and regulation. As a matter of convention, executive orders are generally directed to agencies and officials of the federal government, while proclamations are generally reserved for presidential actions that affect private conduct (though these rough categories allow for some overlap).[191]

Statutory law also requires that all orders and proclamations with "general applicability and legal effects" be published in the *Federal Register*.[192] And regulations describe the manner in which proclamations and orders are to be routed through the government and submitted to DOJ for approval.[193] These functions are also centralized within OLC, which is responsible for "[p]reparing and making necessary revisions of proposed Executive orders and proclamations, and advising as to their form and legality prior to their transmission to the President; and performing like functions with respect to regulations and other similar matters which require the approval of the President or the Attorney General."[194]

### *2. Signing Statements and Views Letter Exchanges*

Presidents may also send signals about their constitutional judgments that do not primarily speak to the public or create new rules for action

[188] John Contrubis, Cong. Rsch. Serv., 95-772A, Executive Orders and Proclamations 25–26 tbl.1 (1999) (documenting the number of executive orders issued by each president from 1789 until 1995); see also Executive Orders, Am. Presidency Project, https://www.presidency.ucsb.edu/statistics/data/executive-orders [https://perma.cc/D4YK-N58A] (last updated Nov. 20, 2025) (updating counts from 1995 until present).

[189] Contrubis, supra note 188, at 26 tbl.1.

[190] Id.

[191] See id. at 2–15 (offering a history of these genres and noting some ambiguity about their scope).

[192] 44 U.S.C. § 1505(a).

[193] See generally 1 C.F.R. pt. 19 (2023) (outlining the process for approval of executive orders and proclamations); see also id. § 19.2(c) ("If the Attorney General approves the proposed Executive order or proclamation, he shall transmit it to the Director of the Office of the Federal Register.").

[194] 28 C.F.R. § 0.25(b) (2024).

within the executive branch. Presidents often implement the Constitution in a fashion that is directed in the first instance to Congress—through so-called "signing statements" and "views letters." These are primarily a tool to put Congress (and the public) on notice of the president's views on a statute, and they often include a statement explaining that certain provisions will not be fully implemented because they are deemed unconstitutional or that certain provisions will be interpreted in a fashion to avoid a constitutional problem.

James Monroe is generally considered the first president to have used signing statements, though this appears to us something of a misnomer.[195] In 1822, Monroe sent two letters to the Senate explaining his interpretations of the earlier 1821 Army Reduction Act;[196] those statements were not contemporaneous with the signing of that bill. While presidents had certainly expressed views on the scope and constitutionality of legislation before Monroe's statements,[197] Monroe's letters were nevertheless important early documents in which the president articulated his constitutional views to Congress. It was likely President Andrew Jackson who made the first "signing statement" in the modern conventional sense: he signed an appropriations bill that in his view could "be construed to authorize the application of the appropriation for the continuance of the road beyond the limits of the Territory of Michigan," but he "desire[d] to be understood as having approved [the] bill with the understanding that the road authorized by [the] section is not to be extended beyond the limits of the said Territory."[198]

Signing statements became routine during the Administration of Franklin Roosevelt.[199] And they became much more popular and vigorously used during the Reagan Administration.[200] Famously, it was during the Reagan Administration that then-Deputy Assistant Attorney General Samuel Alito, while serving at OLC, wrote a memo to "The

[195] See Bradley & Posner, supra note 13, at 312 ("Presidents have issued signing statements since early in U.S. history, starting with James Monroe.").

[196] Monroe, supra note 53, at 111; James Monroe, Special Message to the Senate of the United States (Apr. 13, 1822), *in* 2 A Compilation of the Messages and Papers of the Presidents, 1789–1897, supra note 53, at 129.

[197] See Letter from Thomas Jefferson to Edward Livingston, supra note 91 (expressing a view on the unconstitutionality of the Alien and Sedition Acts).

[198] Andrew Jackson, Special Message to the Senate and House of Representatives of the United States (May 30, 1830), *in* 2 A Compilation of the Messages and Papers of the Presidents, 1789–1897, supra note 53, at 483, 483.

[199] Contrubis, supra note 188, at 26 tbl.1.

[200] Id.

Litigation Strategy Working Group" outlining his goal of "ensur[ing] that Presidential signing statements assume their rightful place in the interpretation of legislation" and noting that past presidents had "issued signing statements when presented with bills raising constitutional problems."[201]

As noted above, controversy erupted in 2006 over President Bush's use of signing statements.[202] But the practice survived and is now firmly entrenched. President Obama, for example, issued a memorandum on signing statements confirming that they "serve a legitimate function in our system, at least when based on well-founded constitutional objections."[203] And even the Congressional Research Service concedes that "there is little evident constitutional or legal support for the proposition that the President may be constrained from issuing a statement regarding a provision of law."[204]

Less well noticed, however, was that President Obama's memorandum also described signing statements as part of a wider process of communication between Congress and the executive branch. Indeed, signing statements are best understood as the final product at the end of a long iterative process within the executive branch and between the branches. For more than the last fifty years, the Office of Management and Budget has coordinated what is formally entitled the Legislative Coordination and Clearance process—and more commonly referred to as the "bill comment" process.[205] Sometimes the process ends there because Congress edits proposed legislation to reflect the input of the executive branch. And sometimes the process ends there because Congress does not make changes, but the executive branch nevertheless decides that a signing statement is not worthwhile.

In addition, the basic process involved with signing statements—a letter exchange with Congress culminating in the possibility of a

[201] Memorandum from Samuel A. Alito, Jr., Deputy Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Just., to The Litig. Strategy Working Grp. 1 (Feb. 5, 1986), https://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf [https://perma.cc/AA5E-VMUB].

[202] See supra note 127 and accompanying text.

[203] Presidential Signing Statements, 74 Fed. Reg. 10669, 10669 (Mar. 11, 2009).

[204] Todd Garvey, Cong. Rsch. Serv., RL33667, Presidential Signing Statements: Constitutional and Institutional Implications 1 (2012).

[205] See Benjamin J. Schwartz, Comment, The Recommendations Clause and the President's Role in Legislation, 168 U. Pa. L. Rev. 767, 778–79 (2020).

presidential statement—occurs in other areas of the law,[206] though it is perhaps most common in the context of proposed and enacted legislation, since that process requires the collaboration of the branches. Moreover, we note that the process can culminate in other things besides (or in addition to) a presidential signing statement. One possibility is an opinion. The Ronald Reagan Centennial Commission Act of 2009, for example—a law that created a commission containing members of both the executive branch and Congress—generated both a signing statement and an OLC opinion elaborating on the statement's constitutional concerns.[207] But what is an opinion? We now turn to that question.

*3. The Invention of the Binding Opinion*

As noted above, the executive branch practice of issuing legal opinions dates back to the Judiciary Act of 1789, which created the position of the attorney general and defined the occupant of that office as one "whose duty it shall be to . . . give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments."[208]

The attorney general has wielded this duty and authority ever since. Today, the lineal descendant of the Judiciary Act's original statutory authority is contained in a series of provisions at Title 28 of the United States Code, starting with Sections 511 and 512, which state that "[t]he Attorney General shall give his advice and opinion on questions of law when required by the President" and that "[t]he head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."[209]

Since 1969, the opinion-writing authority has been delegated by regulation to OLC, which is responsible for "[p]reparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the

[206] One such area is the budget and appropriations process. See Peter M. Shane, Presidential Signing Statements and the Rule of Law as an "Unstructured Institution," 16 Wm. & Mary Bill Rts. J. 231, 245 (2007).

[207] See Statement on Signing the Ronald Reagan Centennial Commission Act, 2009 Daily Comp. Pres. Doc. 424 (June 2, 2009) (President Obama); Admin. of the Ronald Reagan Centennial Comm'n, 34 Op. O.L.C. 174 (2010) (OLC opinion).

[208] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

[209] 28 U.S.C. §§ 511–512.

Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet."[210] And, because OLC wields the attorney general's statutory opinion-writing authority, the difference between "OLC opinions" and "Attorney General opinions" is something of a formalism. Opinions prepared by OLC for the rest of the government are prepared pursuant to delegated statutory authority (and the attorney general frequently reviews them),[211] while opinions signed by the attorney general are prepared by OLC.[212]

Perhaps the most important feature of the opinions of the attorney general and OLC is that they are nearly universally regarded as binding on the executive branch as a whole (though not the president). This has been true across recent changes in administration and changes in party control of the executive branch. In 2005, for example, OLC's internal guidance noted that its "opinions are controlling on questions of law within the Executive Branch."[213] In the 2010 update to that internal guidance, the statement became broader and stronger: "OLC's core function, pursuant to the Attorney General's delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government."[214] The government has also consistently taken this position in litigation.[215]

[210] 28 C.F.R. § 0.25(a) (2024). The Office also has a substantially similar role within DOJ: "Rendering opinions to the Attorney General and to the heads of the various organizational units of the Department on questions of law arising in the administration of the Department." Id. § 0.25(c).

