Theory and Structure in the Executive Branch

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Thank you very much for that wonderful introduction. I am very pleased to be with you this afternoon. I am really pleased to be here for two principal reasons. One is that I have long been a fan of The University of Chicago Legal Forum. I actually first came across it when I was handed a volume by none other than the aforementioned John Ashcroft, then a relatively obscure junior Senator from Missouri. I was working with him, and there was an issue that we were both dealing with, and either because it goes to all alumni or because he sought it out, he had a copy of the Forum on an issue of relevance and handed it to me, and I have certainly been a fan ever since. The other reason that I am excited about being with you today is that this particular volume of the Forum focuses on an issue near and dear to my heart.

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1 This is a transcript of the speech given by Mr. Clement as the keynote address for the 2011 University of Chicago Legal Forum Symposium on Friday, October 22, 2010. The transcript has been edited in places with the permission of the speaker.
Appellate lawyers are fortunate to participate in important cases in a broad range of fields. Being an appellate lawyer is the perfect calling for someone with a short attention span, because of the day-to-day variation of the work. One day you can work on a great intellectual property case, like *MGM Studios, Inc v Grokster, Ltd* \(^2\), and then the next day you can shift gears and turn to a case involving religious freedom or First Amendment free speech or something else completely different. Sometimes, after litigating a case people will think you might have something to say about that doctrinal area of law. In reality, you are ready to move on to the next case. However, when I received this invitation involving the broader topic of governance and power, it did bring to mind a few thoughts that I wanted to share based on my own experience in the executive branch.

The topic I would like to discuss is the importance of theory and structure in the executive branch. Specifically, I would like to discuss the theory and structure *in* the executive branch—not the theory and structure *of* the executive branch, but theory and structure *in* the executive branch. The idea behind this keynote speech, which will hopefully serve as a nice counterpoint to some of the more theoretical discussion later in the Symposium, is to focus on some lessons learned based on actual, real-world experience during more than seven years in the Justice Department and Solicitor General’s Office.

I will start with theory. You might think that an attorney attempting to provide a practical perspective would not start by discussing theory. However, theory is incredibly important in properly discharging the vital responsibilities of senior officials in the executive branch—particularly in the Justice Department. Individuals serving in the executive branch often confront questions or issues that are simply too difficult to address on an ad hoc basis. Unless an official approaches the issue with a theory about how to address it and how to discharge the official’s functions, the official is almost doomed to failure. The issues are simply too complex and too numerous to try to “wing it” and make every decision on the basis of ad hoc judgment.

Consider, for example, the duties of the solicitor general, which include making thousands of decisions each year. These decisions span all of the various aspects of the job, including the decisions about what positions to take in the Supreme Court, which adverse decisions from the lower courts to appeal, and how

to respond when the opposing party has filed a petition for certiorari. Any one of those decisions can be the source of controversy, and, if the decisions are made poorly, almost certainly will be a source of controversy. A couple of examples can best illustrate the difficult questions that can arise and then explain how theory can play a role in answering them.

I will start with something literally from yesterday’s paper. For the past decade I have taught a separation of powers seminar at the Georgetown University Law Center. One of the enjoyable things about teaching the separation of powers, particularly in Washington, DC, is that no matter what the planned curriculum is at the start of the semester, it is almost guaranteed that at some time during the course of the semester, there will be something on the front page of the newspaper that will fit right into the curriculum and that will illustrate the kind of separation of powers issues that arise in Washington, DC on a daily basis. So I was, in that respect, quite pleased to see an article from the Associated Press yesterday titled Why US Lawyers Fight For Law on Gays Obama Opposes. So there it is, my first prop. Hot off the press from yesterday’s AP wire.