[211] See, e.g., 2005 Best Practices Memorandum, supra note 79, at 3 ("Our general practice is to circulate draft opinions to the Office of the Attorney General and the Office of the Deputy Attorney General for review and comment.").

[212] See 28 C.F.R. § 0.25(a) (giving OLC the function and duty of "[p]reparing the formal opinions of the Attorney General").

[213] 2005 Best Practices Memorandum, supra note 79, at 1.

[214] 2010 Best Practices Memorandum, supra note 79, at 1; see also Walter E. Dellinger et al., Principles to Guide the Office of Legal Counsel (Dec. 21, 2004), *reprinted in* Dawn E. Johnsen, Guidelines for the President's Legal Advisors, 81 Ind. L.J. 1348, 1348 (2006) (proposed guidelines stating that "OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President").

[215] See, e.g., Memorandum in Support of Defendants' Motion to Dismiss at 22 n.9, Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just., 164 F. Supp. 3d 145 (D.D.C. 2016) (No. 13-cv-01291) ("OLC's view is typically authoritative within the Executive Branch pending further review—even if that view is provided only as informal advice."); id. at 21 (noting that OLC legal opinions "are generally authoritative within the Executive Branch on the legal issues resolved in those opinions"); Final Brief for Appellee at 25, Elec. Frontier Found. v. U.S. Dep't of Just., 739 F.3d 1 (D.C. Cir. 2014) (No. 12-5363) (stating that "OLC opinions

And academic commentators have long treated the opinions as binding.[216] So too have the media.[217] So have courts.[218] As has Congress.[219] By near universal acclamation, OLC opinions are binding.

Why? This is an important but undertheorized question. There is some sparse literature on the topic, generally making the point that opinions have been considered binding as a matter of convention for hundreds of years, while noting that the legal basis for this practice is somewhat uncertain.[220] But we offer a series of stronger claims.

First, as a matter of original law and practice, the case for a "binding" opinion is surprisingly weak. There is little evidence that early opinions were considered binding and little argument that they should be—a formal legal case that remains weak today. Moreover, the practice of

are 'controlling' or 'binding'" in the sense that they "operate by custom and practice of the Executive Branch to provide the legal backdrop" for policymaking).

[216] Nealon, supra note 14, at 842 ("Practice makes it clear that they are considered to be much more than merely advisory."); see also Trevor W. Morrison, Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation, 124 Harv. L. Rev. F. 62, 63 (2011) (stating that OLC opinions are "treated as binding within the executive branch unless overruled by the Attorney General or the President"); Garrison, supra note 48, at 236–37 ("OLC wields significant inter-branch power due to its authority to . . . issue binding determinations of the law within the executive branch . . . .").

[217] Charlie Savage, 2 Top Lawyers Lose Argument on War Power, N.Y. Times, June 18, 2011, at A1 (stating that OLC's "interpretation of the law is legally binding on the executive branch"); Fred Barbash, 'The Law that Presidents Make' Is Unsurprisingly Kind to Executive Branch, Wash. Post, June 1, 2019, at A4 (stating that OLC's opinions "are binding on the federal government").

[218] See, e.g., Cherichel v. Holder, 591 F.3d 1002, 1016 n.17 (8th Cir. 2010) (stating that "OLC opinions are generally binding on the Executive branch"); Tenaska Wash. Partners II, L.P. v. United States, 34 Fed. Cl. 434, 439 (1995) ("Memoranda issued by the OLC . . . are binding on the Department of Justice and other Executive Branch agencies and represent the official position of those arms of government.").

[219] See, e.g., Michael John Garcia & Kate M. Manuel, Cong. Rsch. Serv., R41423, Authority of State and Local Police to Enforce Federal Immigration Law 24 (2012) ("OLC opinions are generally viewed as providing binding interpretive guidance for executive agencies and reflecting the legal position of the executive branch . . . ."); Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 7 (2008) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary) ("[W]e have always seen the OLC as a place to provide impartial, independent interpretations of the law that bind the executive . . . ."); 153 Cong. Rec. 27203 (2007) (statement of Sen. Richard Durbin) (stating that OLC's "legal opinions are binding on the executive branch of [the] Government").

[220] See Randolph D. Moss, Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel, 52 Admin. L. Rev. 1303, 1318 (2000) ("Although subject to almost two hundred years of debate and consideration, the question of whether (and in what sense) the opinions of the Attorney General, and, more recently, the Office of Legal Counsel, are *legally* binding within the executive branch remains somewhat unsettled.").

treating such opinions as binding emerged much more recently than commonly appreciated. Instead, we contend that the "controlling" legal opinion is something that was invented by the executive branch, and it is only a relatively recent practice.[221]

In ordinary usage, the term "opinion" can of course suggest both a mere view ("whether the new television show is good is a matter of opinion") or a binding legal determination ("the Supreme Court issued its opinion"). But we see no textual or historical indication that the term "opinion" used in the Judiciary Act of 1789 and its successor public laws necessarily implies a binding document. Dictionaries contemporaneous with the original Judiciary Act generally define "opinion" as a "belief" or "sentiment."[222] And while some of those dictionaries do cash out the term to mean "judgment,"[223] that definition is question-begging—since "judgment" can also refer to either a mere opinion or a binding legal determination.

Various textual indications, both old and new, also push against reading "opinion" to suggest a binding legal determination. The Judiciary Act's opinion-writing authority replicates and expands on the similar language of Article II, which empowers the president to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective

[221] This is sometimes why, when offering specifics, OLC officials report that such opinions are "binding by custom and practice." Josh Gerstein, Official: FOIA Worries Dampen Requests for Formal Legal Opinions, Politico (Nov. 5, 2015, 3:59 PM), https://www.politico.com/blogs/under-the-radar/2015/11/official-foia-worries-dampen-requests-for-formal-legal-opinions-215567 (quoting former acting OLC head Karl Thompson).

[222] See, e.g., Thomas Sheridan, A Complete Dictionary of the English Language (London, Charles Dilly 2d ed. 1789) (defining "opinion" as "[p]ersuasion of the mind, without proof; sentiments, judgment, notion; favourable judgment"); Nathan Bailey, An Universal Etymological English Dictionary (Edinburgh, Neill & Co. 25th ed. 1783) (defining "opinion" as "mind, thought, belief, esteem, judgment"); William Perry, The Royal Standard English Dictionary (Worcester, Isaiah Thomas 1st Am. ed. 1788) (defining "opinion" as "sentiment, judgment, notion"); 3 Ephraim Chambers, Cyclopaedia (London, J.F. & C. Rivington et al. 1786) (defining "opinion" as "a probable belief; or a doubtful and uncertain judgment of the mind" or "the assent of the mind to propositions not evidently true at first sight; nor deduced, by necessary consequence, from others that are so; but such as carry the face of truth"). Contemporaneous legal dictionaries that we have reviewed, which might be thought more probative on the question, do not include entries for the term. See, e.g., Giles Jacob, A New Law-Dictionary (J. Morgan ed., London, W. Strahan & W. Woodfall 10th ed. 1782); 2 Timothy Cunningham, A New and Complete Law-Dictionary (London, J.F. & C. Rivington et al. 3d ed. 1783).

[223] See, e.g., Bailey, supra note 222.

Offices."[224] On this reading, the Judiciary Act's opinion-writing authority is more naturally read as emphasizing the new attorney general's *duty*—a duty that would have been parallel to the existing constitutional duty of department heads and relevant for a new executive department with a subject-matter expertise that would naturally cut across the government as a whole. But, if the Judiciary Act simply repeated and expanded the president's Article II opinion-gathering authority, it should not be read as referring to a binding legal judgment because the opinions of the other executive departments would not have been legal in nature, much less binding (and have never been interpreted as such).

The modern statute likewise gives no affirmative textual indication that attorney general opinions are binding on the executive branch and contains at least some evidence suggesting that they are not. Section 513 of Title 28, for example, *does* more clearly state that some of the attorney general's views bind—he receives certain questions "for disposition"—but only in the limited context of questions arising within the Department of Defense.[225]

Early practice likewise gives no reason to think that early attorney general opinions were viewed as binding. Stylistically, the first opinions were written as personal letters to cabinet members (usually the secretary of state or treasury) and often answered questions about specific cases, rather than generally applicable legal issues. They also contain language suggesting that the attorney general was offering only one input for the recipient's final judgment. For example, in response to a request from the Secretary of War about issuing certain certificates for land title, Attorney General Charles Lee wrote that he did "not think it reasonable" for the Secretary of War to withhold them and "suggested that the certificates be issued."[226] Likewise, in responding to an inquiry about the legality of arresting the Dutch ambassador's servant, Attorney General Edmund Randolph offered his thoughts with qualifiers, such as "I ought not to omit

[224] U.S. Const. art. II, § 2. See generally Ilan Wurman, The Original Presidency: A Conception of Administrative Control, 16 J. Legal Analysis 26 (2024) (providing a recent revisionary account of the Opinions Clause).