Now, one thing that is striking about this story is that it quotes from a variety of former solicitors general, myself included. And what is noteworthy is that, while the article quotes solicitors general from different political parties and different administrations, each of them talks about the importance the Justice Department places on defending the constitutionality of acts of Congress, and, in particular, making arguments in defense of acts of Congress as long as reasonable arguments can be made, even if, as a policy matter, that particular administration has qualms about the statute at issue. Going back a number of administrations, it is clear that each one defended the constitutionality of laws that conflicted with that particular administration’s policy goals. Despite the policy concerns, in each instance the Solicitor General’s Office and the Justice Department more broadly will present the best argument that they can possibly muster to defend the constitutionality of the statute. All of that is referenced in this article.

This newspaper article also mentioned reports that individuals in the White House brought pressure on the Justice Department not to appeal the decision holding the “Don’t Ask, Don’t
Tell policy unconstitutional and not to seek a stay of the effectiveness of that ruling. Now, given the stated policy position of the Administration, it is hardly surprising to learn that there were some in the Administration and in the White House in particular who would have looked at this district court ruling striking down the Don’t Ask, Don’t Tell policy and enjoining its enforcement nationwide as a gift. The Obama Administration had clearly said that they wanted to phase out Don’t Ask, Don’t Tell. Members of the Administration realize that there are some difficult issues associated with this, and now a district court judge has said it is unconstitutional. Under these circumstances, it would certainly be tempting to acquiesce in that ruling and effectively short-circuit the process of having Congress repeal the law or having the President do something more formal to address the issue. So of course, those pressures were brought to bear. They were not successful. As you no doubt have read in the paper, the Justice Department has filed papers with the Ninth Circuit seeking a stay of the district court’s ruling. As unsurprising as it was that individuals in the White House would have liked this appeal not to have been pursued, it was equally unsurprising to me that the Justice Department nonetheless decided to appeal the ruling.

Why is that? Because at a very basic theoretical level, the Justice Department lawyers and the people in the Solicitor General’s Office understand that the duty to defend acts of Congress against constitutional attacks, with its theoretical moorings in the Take Care Clause, is more important than any one particular controversy. I think that theory is almost universally accepted by both career lawyers and political appointees at the Justice Department, so in some respects it is a clear example. But it should not be taken for granted. Both the attorney general and the solicitor general are presidential appointees, and President Obama is on the record as a policy matter as favoring the discontinuation of Don’t Ask, Don’t Tell. Under those circumstances, the results produced by adherence to the duty to defend theory are sufficiently counterintuitive that the AP felt it needed to run this story. That is just one simple illustration of the importance of theory.

But let me try to give you a slightly more complicated example from my own time in the executive branch and my own time

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4 Log Cabin Republicans v United States, 716 F Supp 2d 884 (CD Cal 2010).
5 See Log Cabin Republicans v United States, 2010 US App LEXIS 21651 (9th Cir 2010) (granting the Department of Justice’s Motion to stay the District Court’s ruling).
as solicitor general. The Supreme Court case that gave rise to this example is a case called *Stoneridge Investment Partners v Scientific-Atlanta*,\(^6\) which is a case about aiding and abetting liability, or what is called scheme liability in securities law. By way of background, the Supreme Court in 1994, in *Central Bank of Denver v First Interstate Bank of Denver*,\(^7\) refused to recognize aiding and abetting liability for 10b-5 actions.\(^8\) Then, securities lawyers over the ensuing decade and a half, while avoiding the rubric of aiding and abetting liability, had figured out ways to try to expand the universe of defendants beyond the issuers of securities or the other primary violators through a variety of theories that came to be referred to as scheme liability. The circuit courts divided on the questions whether scheme liability was sufficiently different from aiding and abetting liability, and whether scheme liability could be reconciled with *Central Bank*.\(^9\) The Supreme Court, in 2008, ultimately took the *Stoneridge* case to resolve this question. The Bush Administration had divided over the legitimacy of scheme liability.

But before discussing my experience with *Stoneridge*, I will offer you my own theory about how the solicitor general’s unique position within the executive branch requires that he develop a theory for confronting difficult issues of policy that divide the executive branch. Although much was said during the Bush Administration about the “unitary executive,” the executive branch undeniably has a lot of different constituent components, many of which, because of their different obligations and responsibilities, will tend to see the same issue quite differently. The solicitor general is in a unique position to see these varying positions within the executive branch because the solicitor general has the authority to file one brief and one brief only on behalf of the executive branch in the Supreme Court. So one of the solicitor general’s responsibilities is that, when the Supreme Court agrees to review a nongovernment case, the solicitor general has to oversee the process of deciding whether the United States will file a brief as an amicus curiae, and if so, on which side.

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\(^7\) 511 US 164 (1994).
\(^8\) Id at 166 (holding that a private plaintiff may not maintain an aiding and abetting suit under § 10(b)(5), which imposes “private civil liability on those who commit a manipulative or deceptive act in connection with the purchase or sale of securities”).
\(^9\) Compare, for example, *Simpson v AOL Time Warner*, 452 F3d 1040 (9th Cir 2006), with *Regents of University of California v Credit Suisse First Boston*, 482 F3d 372 (5th Cir 2007).
Sometimes, this is incredibly straightforward. You will have a non-government case in which the decision below effectively invalidated a regulation of a particular agency of the federal government. In cases of this type, the process is not complicated. Officials from the agency will meet with the solicitor general. They will suggest that the solicitor general file an amicus brief in defense of the regulation; no other interested part of the government will be particularly aggrieved by defending this regulation; and the brief will be filed.

But many other cases are far more complicated. A common example arises when the Supreme Court grants certiorari in a case involving one of the antidiscrimination statutes in a private sector employment context (for example, Title VII or the Americans with Disabilities Act). The dynamic is usually the same: when the Court grants the case, very often the Civil Division of the Justice Department—which is responsible for defending the United States as an employer against suits under these same statutes—typically will come into the Solicitor General’s Office either in person or through a memo, and say, “the Supreme Court has taken this case involving (for instance) the scope of Title VII. It’s a very important case, and we need to file a brief in this case on behalf of the employer because we are, after all, the nation’s largest employer, and will face liability under the same statute.” That would all be simple enough except that lawyers from the Civil Rights Division just down the hall would be equally likely to come down the hall in such a case and say, “the Supreme Court has just granted review in this employment case, and it’s vitally important that the United States file a brief on behalf of the employee because the Civil Rights Division is the enforcement arm for these statutes in their application to public employers at the state and local level. Thus, we have an interest in the case, and it is on the employee’s side of the case.” The process of trying to identify the proper course of action in those cases is one of the most difficult jobs that the solicitor general faces.

To make that decision, I would submit that one needs a theory about ordering those various policy interests and legal interests and coming up with a simple position for the United States. My own theory, for what it is worth, depended on making a distinction that is not an easy distinction to make, but a vital one: the distinction between legal questions and policy questions. It struck me that the job of the solicitor general, who by statute is
supposed to be learned in the law, is to decide the legal questions at least in the first instance. Certainly in the case of contentious questions, the attorney general should be notified and consulted. And in extreme cases, even the president should understand the solicitor general’s reasoning. But on a day-to-day basis, these legal decisions are the bread and butter of the solicitor general’s job.

On the other hand, when real, deep-seated policy disagreements existed within the executive branch, I did not feel it was my job to referee those policy disputes. It was not that I did not have views on policy matters; I had a Masters degree in economics, after all. I had thoughts about certain issues, but I did not view advocating for my preferred policy position as being part of the job. The statute said I was supposed to be learned in the law, not learned in policy. So I thought it was very important to distinguish between policy disputes and legal disputes. In the latter case, it is the solicitor general’s responsibility to resolve the dispute and to apply certain criteria.