[225] See 28 U.S.C. § 513. Elsewhere, Title 28 is written in a fashion that appears odd for a binding authority. For instance, the attorney general is obligated to print and publish certain opinions—but not those that are important for the government or the public to understand its legal obligations. Instead, they are simply those opinions that the attorney general "considers valuable for preservation in volumes." Id. § 521.

[226] Issue of Land Certificates, 5 Op. Att'ys Gen. 688, 688–89 (1798).

for your consideration"[227] and "[p]erhaps it might be expedient."[228] The typical opinion in that era "recommended," rather than concluded or mandated.[229] Instead, the creation of the binding opinion was a process that developed slowly over time as the executive branch itself grew. It was not until the mid-nineteenth century that some attorney general opinions began to have a more binding tone: the pleading "for your consideration" language became less frequent, and the opinions began to cite themselves as binding precedent.[230] Attorneys general from the 1840s onward started referring to themselves and their predecessors as "holding" a certain way in opinions.[231] For example, Attorney General Reverdy Johnson referred to an 1841 opinion and stated that "[t]he question, then, as far as this office and the treasury are concerned, is not open to controversy," because "[i]t has been adjudicated by the proper law officer of the government."[232]

But this practice was hardly universal and indeed remained a matter of dispute much later than has been appreciated. As Rita Nealon noted more

[227] Who Privileged from Arrest, 1 Op. Att'ys Gen. 26, 28 (1792).

[228] Id. at 29.

[229] See, e.g., The Pardoning Power, 5 Op. Att'ys Gen. 687, 688 (1795) ("The Attorney General therefore recommends that the further consideration of the case of John Mitchell be postponed until his trial shall have taken place.").

[230] The difference in tone is perhaps starkest in Attorney General John Crittenden's 1850 opinions, where he frequently feels comfortable declining to explain his reasoning and just stating a conclusion. See Claim of Ross's Representatives, 5 Op. Att'ys Gen. 250, 251 (1850) (noting that he is too busy to explain a conclusion); Auth. of Sec'y of the Interior Respecting Patent Off., 5 Op. Att'ys Gen. 283, 284 (1850) (same); Site of Light-House at the Mouth of Muskegon River, 5 Op. Att'ys Gen. 267, 268 (1850) (suggesting that the issue in question is self-explanatory).

[231] Sec'y of War Cannot Compensate Collectors for Disbursing Moneys, &c., 4 Op. Att'ys Gen. 401, 402 (1845) (stating that the predecessor, who held office from 1843 to 1845, "held that collectors might receive compensation for superintending light-houses"); Dist. Att'y, 7 Op. Att'ys Gen. 84, 86 (1855) (saying "I have held" in reference to his own opinion from 1855); Lieutenant Gen. Scott's Case, 7 Op. Att'ys Gen. 399, 413 (1855) (referring to an 1851 opinion as a holding); Appointments During Recess of the Senate, 16 Op. Att'ys Gen. 522, 525–30 (1880) (recounting several prior attorneys generals' "holdings" regarding recess appointments). On the contemporaneous meaning of "hold," see 2 Alexander M. Burrill, A Law Dictionary and Glossary 25 (New York, John S. Voorhies 2d ed. 1860) (defining "hold" as "[t]o bind; to be of legal force or efficacy"); 2 John Bouvier, Bouvier's Law Dictionary and Concise Encyclopedia 1444 (Francis Rawle ed., 8th ed. 1914) (defining "hold" as "[t]o decide, to adjudge, to decree"); William C. Cochran, The Students' Law Lexicon: A Dictionary of Legal Words and Phrases 135 (Cincinnati, Robert Clarke & Co. 1888) (same); 1 Stewart Rapalje & Robert L. Lawrence, A Dictionary of American and English Law 612 (Jersey City, Frederick D. Linn & Co. 1888) (defining "hold" as "[t]o announce a legal opinion; to adjudge or decree").

[232] Mileage of Senators Attending a Special Session, 5 Op. Att'ys Gen. 191, 203 (1849).

than seventy years ago, attorneys general themselves "have held divergent views as to the conclusiveness of their opinions" and have done so even after some opinions were issued in a binding fashion.[233] In 1882, for example, President Arthur asked Attorney General Benjamin Brewster for his views on what "seem[ed] to be a reluctance on the part of some subordinates in the Interior Department to act in accordance with the law as stated" in an earlier opinion of an acting attorney general and inquired as to whether "the opinion rendered . . . should be carried into execution."[234] Brewster answered that "while it is the duty of the Attorney-General to give his opinion upon questions of law arising in the administration of any Executive Department at the request of the head thereof, such duty ends with the rendition of the opinion, which is advisory only."[235] The Attorney General continued to note more generally that he had

> no control over the action of the head of Department to whom the opinion is addressed, nor could he with propriety express any judgment concerning the disposition of the matter to which the opinion relates, that being something wholly within the administrative sphere and direction of such head of Department.[236]

This 1882 opinion not only stands as one example of the general proposition that attorneys general had different views on the bindingness of attorney general opinions, but it also rebuts the common proposition that *other agencies* have always treated attorney general opinions as binding[237]—since, in this case, it was "reluctance on the part of some subordinates in the Interior Department to act in accordance with the law as stated" that led to the follow-up inquiry.[238]

Brewster's limiting principle—that the attorney general has nothing binding to say about matters "wholly within the administrative sphere and direction" of another department head[239]—is fascinating and one about which we know of little prior scholarship. For now, it suffices to note that

[233] Nealon, supra note 14, at 840.
[234] Att'y-Gen., 17 Op. Att'ys Gen. 332, 333 (1882).
[235] Id.
[236] Id. (emphasis omitted).
[237] See Moss, supra note 220, at 1320 ("[W]e have been able to go for over two hundred years without conclusively determining whether the law demands adherence to Attorney General Opinions because agencies have in practice treated these opinions as binding.").
[238] Attorney-General, supra note 234, at 333.
[239] Id.

Brewster's view was hardly an outlier, and indeed, versions of it remained common well into the twentieth century. For example, various attorney general opinions from the early twentieth century note that certain questions of law are "essentially judicial in character" and therefore not appropriate for resolution by the attorney general.[240] In 1911, for example, the Secretary of the Interior asked Attorney General George W. Wickersham whether certain non-reservation lands could be considered "Indian country" for the purposes of administering a particular federal statute[241]—a classic question, asking for the application of law to facts, that OLC regularly answers today and has answered for many decades,[242] even when the judiciary might subsequently weigh in. But Wickersham answered that the question was "essentially judicial in character and [was] not one arising in the administration of the Interior Department, and therefore it would be improper for the Attorney General to give an official opinion thereon."[243] The other branches also took a somewhat mixed view on the issue of whether the attorney general's opinions were binding.[244]

It was only during the First World War that the executive branch itself began more concretely to take the view that attorney general opinions are binding. In 1918, President Wilson issued an order that attempted to consolidate legal authority in the attorney general—ordering that "any opinion or ruling by the Attorney General upon any question of law arising in any Department, executive bureau, agency or office shall be treated as binding upon all departments, bureaus, agencies or offices

[240] Nonreservation Schs.—Indian Country—Att'y Gen.'s Op., 29 Op. Att'ys Gen. 226, 226 (1911) [hereinafter Nonreservation Schools].

[241] Id.

[242] See The Scope of State Crim. Jurisdiction over Offenses Occurring on the Yakama Indian Rsrv., 42 Op. O.L.C. 90, 92, 94 (2018) (opining on various issues related to "Indian country" in a specific statutory and federalism context).

[243] Nonreservation Schools, supra note 240, at 226; see also Canal Zone—U.S. Att'y & Dist. Judge—Occupancy of Quarters, 34 Op. Att'ys Gen. 517, 519 (1915) ("Your . . . question, therefore, is one for judicial rather than administrative determination."); Attorney-General—Opinion, supra note 176, at 370 ("[T]he question is preeminently one for judicial and not executive determination.").

[244] Smith v. Jackson, 246 U.S. 388, 390–91 (1918) ("[I]t is obvious on the face of the statement of the case that the Auditor had no power to refuse to carry out the law and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney General and, second, beyond all possible question to the judgments of the courts below."); see also Cong. Globe, 41st Cong., 2d Sess. 3065 (1870) (statement of Rep. Jenckes) ("The heads of Departments may act on their own discretion; but when they take advice we want to know what that advice is, so that the law department of the Government shall not be giving different advice to different heads of Departments or different bureaus.").

therewith concerned."[245] (Though the scope and timing of that wartime order, as others have noted, is unclear.[246]) By centralizing interpretive authority in a single officer, Wilson's order clarified that the attorney general's opinion is the definitive legal opinion, rather than one among many. That consolidation continued during the New Deal era.[247]

And it was only in 1979 that President Carter more formally centralized legal authority in DOJ. That year, President Carter issued an executive order regarding the "Resolution of Interagency Legal Disputes," providing that

> [w]henever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve . . . a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.[248]

But even this cannot explain the full scope of DOJ's currently operative claim that it "provide[s] controlling advice to Executive Branch officials on questions of law."[249] Carter's order—while still operative[250]—is limited to agencies "whose heads serve at the pleasure of the President" and "legal dispute[s]."[251] Carter's order thus has no way to explain why, for example, the Federal Deposit Insurance Corporation (an independent agency) should be bound by an OLC opinion on the very general matter of *The Constitutional Separation of Powers Between the President and*

[245] Exec. Order No. 2877 (1918), *reprinted in* Sewall Key, The Legal Work of the Federal Government, 25 Va. L. Rev. 165, 190 n.94 (1938).