Sometimes, resolution of conflicting views within the executive branch turns on the formality with which those views have been adopted. Maybe in one case the position of the Civil Rights Division was encapsulated in a regulation, whereas the position of the Civil Division was simply on a litigation wish list. In that case, the deference due to a government position encapsulated in a regulation would make it easy enough to defer to the Civil Rights Division’s position. But if the dispute was at bottom a policy dispute, then it seemed to me that it was not my responsibility to referee that dispute, but to make sure that somebody, namely the President—perhaps acting through the White House Counsel—referee that policy dispute.

And that brings me back to the Stoneridge case, where precisely this kind of policy dispute existed within the executive branch. The SEC was involved in some lower court litigation involving scheme liability issues. In the lower courts, the SEC can file amicus briefs without the prior approval of the solicitor general. The SEC was on record in a Ninth Circuit amicus brief as embracing scheme liability as appropriate under 10b-5. Others within the executive branch opposed scheme liability. Indeed,

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10 See 28 USC § 505.
12 One of the theoretical points about the executive branch that I believe in is that
at least three components of the executive branch—the Federal Reserve Board, the Comptroller of the Currency, and the Department of the Treasury—were on record as opposing scheme liability. So we had the SEC recommending that the United States file a brief supporting scheme liability, and other entities within the executive branch recommending that we file a brief opposing scheme liability.

Now certainly this matter posed a legal question, and as to that legal question, the Solicitor General's Office did its own independent analysis and found that a brief could be filed in support of either side. The nature of the issue would have required a narrower brief on one side and permitted a broader brief on the other, but there were legal merits to both positions. The ultimate question in this case simply depended on what, at the end of the day, the President's view was on the policy issue of whether scheme liability was desirable as a protective measure for investors, or was undesirable given the effects on the financial markets more broadly. Again, as I had a Masters degree in economics and had thoughts on these matters, it would have been tempting to resolve this policy issue myself. Instead, I notified the White House of the situation, and the President ultimately made a determination that, as a policy matter, he supported the views reflected by the Federal Reserve Board, the Comptroller of the Currency, and the Department of the Treasury against scheme liability. The President was also very clear that he was simply answering the policy question that was asked of him and was not telling the Solicitor General how to write the brief or on which side to file.

Now, two things should not be surprising to hear. First, that the United States ultimately filed a brief in favor of the defendants in this case arguing against scheme liability. Once the policy input was provided, the decision to file was straightforward because the legal analysis was previously completed and allowed a filing on either side. Second, I think that this was handled the right way, which is to say that distinctions between legal and policy questions were drawn, and the policy questions were decided by the politically accountable components of the executive branch. The position of the President was presented to the press in a call initiated by the head of his Council of Economic Advisors, Al Hubbard. There was some criticism of the President's

the attorney-client privilege extends to government lawyers. So what I am relating about this case is all based on publicly available sources, which I double-checked to make sure I was not saying anything based on personal recollection rather than what was reported.
position. There was some criticism of his mere involvement in this issue. But the latter criticism is properly answered by an understanding that, at bottom, there was a policy dispute within the executive branch. Some might disagree with President Bush's policy choice in this case, but it seems clear to me that the policy choice is the president's, not the solicitor general's, to make. As the most politically accountable person within the executive branch, the president should make that decision and take the heat or claim the credit for it. And my view is that, when the Justice Department encounters difficulties, it is often when it submits to the entreaties that are always there to allow litigation decisions to be influenced by efforts to relitigate what are essentially policy disputes.

It seems clear such entreaties were made in the context of the Don't Ask, Don't Tell policy. Presumably, at some point there was a decision made in the current administration that a legal defense was going to be made of the policy. The district court's decision rejecting the defense, invalidating the policy, and enjoining it nationwide provided an opportunity for some to relitigate that decision. It would have been one thing if the President made an announcement that he was heretofore going to change his policy completely. But not having done so, it is perfectly consistent with the basic theory for the executive branch, through the Justice Department, to continue to defend those laws.

Now let me finish my discussion about theory with one more point about the difficulties that can ensue in the absence of a clearly articulated theory. One of the things that I witnessed firsthand at the Justice Department during my tenure was the furor that followed the firing of seven United States Attorneys in one day. In the abstract, this did not strike me as particularly fertile grounds for a scandal. The basic elements are that a Republican president decides to relieve some Republican US Attorneys of their responsibilities as presidential appointees. This dynamic seems like an unlikely source of scandal because the president has a great deal of discretion as to who will serve as a United States Attorney. The president can remove a US Attorney and replace him or her with someone else for almost any reason, and probably for no reason at all. But there are certain reasons, such as a US Attorney's failure to pursue a prosecution that would yield partisan political advantage, that are accepted as improper bases for removal of a US Attorney. Moreover, as the scandal unfolded, the one thing that seemed to be missing from the deliberative process that produced the firings was any indi-
cation that the people making these decisions had a theory as to what factors should and should not be taken into account.

It is a useful thought experiment to ask what would have happened if one of the emails exchanged within the executive branch had reflected a coherent theory of factors that should be out of bounds in removing US attorneys and confirmed that no one was added to the list for impermissible reasons. For example, an email confirming that no one was added for failure to pursue a prosecution that would have served a partisan political agenda. If that email had been sent, and responses confirmed that such partisan issues were not considered, I suspect that the whole situation would have played out much differently. This example highlights the importance of having a theory for discharging an executive branch responsibility. In this case, it seems clear that, while the executive enjoys a great deal of discretion in making a removal decision, there are some considerations that are simply out of bounds. If that theory had been reflected in the decision-making process, I think the entire dynamic would have played out differently. And frankly, it was a process that was difficult for me to watch firsthand because the people who were involved were people who were my colleagues and whom I knew to be people trying to do their jobs in an appropriate and professional way. Where they suffered, if they did, was not for a lack of diligence and good faith but for having their decisions fail to reflect a theory of how to discharge an important executive branch responsibility.

I promised two things: a discussion of theory and a discussion of structure. So let me shift gears and discuss the importance of structure in the executive branch. At the outset, generally there are two major competing tendencies in thinking about how to structure the executive branch. On the one hand, given the power and breadth of the modern executive branch, there is an understandable desire for accountability. As a voter, when a decision is made, it is beneficial to know who the decision maker was, why they made the decision, and if you do not like the decision, you want to be able to do something about it. You can hold someone politically accountable. On the other hand, there is a competing impetus in at least some areas that are particularly sensitive, where a premium is put on independence. The Director of the Federal Bureau of Investigations (FBI) is a prominent example of the latter.

But independence from what? Not independence from the president in the abstract because we are talking about executive branch officers, but certainly independence from political consid-
erations. And so for certain agencies like the FBI or the CIA, and especially in the wake of past scandals, there has been a tendency to try to insulate the heads of those agencies—the people responsible for making sensitive decisions about who to investigate and how to investigate—from political influences.

There are certainly ways to ameliorate the tension, but at some basic level those are competing tendencies because the flip side of accountability is, in a sense, responsiveness to the president. Chief Justice Roberts made this point for the Supreme Court in *Free Enterprise Fund v Public Company Accounting Oversight Board*. The Court struck down the double for-cause removal provision in Sarbanes-Oxley because it provided too much independence and not enough presidential accountability for the actions of the Public Company Accounting Oversight Board. In doing so, the Court observed that the "diffusion of power carries with it a diffusion of accountability."14

But the same trade-off exists even within constitutional limits. And so if you try to shield the FBI director from political influences and make him more independent by giving him a tenure term that stretches across administrations, the president becomes less accountable for the actions of the FBI director. Likewise, if you insulate the rest of the FBI from political considerations by staffing the FBI entirely with career officials—so that the only politically-appointed officer is the director—then you maximize independence at the expense of accountability. On the one hand, maximizing independence is an understandable reaction to some of the observed abuses over time. But on the other hand, the lack of accountability creates inevitable costs when problems arise, and problems will arise.