[246] See Moss, supra note 220, at 1320 n.67 (explaining that it is unclear whether Wilson intended for the executive order to lapse upon the expiration of the underlying statutory authority or not).

[247] See Jurisdiction of Att'y Gen. to Determine Meaning of the Term "Adjustments" as Used in Exec. Order No. 6440 of November 18, 1933, as Amended, & Inclusion of Definition of Term in Proposed Ord., 37 Op. Att'ys Gen. 562, 563 (1934) ("The opinions of the Attorney General as the chief law officer of the Government should be respected and followed in the administration of the executive branch of the Government.").

[248] Exec. Order No. 12,146, 3 C.F.R. 409, 411 (1979). Carter also ordered that "[w]henever two or more Executive agencies are unable to resolve a legal dispute between them, . . . each agency is encouraged to submit the dispute to the Attorney General." Id. As noted, the difference in wording reflects the difference between agency heads that serve at the pleasure of the president and those that do not (e.g., the Federal Reserve).

[249] 2010 Best Practices Memorandum, supra note 79, at 1.

[250] 11 C.F.R. § 8.2 (2025) ("The Commission will attempt to resolve interagency claims by negotiation in accordance with Executive Order 12146 . . . .").

[251] 3 C.F.R. at 411.

*Congress* (an opinion not arising out of a "legal dispute"). This is why OLC does some amount of advice-giving by quasi-contractual arrangement.[252]

The bottom line is that there has been far more centralization via practice and convention than the underlying legal authorities suggest is required. Why? One plausible argument is simply that the policy arguments in favor of this kind of centralization are very strong. As noted above, for example, the attorney general has a clear statutory role in supervising most litigation involving the United States.[253] Because that role exists—and because there may be strong policy reasons for it, to the extent that it is difficult for both legal and policy reasons to imagine a world in which federal agencies sue each other to resolve legal disputes—one might think that similar considerations should apply *before* the federal government involves itself in litigation. But, of course, other potential explanations are less flattering. It is possible, for instance, that DOJ is simply subject to some of the general imperatives of bureaucracy that have been explored in the political science literature—such as the desire to expand its budget, autonomy, and power.[254] One way or another, the notion of the binding executive branch opinion is one that was invented gradually by the branch itself, not handed to it by Congress or the Constitution.

### *4. The Spectrum of "Controlling Advice"*

The previous Subsection documented the gradual invention of the binding executive branch opinion—a tool that the executive branch itself seems to have been instrumental in creating. We now consider an important and more recent expansion of that story: legal practice in the executive branch no longer requires an "opinion" to bind itself. Instead,

[252] 2005 Best Practices Memorandum, supra note 79, at 1 ("If we are asked to provide an opinion to an executive agency whose head does not serve at the pleasure of the President (i.e., an agency whose head is subject to a 'for cause' removal restriction), our practice is to receive in writing from that agency an agreement to be bound by our opinion.").

[253] See 28 U.S.C. § 516 ("[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."); see also id. § 519 ("[T]he Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party . . . .").

[254] See Devins & Prakash, supra note 96, at 538–40 (describing the theory of bureaucracy dominant in the political science literature and theorizing about some DOJ practices in those terms).

the executive branch now gives itself the more flexible option of binding itself with "controlling advice"—advice that can be offered and distributed in many forms and that does not require a published opinion.

While relatively recent, this shift ostensibly flows from DOJ's longstanding statutory authority and regulations. The modern descendant of the Judiciary Act's attorney general advice-giving authority distinguishes between "opinion" and "advice."[255] The modern OLC regulations further distinguish between "formal" and "informal," and they make vague reference to the Office's role of providing legal advice.[256] But there is no guidance we know of on what constitutes "informal" advice or on how it is produced and distributed. Instead, DOJ's public materials describe best practices only for "formal" opinions—perhaps leaving the slightly ominous impression that informal opinions have no best or governing practices.[257]

A shift away from formal opinions and toward a broader and more flexible notion of "controlling advice" is also suggested in OLC's public documents. In 2005, for instance, OLC noted that its "opinions are controlling on questions of law within the Executive Branch."[258] Five years later, however, the Office described that function more broadly: "OLC's core function, pursuant to the Attorney General's delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government."[259] One can see a similar shift in sentiment reflected later in the 2010 Best Practices memorandum: "This memorandum reaffirms the longstanding principles that have guided and will continue to guide OLC attorneys in *all of their work*, and then addresses the best practices OLC attorneys should follow in providing one particularly important form of controlling legal advice the Office conveys: formal written opinions."[260] The executive branch has also expressed this view in litigation: OLC's view "typically" binds "even if that view is provided only as informal

[255] See 28 U.S.C. § 511 ("The Attorney General shall give his advice and opinion on questions of law when required by the President.").

[256] See 28 C.F.R. § 0.25(a) (2024) (tasking OLC with preparing "formal opinions" but also "rendering informal opinions and legal advice").

[257] See, e.g., 2010 Best Practices Memorandum, supra note 79, at 1.

[258] 2005 Best Practices Memorandum, supra note 79, at 1.

[259] 2010 Best Practices Memorandum, supra note 79, at 1.

[260] Id. (emphasis added).

advice."[261] But "advice" is obviously a flexible category, which gives DOJ a choice of instrument and speed.

## III. EVALUATING EXECUTIVE CONSTITUTIONALISM

Having described the practice of executive constitutionalism in some detail, we now turn to normative analysis. We offer two sets of thoughts. First, Section III.A discusses how the relationship between executive constitutionalism and judicial practice provides insight into the effectiveness of executive constitutionalism—that is, whether specific practices serve executive constitutionalism's proper goals. While some decision-making techniques and procedures easily translate from the judicial to the executive context, others fit poorly and may have been transplanted without sufficient consideration.

Second, Section III.B evaluates the promise and peril of executive constitutionalism more generally. Although we are, on balance, more sanguine about executive constitutionalism than some critics, the story we tell also provides reasons to be skeptical of some aspects of present arrangements—as well as reasons to seek reform.

### *A. Comparisons to Judicial Constitutionalism*

There are many overlaps between executive and judicial constitutionalism. As documented in Part II, many of the ways that the executive branch reaches and effectuates constitutional judgments have clear analogs in judicial practice. The executive branch writes opinions,[262] relies on interpretive tools like avoidance and treatment when construing statutes,[263] decides when and whether to resolve issues based on jurisdictional considerations,[264] and relies on precedent and a form of stare decisis.[265] OLC in particular strives to be court-like (and is often

[261] Memorandum in Support of Defendants' Motion to Dismiss, supra note 215, at 22 n.9.

[262] See supra Subsection II.B.3; Garrison, supra note 48, at 230–32; Kmiec, supra note 14, at 337–38; John O. McGinnis, Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon, 15 Cardozo L. Rev. 375, 375–76 (1993); Nealon, supra note 14, at 825–30; Irwin S. Rhodes, "Opinions of the Attorney General" Revived, 64 A.B.A. J. 1374, 1375–76 (1978).

[263] See supra Subsection II.A.3; Morrison, supra note 26.

[264] See supra Subsection II.A.5.

[265] See supra Subsection II.B.3; Morrison, supra note 14.

described as court-like[266]): it publishes its opinions in bound volumes,[267] requests briefing to aid its decision-making,[268] and tries to maintain an appearance of fairness and neutrality when resolving intra-branch conflicts.[269]

The existence of so many analogs should be unsurprising. The executive branch faces many of the same considerations as the judiciary in resolving constitutional issues. That the two branches have converged on similar forms of constitutional practice may suggest that some methods are particularly useful in both contexts. In this way, convergence can be understood as a form of parallel evolution, in which the same traits emerge in different contexts that experience similar pressures.[270] Certain forms of organizational structure may simply be more (or less) efficient for certain problems. It may thus be unsurprising to see those forms emerge and replicate themselves across contexts.[271]

But part of the story is surely more contingent. Those who have designed and shaped the practice of executive constitutionalism are mostly—and perhaps exclusively, with the exception of some presidents who have used their office to advance constitutional visions—lawyers.[272] Because American legal education emphasizes judicial opinions,[273] lawyers are socialized to think of courts as an ideal type and will thus tend to find judicial methods readily available and intuitive. This explanation

[266] See supra note 25 and accompanying text.

[267] See Rhodes, supra note 262, at 1375.

[268] See supra note 169 and accompanying text.

[269] For example, OLC guidance provides that if an OLC opinion

> resolves an issue in dispute between executive agencies, we should take care to consider fully and address impartially the points raised on both sides; in doing so, it is best, to the extent practicable, to avoid ascribing particular points of view to the agencies in a way that might suggest that one side is the "winner" and one the "loser."

2005 Best Practices Memorandum, supra note 79, at 3.

[270] See A.M. Westram & K. Johannesson, Parallel Speciation, *in* 3 Encyclopedia of Evolutionary Biology 212, 213–14 (Richard M. Kliman ed., 2016).

[271] In addition, the law literature has made the related point that certain organizational structures—like the separation of powers—can be conceptualized as operating *within* branches as well as between them. See generally, e.g., Katyal, supra note 38 (conceptualizing and proposing a set of checks internal to the executive branch that constitute an "internal separation of powers"); Michaels, supra note 38 (conceptualizing and identifying certain "recurring patterns" that constitute a broader separation of powers).

[272] Some presidents, of course, were trained as lawyers, including Presidents Clinton, Obama, and Biden.

[273] See John V. Orth, Who Judges the Judges?, 32 Fla. St. U. L. Rev. 1245, 1256 (2005) ("[S]ince the days of Dean C.C. Langdell at Harvard, American legal education has been centered on the judicial opinion.").

suggests the possibility that some instances of judicial-executive convergence could be maladaptive—that is, lawyers are biased in favor of a judicial structure, even when it is not a good fit.

Closely examining analogies between the two contexts thus has practical implications. To the extent similarities exist, such an inquiry can show us why those similar practices may be desirable in both contexts. It can help us identify and label practices that might go both unnoticed and undertheorized. And it might suggest additional possibilities for importing judicial concepts into the executive branch, as some scholars have urged.[274] At the same time, a close examination of executive and judicial constitutionalism can help us identify critical differences between the two contexts—which can suggest ways in which executive constitutionalism errs by mimicking judicial practice.[275]

### *1. Rule of Law Norms*

Start by considering the most salient similarities between executive and judicial constitutionalism. Both branches recognize some obligation to make decisions that are not dictated purely by partisan or policy preferences. To serve these goals, some key features of the judicial process readily translate to the executive context. These features can be roughly grouped into the category of "rule of law" or "legality" norms.[276]

Written opinions explain the bases for decisions to show that those decisions are grounded in generalizable principles. But opinions vary in their audience and visibility. Judicial opinions, except for rare cases involving government secrets, are public. Executive opinions are not consistently published, by contrast. While OLC has chosen to make many

[274] See, e.g., Ackerman, supra note 7, at 143–44 (suggesting an internal quasi-judicial tribunal within the executive branch).

[275] See Pillard, supra note 7, at 736 (criticizing OLC for "structurally mimicking judicial process" but doing so in an "incomplete" manner).

[276] For the classic statement of the basic requirements of legality, see generally Lon L. Fuller, The Morality of Law (rev. ed. 1969). For discussions of the complexity involved in defining the "rule of law," see, e.g., Joseph Raz, The Rule of Law and Its Virtue, *in* Liberty and the Rule of Law 3, 5–6 (Robert L. Cunningham ed., 1979); Erwin Chemerinsky, Toward a Practical Definition of the Rule of Law, 46 Judges' J. 4, 4 (2007); Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781, 781–82 (1989); Robert A. Stein, What Exactly Is the Rule of Law?, 57 Hous. L. Rev. 185, 186–87 (2019). Rather than endorsing a specific, contested definition of the rule of law, we use the phrase more ecumenically to signify "a set of ideals connected more by family resemblance than by a unifying conceptual structure." Lawrence B. Solum, Equity and the Rule of Law, *in* The Rule of Law: Nomos XXXVI, at 120, 121 (Ian Shapiro ed., 1994).

of its opinions public,[277] that process can take years, and many of its decisions remain secret (and in some cases come to light only as the result of litigation of Freedom of Information Act claims).[278]

Another example relates to constitutional methodology. When a new legal question arises, the issue of whether the relevant decision-maker follows a consistent approach again bears on whether that decision-maker is driven by principle or by expediency. Both judicial and executive actors thus tend to follow a constitutional method—reflecting once more the desire to produce opinions that are not, and do not appear to be, dictated by policy preferences. But the specific choice of methods may differ based on the institutional context.

The Supreme Court *qua* court does not choose a binding constitutional methodology. Instead, individual Justices give more (or less) emphasis to different modalities of interpretation, depending on their individual commitments. Several Justices today are committed originalists[279] and devote significant attention to historical sources. Others emphasize precedent and pragmatic considerations to a greater extent.[280]

And yet, as described above, the executive branch, through OLC, has embraced methodological pluralism, even if individual presidents and administrations have occasionally endorsed more distinctive approaches.[281] Why, for example, have we never seen an aggressively originalist executive branch during a Republican administration?

[277] See 39% of Office of Legal Counsel Opinions Kept from the Public, Sunlight Found., https://sunlightfoundation.com/policy/documents/39-of-office-of-legal-counsel-opinions-kept-from-the-public/ [https://perma.cc/2TF5-42US] (last visited Oct. 16, 2025) (suggesting that roughly sixty percent of OLC opinions are published).

[278] See generally Jonathan Manes, Secret Law, 106 Geo. L.J. 803 (2018) (cataloging and critiquing such instances).

[279] Precisely how many is up for debate. See Mike Rappaport, The Year in Originalism, Law & Liberty (Mar. 24, 2021), https://lawliberty.org/the-year-in-originalism/ [https://perma.cc/X5Q3-SEZP] ("[T]here are now four avowed originalists on the Court—Thomas, Gorsuch, Kavanaugh, and Barrett."). Justice Alito has described himself as a "practical originalist." See Neil S. Siegel, The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent, 126 Yale L.J.F. 164, 166 (2016) (citation omitted). Some observers understood Justice Ketanji Brown Jackson's statements during her confirmation hearing as endorsing originalism. See Adam Liptak, Justice Jackson Joins the Supreme Court, and the Debate over Originalism, N.Y. Times (Oct. 10, 2022), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html.

[280] See, e.g., Bradford C. Mank, *Clapper v. Amnesty International*: Two or Three Competing Philosophies of Standing Law?, 81 Tenn. L. Rev. 211, 249–51 (2014) (discussing Justice Breyer's pragmatic approach and emphasis on precedent).

[281] See supra Subsection II.A.1.

One possibility, suggested by Shalev Roisman, is that the executive branch is simply not institutionally equipped to engage in the kind of in-depth historical research required by originalism.[282] But other factors may be in play. Executive branch constitutional interpretation—unlike its judicial counterpart—is produced by a large bureaucracy, and a large portion of the bureaucracy that produces constitutional work in the executive branch persists from administration to administration.[283] Bureaucracy matters for both the production and consumption of legal work. As a matter of production, we should reasonably expect some methodological styles to persist across administrations because the individuals producing those opinions do not always change. On the audience side, the recipients of executive branch constitutional interpretation are often other federal agencies. These agencies are also large bureaucracies with expectations about method. Sudden methodological changes would have the potential to produce substantive legal changes—which would be disruptive, if not untenable, for many agencies. The prospect of abrupt change would also affect incentives going forward: it would make agencies less likely to engage with a central legal process in the future.

A closely related rule of law norm followed by both the judiciary and the executive branch is stare decisis. In both the executive and judicial contexts, adherence to decisions despite changes in personnel can provide institutional stability.[284] It also reinforces the notion that decisions rest on

[282] See Shalev Roisman, The Originalist Presidency in Practice?, Lawfare (Jan. 12, 2021, 2:01 PM), https://www.lawfaremedia.org/article/originalist-presidency-practice [https://perma.cc/TCU2-JTTV] (reviewing Saikrishna Bangalore Prakash, The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers (2020)) ("OLC attorneys are not selected for their ability, nor are they likely to be otherwise qualified, to engage in the sort of historical work necessary to do originalism properly.").

[283] There are around 4,000 political appointees in the executive branch. See P'ship for Pub. Serv., Trump Political Appointee Tracker, Wash. Post, https://www.washingtonpost.com/politics/interactive/2025/trump-appointee-tracker/?itid=sr_0_fa49a40e-20d4-4ce0-9887-5b09fd657fd5 (last updated Nov. 6, 2025, 11:01 AM) ("President Donald Trump has the ability to fill roughly 4,000 politically appointed positions in the executive branch and independent agencies, including more than 1,300 that require Senate confirmation."). This is a tiny fraction of the "nearly 2 million civilian, full-time, nonseasonal, permanent employees of the executive branch." P'ship for Pub. Serv., Fed Figures: Federal Workforce (2019), https://ourpublicservice.org/wp-content/uploads/2022/03/FedFigures_FY18-Workforce-1.pdf [https://perma.cc/6F5X-C37L].