Let me just give two examples in the specific context of the FBI. First, I will resort again to the newspaper; specifically, a report criticizing the FBI's implementation of a computer project. The FBI has tried to renovate its computer system to ensure that an investigating agent can tap into information from all ongoing investigations. The cost overruns of this project have been breathtaking, and it is nowhere near completion. It is approximately three times over budget, and it is only half completed and basically useless in its current state. This is the kind of project that incenses congressional committees, and in other cir-

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13 130 S Ct 3138 (2010).
14 Id at 3144.
cumstances, you might think that heads would roll. But in the context of the FBI, there is not an appropriate head to roll. This is a debacle, but not something that merits the removal of the director. If there were a politically-appointed assistant director for technology, that would be an appropriate person to hold accountable. But in the current structure of the FBI, it does not work that way. There is the director and then there are career officials.

Another great example of this phenomenon came in March 2007. There was a controversy over abuses by the FBI in the administration of so-called national security letters. The Inspector General at the Justice Department conducted an investigation and found that there were a number of unauthorized national security letters that had been executed—a very significant problem. In addressing this problem, the FBI director, Bob Mueller, who is a friend of mine and a great public servant, stepped up to the proverbial plate. And in a press conference he asked, “How could this happen?” “Who is to be held accountable? And the answer to that is, I am to be held accountable.” But nobody thought Bob Mueller was the problem. If anything, he was part of the solution and was generally doing a very good job in challenging times. But because he is the only politically accountable individual at the FBI, in a sense his rhetorical question could only be answered in that way. Who is to be held accountable? The FBI director is to be held accountable.

Now I do not have any particular solution to propose when it comes to the FBI because I think the FBI poses this dilemma in a particularly poignant way. I think that most people want a degree of independence when it comes to the FBI, and so having an FBI director whose term spans administrations makes sense. But does it make sense to have no other individual in the entire FBI politically appointed and politically accountable? On that I am less sure because the normal political response to some of these problems might be to demand a resignation or to fire some politically-accountable individual, and that really is not an option given the FBI's current structure.

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16 See, for example, John Solomon and Barton Gellman, *Frequent Errors in FBI's Secret Records Requests*, Wash Post (March 9, 2007), online at http://www.washingtonpost.com/wp-dyn/content/article/2007/03/08/AR2007030802356.html (visited Sept 9, 2011).

But let me move from the FBI to a different issue where I think I do have something more in the way of a concrete suggestion, and this is the case of the Office of Legal Counsel (OLC), another component of the Justice Department that I watched very closely for seven years. In order to understand the OLC and the difficulties of discharging its important and sometimes difficult functions, it helps to understand both the history of the office and its function within the executive branch. Let me start with the history. If you go all the way back to the Judiciary Act of 1789,\(^{18}\) you will see the description of the responsibilities of the attorney general:

> [T]here shall [ ] be appointed a meet person, learned in the law, to act as attorney-general for the United States ... whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and 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.\(^{19}\)

So, as originally conceived, the attorney general served two functions. One was to argue cases on behalf of the government in the federal courts, and the other was to provide legal opinions when asked by the president or the heads of other departments.

About a hundred years later, in 1870, Congress re-conceptualized the attorney general’s job, and created the solicitor general’s office.\(^{20}\) In doing so, Congress transferred the attorney general’s two original functions, but most clearly the litigating function, to the solicitor general.\(^{21}\) Now, I would be remiss if I did not add as an interesting historical note that, at the point that the litigating responsibilities were removed from the attorney general to this newly-created position of the solicitor general, from that point forward, the requirement that the attorney general be learned in the law was also removed from the statute books.\(^{22}\) From that point forward, only the Solicitor General needed to be learned in the law. But more importantly, Congress

\(^{18}\) Act of September 24, 1789, 1 Stat 73 ("Judiciary Act of 1789" hereinafter).

\(^{19}\) Judiciary Act of 1789 § 35, 1 Stat at 93.