[284] See, e.g., Randy J. Kozel, Settled Versus Right: A Theory of Precedent 18 (2017) (noting that a benefit of stare decisis is that "the potential vacillation of constitutional law following changes in judicial personnel is replaced by an abiding sense of stability and impersonality").

something more than the whims of whoever happens to control the levers of power at any given moment.[285]

*2. Jurisdictional Limits*

The executive branch, and OLC in particular, also consistently endorses—although it does not consistently follow—various jurisdictional and justiciability limits that resemble judicial practices. One example is the stated requirement that OLC only weigh in on "concrete" questions, rather than "abstract legal opinion[s]."[286] This requirement resembles, and is perhaps modeled on, the Article III case-or-controversy requirement, which prevents the judiciary from addressing legal questions that do not arise in the context of a particular case.[287]

At the same time, an OLC legal issue cannot be *too* concrete. OLC insists that it should "address legal questions prospectively" and "avoid[] opining on the legality of past conduct."[288] This rule is not at all judiciary-like. One of the key purposes of judicial proceedings is to determine whether past conduct violated the law. A judicial decision weighing in on what hypothetical conduct might violate the law in the future would be an impermissible advisory opinion.[289]

The prospectivity and concreteness requirements are not strictly incompatible. The Goldilocks zone between these two requirements covers situations where a legal issue has arisen with respect to a particular dispute, but the executive has not yet acted and is awaiting legal guidance. Nonetheless, the two requirements are in considerable tension, and each requires justification—a justification that will and should be institution-specific.

The prospectivity requirement is perhaps best explained by what Harold Koh identifies as the danger of "lock-in":

[285] See Morrison, supra note 14, at 1496–97 (noting that OLC's adherence to stare decisis strengthens institutional legitimacy and credibility).

[286] See supra Subsection II.A.5; 2005 Best Practices Memorandum, supra note 79, at 1.

[287] See, e.g., Erwin Chemerinsky, Constitutional Law: Principles and Policies 50 (6th ed. 2019) (describing this limit).

[288] 2005 Best Practices Memorandum, supra note 79, at 1–2.

[289] See, e.g., Ala. State Fed'n of Lab. v. McAdory, 325 U.S. 450, 461 (1945) (observing that the "Court is without power to give advisory opinions" and that "[i]t has long been its considered practice not to decide abstract, hypothetical or contingent questions" (citations omitted)).

> Wherever possible, OLC has sought to be consulted *before* the United States government irrevocably commits itself to an action so that the Office can impartially evaluate the legality of the proposed action *ex ante*, rather than being locked into a position by its client's action and then being forced to issue a legal opinion justifying that action after the fact.[290]

Given this goal, however, one might think that OLC should look to address issues when they are the *most* abstract and hypothetical. The more concrete a particular legal question is, after all, the more the concrete stakes for the current administration will be clear—and, thus, the greater the likelihood that any legal analysis might be influenced or unconsciously infected by that awareness.

One might even argue that OLC is best positioned to impartially and objectively analyze a legal question when its attorneys are wholly ignorant of whose ox will be gored by the result. As Adrian Vermeule observes, prospectivity requirements are useful because they prevent decision-makers from "identify[ing] the winners and losers from proposed policies—to know who will bear costs and benefits as well as what those costs and benefits will be."[291] The more abstract the question, the thicker OLC's veil of ignorance becomes.[292] To the extent that the executive branch's legal analysis (unlike its policy aims) is supposed to be driven by principle, and not a desire to benefit or burden a particular party, we might prefer that OLC focus on legal questions that are not merely prospective, but entirely hypothetical.

What, then, to make of the concreteness requirement, which pushes in the other direction? To be sure, "concreteness" is an important consideration for the judiciary. Under Article III's case-or-controversy requirement,[293] federal courts neither "adjudicate hypothetical or abstract disputes" nor "possess a roving commission to publicly opine on every legal question."[294] Those limits on the judiciary find support in the

[290] Harold Hongju Koh, Protecting the Office of Legal Counsel from Itself, 15 Cardozo L. Rev. 513, 515 (1993).

[291] Adrian Vermeule, Veil of Ignorance Rules in Constitutional Law, 111 Yale L.J. 399, 408 (2001).

[292] See generally John Rawls, A Theory of Justice (1971).

[293] U.S. Const. art. III, § 2.

[294] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

separation of powers, since "[f]ederal courts do not exercise general legal oversight of the Legislative and Executive branches."[295]

But no such constitutional limit constrains the executive branch's power to police *itself*. Nonetheless, when OLC has been seen to have disregarded the concreteness requirement, it has faced substantial criticism. OLC head Jack Goldsmith and later acting head Bradbury both criticized OLC opinions from the early Bush Administration for failing to heed this requirement.[296] So what is desirable about concreteness in the executive branch?

One justification is that tying legal analysis to concrete facts leads to better legal analysis. That is an article of faith in the judicial context. Frederick Schauer notes that "[t]reating the resolution of concrete disputes as the preferred context in which to make law . . . is the hallmark of the common law approach."[297] But, as Schauer argues, it is possible that a case-based approach could lead to worse decisions. "[C]oncrete cases" could be "more often distorting than illuminating," because "the very presence of such cases may produce inferior law whenever the concrete case is nonrepresentative of the full array of events that the ensuing rule or principle will encompass."[298] We cannot say for certain, then, that concreteness always produces better decisions.

Another possible virtue of concreteness is that the consequences of legal analysis will be easier to foresee. As the Supreme Court has put it, requiring that decisions be made in the context of particular cases "tends to assure that the legal questions presented to the court will be resolved,

---

[295] Id.

[296] See Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 150 (2007) (calling the legal arguments in certain opinions "wildly broader than was necessary to support what was actually being done"); see also Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Just. 1 (Jan. 15, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf [https://perma.cc/8HPA-JLMJ]. In withdrawing a number of OLC opinions issued early in the Bush Administration, Bradbury stated that the opinions

> do not address specific and concrete policy proposals, but rather address in general terms the broad contours of legal issues potentially raised in the uncertain aftermath of the 9/11 attacks. Thus, several of these opinions represent a departure from this Office's preferred practice of rendering formal opinions addressed to particular policy proposals and not undertaking a general survey of a broad area of the law or addressing general or amorphous hypothetical scenarios involving difficult questions of law.

Id.

[297] Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. 883, 883 (2006).

[298] Id. at 884.

not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[299] Indeed, in the executive context, broad and untethered opinions could be relied on by agencies in novel contexts that OLC did not sufficiently consider when formulating an opinion. In this way, concreteness in the executive branch might resemble minimalism in the judiciary—that is, the notion that courts should "say[] no more than necessary to justify an outcome, and leav[e] as much as possible undecided."[300] And one rationale for a minimalist approach is the reduction of error costs: "the accretion of case-by-case judgments" may "produce fewer mistakes on balance, because each decision would be appropriately informed by an understanding of particular facts."[301]

But, as always, there are trade-offs. Narrower, fact-specific decisions necessarily provide less guidance that speaks to the broad needs of the diverse executive branch. In a large and complex hierarchy, sweeping statements can importantly and appropriately inform and police disparate actors lower in the hierarchy. For this reason, it is unsurprising that OLC sometimes issues opinions that are anything but minimalist. Consider OLC's response to the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*.[302] The Office produced a memo directed "to General Counsels" laying out OLC's understanding of "the new standard for assessing the constitutionality of federal affirmative action programs."[303] Indeed, as noted above, many of the Office's most well-known and often-cited opinions are completely divorced from something like a case or controversy.[304] They speak instead on broad legal issues to the entire executive branch.

Here, we do not attempt to resolve this trade-off—between minimalism, on the one hand, and efficient communication in a complex hierarchy, on the other—or suggest that it will always point in one direction. It is possible that OLC's current approach in practice appropriately balances these competing considerations. Nor is any of this

[299] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

[300] Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 6 (1996).

[301] Id. at 18.

[302] 515 U.S. 200 (1995).

[303] *Adarand* Legal Guidance, supra note 50, at 171.

[304] See supra note 50 (discussing the OLC opinions that have been issued to the general counsels of the executive branch as a whole).

to say that the executive branch should never rely on self-imposed justiciability-like rules. Rather, showing that such restrictions are appropriate requires special, executive branch-specific justifications—which have never been fully articulated. And it suggests a modicum of skepticism toward the general applicability of the institution's own stated norms.

OLC's use of jurisdictional-type limitations can also serve an additional purpose: enabling the executive branch to defer or punt on questions it is not ready to resolve (or, perhaps, questions that it believes the relevant audience is not ready to have resolved). As John McGinnis has explained, "the jurisdictional doctrines [OLC] employs are subject to—perhaps even designed for—manipulation. These 'passive virtues' permit OLC to avoid entanglements that would be unwise and preserve its political capital . . . ."[305] McGinnis's invocation of the passive virtues is apt. The Supreme Court is widely seen as occasionally manipulating doctrines like standing in order to kick the can down the road on particularly difficult questions.[306]

This analogy may shed light on some of OLC's practices. OLC's apparent inconsistency in adherence to a concreteness requirement makes sense if one understands that requirement not as a rigid constraint but instead as a kind of discretionary factor—one that OLC can emphasize more, or less, depending on the specific factual circumstances or broader institutional reticence to resolve a particular constitutional question. Of course, to the extent that the executive branch is using those jurisdictional requirements strategically, it opens itself up to accusations that are familiar from the judicial context: that it manipulates jurisdictional rules based on policy preferences, rather than principle.[307]

One final comment on the differences is in order. When a court declines to reach a constitutional question on jurisdictional grounds, it typically expresses no view on the underlying constitutional issue, and the status quo remains undisturbed. The executive branch does not always enjoy

[305] McGinnis, supra note 262, at 434–35 (footnote omitted); see also Pillard, supra note 7, at 734 ("OLC also brings some of the passive virtues of the judiciary into the executive branch, but in an incomplete way.").

[306] See Bickel, supra note 39.

[307] See, e.g., Luke G. Cleland, Comment, John Roberts and Owen Roberts: Echoes of the Switch in Time in the Chief Justice's Jurisprudence, 54 St. Mary's L.J. 851, 869 (2023) ("It is well established that ideology influences the determination of justiciability insofar as justices manipulate the facts or law to make cases justiciable or non-justiciable, depending on their preexisting political predilections.").

this same luxury. Constitutional questions within the executive branch often—though not always—arise in the context of proposed action, as when the president wants to pursue a particular policy course. In such cases, the absence of an OLC opinion does not halt the contemplated action. The president might choose to proceed without formal legal guidance, delegate the question to a general counsel within the relevant agency,[308] or abandon the initiative altogether based on a broader legal and policy assessment. That dynamic stands in marked contrast to the judiciary's capacity to withhold judgment without consequence to the parties' underlying objectives.

*3. Remedial Considerations*

Once the executive branch has determined that a particular policy or law is unconstitutional, the question becomes how to respond. Here, the relevant analogy is to remedies: What options does a court have once it has determined that the Constitution has been violated? Unsurprisingly, many executive branch practices have obvious remedial judicial analogs. Perhaps most obviously, the refusal categorically to enforce a law that the executive concludes is invalid resembles how a court might declare a law facially unconstitutional.[309]

But for both the executive and the courts, there are other possibilities for addressing constitutional problems. Consider the practice of statutory treatment explored above.[310] It suggests an analogy to the doctrine of severability: after determining that some portion of a law is unconstitutional, a court must then determine whether to "sever" the offending provision and give effect to the rest of the law or to strike it down in its entirety.[311]

[308] See, e.g., U.S. Gov't Accountability Off., B-331564, Office of Management and Budget—Withholding of Ukraine Security Assistance 1 (2020), https://www.gao.gov/assets/b-331564.pdf [https://perma.cc/23GU-3DYL] (delegating a constitutional question regarding the Trump Administration's withholding of appropriated funds to the General Counsel of the Office of Management and Budget rather than to OLC).

[309] See United States v. Salerno, 481 U.S. 739, 745 (1987) (noting that to succeed in a "facial challenge" to an act of Congress, "the challenger must establish that no set of circumstances exists under which the Act would be valid").

[310] See supra Subsection II.A.3.

[311] See, e.g., Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., concurring in part and dissenting in part) ("Instead of declining to enforce an unconstitutional statute in an individual case, this Court has stated that courts must 'seve[r] and excis[e]' portions of a statute to 'remedy' the constitutional problem." (alterations in original) (quoting United States v. Booker, 543 U.S. 220, 245 (2005))).

Ostensibly, in the courts, this inquiry is aimed at determining congressional intent: What would Congress have wanted if it had known the relevant provision was unconstitutional?[312] Likewise, when treating a statutory provision, the executive has historically selected an implementation of the law that best accomplishes Congress's policy goals without running afoul of the Constitution. One example, recounted above, is President Johnson's handling of a provision requiring the Panama Canal Company to obtain approval from the relevant House and Senate committees before disposing of real property.[313] Rather than declare the provision a complete nullity, President Johnson "treated" it as a request for information with which his Administration was willing to comply. Congress did not get the full, original provision—but the executive branch's treatment provided half a loaf.

But the executive branch has tools to address acknowledged constitutional violations that lack clear judicial parallels. Consider how, as described above,[314] the executive has frequently acquiesced to Congress even when Congress has done something that is plainly unconstitutional—such as the executive branch's willingness to follow legislative veto-type provisions that *Immigration & Naturalization Service v. Chadha* identifies as unconstitutional.

Why is this practice of executive acquiescence permissible? When it has found a constitutional violation, a court is not allowed to declare that it will nevertheless let things slide, even if in practice there are ways in which courts can fail to effectively remedy constitutional violations. Yet the executive does just that.[315]

The duty to defend raises similar questions. Even if the executive branch determines that a law is unconstitutional, it has some obligation to

[312] See, e.g., *Booker*, 543 U.S. at 246 ("We seek to determine what 'Congress would have intended' in light of the Court's constitutional holding." (quoting Denv. Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 767 (1996) (plurality opinion))); Champlin Refin. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932) ("Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.").

[313] See supra text accompanying notes 115–19.

[314] See supra Subsection II.A.4.

[315] To be sure, as Shalev Roisman observes, one branch may acquiesce in a constitutional violation by another branch "for many reasons not primarily motivated by constitutional analysis," including ignorance, political incentives, and coercion, among other possible reasons. Shalev Roisman, Constitutional Acquiescence, 84 Geo. Wash. L. Rev. 668, 684–85 (2016).

defend the constitutionality of that law in the courts, so long as there are plausible and good-faith arguments for doing so.[316] Again, why does the executive seem to have the ability—and sometimes even the obligation—to act as if a law it believes is unconstitutional is nonetheless valid?

To some extent, these practices rest on a partial acceptance of judicial supremacy.[317] In the case of the duty to defend, one rationale is that it is ultimately the Supreme Court's job to decide whether a law is unconstitutional; the executive should follow the law until the Court says otherwise.[318] This rationale may have special force in situations where Congress and the executive branch have different views on a question and where nonenforcement of a questionable provision might prevent any institution from developing more fulsome answers to the open question.[319]

But that rationale does not explain the executive's acquiescence in legal provisions that violate well-established Supreme Court precedent, such as the numerous *Chadha* violations described above.[320] In such cases, there is no open legal question that requires development in another forum; the Supreme Court has already decisively spoken on the matter and the executive branch has repeatedly relied on that decision in its public statements on the subject.

As noted above,[321] perhaps the most plausible explanation is separation of powers realities: Congress may retain functional control over an

[316] See supra Subsection II.A.2.

[317] See Presidential Authority, supra note 95, at 201 (noting that a relevant consideration for the president, in deciding whether to enforce a statute that presents constitutional difficulties, "is the likelihood that compliance or non-compliance will permit judicial resolution of the issue"); Attorney General's Duty, supra note 98, at 55–56 ("[T]he Judicial Branch is ordinarily in a position to protect both the government and the citizenry from unconstitutional action . . . .").

[318] See supra Subsection II.A.2.

[319] As suggested by some of our discussion above, there could be other solutions. For example, the Obama Administration declined to defend the constitutionality of the Defense of Marriage Act but nonetheless continued to enforce the provisions it had concluded were unconstitutional. United States v. Windsor, 570 U.S. 744, 753–54 (2013). The government did not object when the Bipartisan Legal Advisory Group ("BLAG") of the House of Representatives sought to intervene in the litigation challenging the law's constitutionality. Id. at 754. BLAG defended the law all the way to the Supreme Court, where BLAG's "capable defense of the law" satisfied the Court that the constitutional arguments had been fully aired. Id. at 763; see also Brianne J. Gorod, Defending Executive Nondefense and the Principal-Agent Problem, 106 Nw. U. L. Rev. 1201, 1247–53 (2012) (arguing in favor of "alternatives to executive defense," such as representation by Congress or by appointed counsel).

[320] See supra text accompanying notes 138–50.