\(^{20}\) Act to Establish the Department of Justice § 2, 16 Stat 162 (1870).

\(^{21}\) Id.

\(^{22}\) See Act of June 22, 1870, ch 150 § 1, 16 Stat at 162; Rev Stat §§ 346–347 (1878).
transferred the day-to-day functions that were originally given to the attorney general to the solicitor general, and re-conceptualized the attorney general’s job as more of an administrative role because the 1870 Act not only transformed responsibility but created the United States Department of Justice itself. The attorney general henceforth had to run the department.

Then, in 1933, a second development took place. The opinion writing function—which had been transferred from the attorney general to the solicitor general in 1870—was transferred again, this time to the newly-created position of assistant solicitor general. A few years later, that became the assistant attorney general for the OLC. That is the short history of the creation of the OLC. It was created out of the Solicitor General’s Office to discharge a function originally granted to the attorney general.

In understanding the OLC, it is important to understand that the Office’s opinion-writing role is essentially a counseling function. The Office’s lawyers are asked before an executive branch action takes place, in a pre-decisional context, whether certain actions are constitutional or are otherwise lawful. They answer the question: “Can we lawfully take this action?” They also address these questions in a context where, because the action has not yet taken place, they do not necessarily apply a very deferential standard. They are not asked whether, if an executive branch officer were to do this, it would be defensible in court. They are asked, instead, the much more direct question of whether or not the proposed action is lawful.

To make the OLC’s job even more challenging, many of the questions the Office is asked arise in contexts where the issue will not generally be litigated. For example, the Office may be asked to address whether or not a certain military course of action can lawfully be taken. Because such questions are rarely litigated, the Office will often have to decide them without the concrete guidance of prior judicial opinions. Nonetheless, they are legal questions that must be answered.

One challenge that the Office of Legal Counsel has in common with the Solicitor General’s Office is that both offices must sometimes tell the president of the United States “no.” That is a

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23 Act to Establish the Department of Justice § 1, 16 Stat at 162.
24 See Act of June 16, 1933, ch 101 § 16, 48 Stat 283 at 307-08 (establishing the position of assistant solicitor general, to be appointed by the president and confirmed by the Senate).
25 See Reorganization Plan No 2 of 1950, §§ 3-4, 64 Stat 1261, 1261.
very difficult position to be in, given that both the solicitor general and the head of the office of legal counsel are appointed by the president and serve at the president's pleasure. But they have to do it.

But what has struck me upon reflection is how much more difficult the task is for the OLC than for the solicitor general, for two reasons. One, the two officers are generally applying different standards to the questions that come before them. The solicitor general's decisions arise in the context of litigation, and there is a long-standing tradition of making reasonable arguments in defense of the constitutionality of acts of Congress. There is a similar tradition of making reasonable arguments in defense of executive branch actions already taken and challenged in court. Thus, the solicitor general applies a relatively forgiving standard, which means that situations in which a statute cannot be defended will be relatively rare. The solicitor general enjoys a second advantage that also derives from the fact that the solicitor general is a litigator and the questions that he or she is asked arise in litigation. Because of that, in the relatively rare case in which the solicitor general must tell the president that the president's favored position is indefensible, the solicitor general can bring with him or her a sheath of legal opinions from the Supreme Court that explain precisely why it is that the position at issue is indefensible. So although the solicitor general has to tell the president "no" from time to time, the relatively forgiving standard makes these occasions rare, and the refusal to adopt the president's preferred position can be backed up with concrete judicial opinions.