[321] See supra text accompanying note 157.

agency's appropriations, and an agency may go along with a procedurally unconstitutional demand to keep the relevant committee happy. In some senses, this is perfectly unobjectionable. And yet this also serves to emphasize the institutional differences between the executive branch and the judiciary—which generally does not and may not take such considerations into account. (Indeed, structural constitutional constraints arguably prevent the judiciary from worrying about appropriations when it makes decisions.[322])

### *B. Inventing Executive Constitutional Practice*

A striking fact about the practices and norms of executive constitutionalism highlighted above is that many are relatively new innovations. Recall that the notion that opinions by the attorney general bind other parts of the executive branch did not emerge until the twentieth century.[323] Even newer is the idea that *informal* advice, not produced as part of a formal opinion, is binding.[324] So too with the duty to defend, which appears to be less than half a century old.[325] Indeed, OLC itself—not to mention the nuanced procedures and jurisdictional rules OLC has developed for answering, and not answering, constitutional questions—is a twentieth-century creation.[326]

Certainly, not all the practices documented here are entirely new. Statutory treatments, we have shown, date back to the Jefferson Administration.[327] Presidential proclamations and orders are even older.[328] Signing statements can be traced to the Jackson Administration.[329] But even with these practices, the story is always one of innovation and change. Orders and proclamations—first used by Washington—are mentioned nowhere in the Constitution and began to play an outsized role only in the twentieth century. Signing statements did not acquire anything resembling their present role until at least the

[322] See U.S. Const. art. III, § 1 ("Judges . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

[323] See supra Subsection II.B.3.

[324] See supra Subsection II.B.4.

[325] See supra Subsection II.A.2.

[326] See supra Part I; Paul D. Clement, Theory and Structure in the Executive Branch, 2011 U. Chi. Legal F. 1, 13–14 (describing the creation in 1933 of the office that became OLC).

[327] See supra text accompanying notes 110–14.

[328] See supra Subsection II.B.1.

[329] See supra text accompanying note 198.

1930s.[330] President Jefferson may have begun the practice of treatment in 1801, but it was President Johnson in 1964 who ushered in its modern and consistent role.[331] Executive constitutionalism as practiced today has not been with us throughout the history of the Republic.

What does this tell us? For one, it shows that the fine details of executive constitutional practice are not inevitable or static. We can imagine different ways of doing things because, in fact, executive constitutional practice has not always looked like it does today. This observation thus meshes with and reinforces some of the previous discussion about judicial analogies and disanalogies, which concluded that some details of executive constitutional practice might have developed without strong reasons and could ill serve the needs of the executive branch.

But there is a sharper lesson here. Our descriptive account shows that a good swath of executive constitutional practice did not arise accidentally. It was *invented* consciously by a range of different actors. Attorney general opinions did not accidentally become binding. Supported by the White House, a series of attorneys general and other actors within DOJ claimed authority by insisting that their opinions bind the rest of the executive branch.[332]

If important parts of executive constitutional practice did not arise organically, but were in fact invented, the question should become, *why* were these practices invented? For whose benefit, and to serve which ends? We do not mean to claim something nefarious was at work. No doubt the key decision-makers had (or believed themselves to have) good reasons to shape the practices of executive constitutionalism we take for granted today.[333] But they had their own agendas and priorities, and there is no reason to assume that their choices were the best or only options. Understanding that executive constitutional practice was invented creates space for imagining how it might be *re*invented to serve different ends. We do not take on that challenge here; for now, we are content to show that such an effort is possible.

[330] See supra text accompanying note 199.

[331] See supra text accompanying note 115–19.

[332] See supra Subsection II.B.3.

[333] One practical reason that internal and binding legal procedures emerge is to provide procedures that insulate individual executive branch actors from civil and criminal liability—e.g., for withholding documents from Congress or in intelligence and national security contexts.

This observation also has connections to broader debates about presidential power. Then-Professor Elena Kagan famously observed that "[w]e live today in an era of presidential administration."[334] Tracing the increasing presidential control over the administrative state from the Reagan Administration through the Clinton Administration, Kagan argued that the new regime of presidential administration "advances political accountability" and "furthers regulatory effectiveness."[335]

In recent work, Ashraf Ahmed, Lev Menand, and Noah Rosenblum hotly dispute Kagan's account. They contend that Kagan erroneously paints the rise of presidential administration "as a smooth working out of a particular notion of administrative governance," when in fact, "the passage to presidential administration was deeply contested, both institutionally and intellectually."[336] They argue that this shift "required the demise of a prior form of governance where Congress played a larger role and that presidential administration's entrenchment was the product of a bipartisan consensus about the dangers of government interventions in markets and an ever-expanding regulatory state."[337] They further claim that Kagan's "selective and irenic history of presidential administration . . . deprives us of tools to assess its internal dangers, as well as the concepts to push back against its excesses."[338]

Here, we do not attempt to referee this historical and normative dispute. Instead, we point to this debate to show that there are meaningful stakes to how we understand the development of executive constitutional practice. Is much of our practice today the result of a steady process of rational improvements? Or is it the product of successful power grabs by different actors at key moments, when other arrangements might have been possible? The answer, surely, is some mix of both stories—but understanding the details is critical if we hope to imagine, and perhaps pursue, different visions of executive constitutionalism.

## CONCLUSION

This Article has attempted to provide something close to a systematic account of the way in which the executive branch does constitutional interpretation. As we have shown, the practice of executive

[334] Kagan, supra note 16, at 2246.
[335] Id. at 2384.
[336] Ahmed, Menand & Rosenblum, supra note 16, at 2136.
[337] Id. at 2137.
[338] Id. at 2136.

constitutionalism has developed into a complex set of interacting processes. That practice has some things in common with judicial constitutionalism, but it has many of its own distinctive elements. Attending to the differences between the two contexts can be illuminating, particularly if one thinks present arrangements might be improved.

Pulling back the lens further, can we offer any bottom-line assessment of executive constitutionalism? As noted at the outset, Judge Pillard argued that the project of executive constitutionalism has largely failed to produce a "distinctive executive vision of constitutional obligation that could supplement, let alone supplant, the Court's."[339] Can our account reinforce or contradict Pillard's?

For the most part, we have not tried to answer this question. This Article has largely focused on procedural and institutional mechanisms through which the executive branch develops and transmits its constitutional vision. We have largely avoided opining on the substance of the constitutional interpretations that the executive branch reaches. That said, we offer a couple of observations that our account supports and that may bear on one's overall normative assessment of executive constitutionalism, even if they cannot provide a complete answer to Pillard's challenge.

First, the practice of executive constitutionalism shows a meaningful effort on the part of many actors across many administrations to implement and adhere to rule of law norms. And those efforts have proven, at least in some ways, successful. Interpretive practices such as methodological pluralism serve to blunt, perhaps dramatically, the ability of each presidential administration to radically reshape executive constitutional interpretation. This is not to say that there are not swings between administrations on important questions.[340] But those swings would likely be more dramatic in a world with a thinner institutional structure for doing constitutional interpretation. The stability these practices provide may be desirable on rule of law grounds.[341]

[339] Pillard, supra note 7, at 683.

[340] See, e.g., id. at 680 (noting disagreement between Republican and Democratic administrations on the constitutionality of abortion restrictions).

[341] See generally Stefanie A. Lindquist & Frank C. Cross, Stability, Predictability and the Rule of Law: *Stare Decisis* as Reciprocity Norm (2010) (unpublished manuscript), https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf [https://perma.cc/ET2L-PU23].

Second, the practice of executive constitutionalism has some features that may compare favorably to judicial constitutionalism. Rather than always claiming the most authority possible, the executive branch often seems to do its best to be conciliatory to Congress. Where Congress passes a seemingly unconstitutional statute, the executive branch uses statutory treatment to search for a way to give a statute as much effect as possible.[342] And sometimes it even accedes to the constitutional violation in the interests of interbranch peace.[343] In an era of constitutional polarization, where many see the judicial branch as increasingly imperial,[344] there is reason to admire the executive branch's willingness to search for institutional compromise in the face of deep constitutional disagreement.

We end on a gloomy note. The practice of executive constitutionalism that we have described may, for all its inherent limitations, soon seem attractive in retrospect. If the second Trump Administration manages to transform the way that the federal government works—and in particular manages to ensure much greater direct political control over decisions traditionally made according to established norms effectuated by a professionalized civil service[345]—one casualty will be the traditional practice of executive constitutionalism, including many of the norms and procedures described here. Indeed, early reports suggest that the current Administration has already deviated from many traditions, such as OLC's traditional role in reviewing the legality of executive orders.[346] If that comes to pass, we suspect that many erstwhile critics of the version of executive constitutionalism we have described may find what replaces it worse.

[342] See supra Subsection II.A.3.

[343] See supra text accompanying note 157.

[344] See, e.g., Josh Chafetz, The New Judicial Power Grab, 67 St. Louis U. L.J. 635 (2023); Mark A. Lemley, The Imperial Supreme Court, 136 Harv. L. Rev. F. 97 (2022).

[345] See Isaac Chotiner, How Donald Trump Is Transforming Executive Power, New Yorker (Feb. 3, 2025), https://www.newyorker.com/news/q-and-a/how-donald-trump-is-transforming-executive-power.

[346] See Bauer & Goldsmith, supra note 20 ("We do not know what legal process the New Trump administration is using to vet the legality of executive orders. But it does not appear that the executive order or regulation are being followed, or that DOJ or OLC is fully in the loop."); Savage, supra note 19 (noting that OLC has played a diminished role in drafting and vetting executive orders during the early months of the second Trump Administration).