The OLC, on the other hand, applies a less forgiving standard. Because they are often asked to provide counsel about a proposed course of action, the Office is being asked a simple question: is it lawful or not? The question is not whether the executive action, once taken, would be defensible in court. The question is more straightforward: is the action legal, not just defensible, but legal, when applying what is essentially a "fifty-fifty standard?" To make matters more difficult, the Office is often asked these questions in a context where there are no Supreme Court opinions to back up the decision. They are asked questions in a prelitigation context, and some of the proposed actions are either novel or involve questions that ordinarily do not get litigated. To ask an inferior officer in the executive branch to say "no" to the president in that context puts that person in a very difficult position. And this difficulty is exacerbated by the structure of the Department of Justice as it concerns the two posi-
tions. The solicitor general is the fourth-ranking individual in the Justice Department. The solicitor general, by tradition going back to 1870, is often, present company excluded, picked from people who have already established themselves as legal academics or as federal judges. It is a very prestigious position and often draws candidates who are later in their careers and have previously established themselves. And, it is a position that both by its structural position as the fourth highest-ranking post, and by its tradition of prestigious office-holders, is designed to attract people with the stature to say “no” to the president of the United States.

The OLC, by contrast, is headed by an assistant attorney general, a lower-ranking position within the Justice Department hierarchy. Although the position has attracted incredibly talented individuals such as Chief Justice Rehnquist and Justice Scalia, it did so early in their careers. The typical candidate to head the OLC is somebody who is relatively early in his or her career and perhaps is interested in another future presidential appointment, be it in the judicial branch or elsewhere in the Justice Department. And so it strikes me that there is a structural problem with the OLC position. The job is incredibly difficult, and yet it is not well-designed to attract someone who is likely well-positioned as a structural matter to say “no” to the president, even though it is vital at times that the head of the OLC be willing and able to do so. This is not to say that the job has not attracted candidates who were in fact ready, willing, and able to say “no” when the law merited that answer. It is only to say that the office is not well-structured to attract such candidates.

So what can be done about this? There are two possibilities. The first would require legislation. In Washington, that qualifies as a theoretical idea, which will probably never happen. But the second is something that could take place even without legislation. The idea that would require legislation would involve a restructuring to raise the position of the head of the OLC within the Department of Justice’s hierarchy. There is nothing that says you cannot have two deputy attorney generals, one for administration and one for the OLC or for “Legal Opinions,” or another more enticing title for this job. Such a change would elevate the position’s stature within the structure of the Justice Department in a way that would make it easier to attract individuals with the

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stature to say "no" to the president. Then the position would become one that, like the solicitor general position, could entice someone to step down from an Article III judgeship or the deanship of a leading law school. I think that would likely be the ideal solution.

A more modest suggestion is that it is always an option for the attorney general to bring the opinion-writing function back within the Office of the Attorney General. For a long time the products of the Department's opinion-writing function were labeled opinions of the attorney general and were collected in a series of books called *Opinions of the Attorney General*. The opinions themselves were personally signed by the Attorney General of the United States. In past decades, a tradition has arisen that the vast majority of the Department's legal opinions are not signed by the attorney general himself or herself but by the head of the OLC or even a deputy in that office. And so the department now has volumes that say *Opinions of the Office of Legal Counsel*.27 Assuming the legislation suggested above is not feasible, it would make sense to bring the opinion-writing function back within the Office of the Attorney General—a return to the original design of 1789—and to have the majority of opinions, or at least the most sensitive ones, signed by the attorney general, who presumably is someone with the stature to say "no" to the president when needed.

Finally, my broader point here is that, given the importance of what the executive branch does, I hope scholars will give greater attention to both the theory and structure of the executive branch. What is the appropriate theory of how the Justice Department is supposed to be run? By what theoretical guideposts should the Department of Defense advise and counsel the president on military matters? More attention to that kind of theoretical inquiry would be useful. And equally important, I think more attention should be paid to how the executive branch's structure influences its effectiveness and whether decision-making authority in sensitive cases is at the proper level of seniority in the hierarchy of the executive branch. For example, I understand that one of the panels in the Symposium will discuss the rise of the executive branch czars. It is definitely worth considering how the czars affect accountability, and how the presence of white house czars affects senior officials in other parts of

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the executive branch. These structural questions are well worth thinking about and will inform the answer to the more basic question of whether the rise of executive branch czars is to be applauded.