

5-2010

A Rhetorical history of the Office of Legal Counsel

William O'Donnal Saas
University of Nevada, Las Vegas

Follow this and additional works at: <https://digitalscholarship.unlv.edu/thesesdissertations>

 Part of the [Rhetoric Commons](#), [Social Influence and Political Communication Commons](#), and the [Speech and Rhetorical Studies Commons](#)

Repository Citation

Saas, William O'Donnal, "A Rhetorical history of the Office of Legal Counsel" (2010). *UNLV Theses, Dissertations, Professional Papers, and Capstones*. 321.
<https://digitalscholarship.unlv.edu/thesesdissertations/321>

This Thesis is brought to you for free and open access by Digital Scholarship@UNLV. It has been accepted for inclusion in UNLV Theses, Dissertations, Professional Papers, and Capstones by an authorized administrator of Digital Scholarship@UNLV. For more information, please contact digitalscholarship@unlv.edu.

A RHETORICAL HISTORY OF THE
OFFICE OF LEGAL COUNSEL

by

William O'Donnal Saas

Bachelor of Arts
University of Nevada, Las Vegas
2006

A thesis submitted in partial fulfillment
of the requirements for the

Master of Arts Degree in Communication Studies
Department of Communication Studies
Greenspun College of Urban Affairs

Graduate College
University of Nevada, Las Vegas
May 2010

Copyright by William O. Saas 2010
All Rights Reserved



THE GRADUATE COLLEGE

We recommend the thesis prepared under our supervision by

William O'Donnal Saas

entitled

A Rhetorical History of the Office of Legal Counsel

be accepted in partial fulfillment of the requirements for the degree of

Master of Arts in Communication Studies

Donovan Conley, Committee Chair

Tom Burkholder, Committee Member

David Henry, Committee Member

David Fott, Graduate Faculty Representative

Ronald Smith, Ph. D., Vice President for Research and Graduate Studies
and Dean of the Graduate College

May 2010

ABSTRACT

A Rhetorical History of the Office of Legal Counsel

by

William O'Donnal Saas

Dr. Donovan Conley, Examination Committee Chair

Associate Professor of Communication Studies

University of Nevada, Las Vegas

For over seventy-five years, the Office of Legal Counsel (OLC) has played a significant role in the crafting of executive policy rhetoric. Yet, within the scholarship in presidential and rhetorical studies, the OLC remains one of the least understood and, thus, underappreciated forces behind executive policy action. This thesis seeks to bridge the research gap by: (1) accounting for the OLC's rhetorical history through discussion of available "opinions" and their rhetorical consequences; and (2) by submitting a case study from the OLC's rhetorical history to critical analysis. Often, I will argue, the OLC "co-invented" international and domestic policies with White House officials—policies with real effects in the realm of global and domestic affairs. The scope of these effects culminated under President George W. Bush, for whom the OLC became an invaluable legal interpretive resource in the war on terror. Throughout, the traditional conception of rhetorical invention is expanded upon to account for jointly- or co-invented rhetorics. This end is facilitated by the historical-theoretical framework of rhetorical hermeneutics.

TABLE OF CONTENTS

ABSTRACT	iii
TABLE OF CONTENTS.....	iv
ACKNOWLEDGMENTS	v
CHAPTER 1 INTRODUCTION.....	1
(co-)Invention	5
Co-invention and Rhetorical Hermeneutics	10
CHAPTER 2 THE OFFICE OF LEGAL COUNSEL: A RHETORICAL HISTORY .17	
The “Schizophrenic” Role of the Attorney General	22
The OLC’s Opinions.....	28
Advocate Until Necessarily Otherwise: OLC-White House Invention from FDR to JFK.....	31
Compelled to Neutrality: OLC-White House Relations From Nixon to Carter.....	38
The Reemergence of Advocacy: OLC-White House Co-invention from Reagan to Clinton.....	44
Conclusion.....	52
CHAPTER 3 WHITE HOUSE-OLC CO-INVENTION IN GEORGE W. BUSH’S RHETORICAL WAR.....	62
The Political Drama of Post-9/11 Rhetoric	65
The Dramaturgical Perspective	68
Co-Inventing “Harbor”	76
Co-Inventing “Unlawful Combatant” and “Enhanced Interrogation”	90
Conclusion.....	97
CHAPTER 4 EPILOGUE.....	105
Conclusion.....	109
BIBLIOGRAPHY	114
VITA.....	127

ACKNOWLEDGMENTS

First and foremost, I would like to thank my wonderful parents, Patricia and David Saas, for their support through the duration of this project. Whatever meager contribution is contained herein is owed directly to their unwavering love and encouragement.

I thank also the wonderful Jessica Leigh Jones, who tirelessly endured the frequent lapses in sanity that accompanied my floundering to find a balance between scholarship and real life.

Donovan Conley, David Henry, Tom Burkholder, and David Fott (political science) were each invaluable contributors to this thesis. I thank them especially for their patience with the project's conceptual development, complicated often by my own naïve theoretical impulses. Indeed, I am indebted to the whole of the Communication Studies faculty for the wonderful scholarly environment they fostered throughout my tenure at UNLV.

CHAPTER 1

INTRODUCTION

Hooded prisoners, bound at the neck, naked and cornered by snarling police dogs; come together in a human pyramid of bruised bodies; compelled to perform sexual acts on one another; forced to masturbate on camera—a small sampling of the numerous acts of coercion and violence captured for longevity on a digital memory card. They are the photographs of prisoner abuse at a United States military detention center in Iraq called Abu Ghraib. Their principle photographers are the 372nd Military Police Company, the officers in charge of prisoner detention and care.¹ When these photos first leaked to the global media on April 28, 2004, they quickly became a focal point of criticism of the United States' record in the “global war on terror.”² Today, their legacy extends to the United States' Middle East war policy, a troubled past carried through to the presidency of Barack Obama.³

From the start, the problem of attributing blame for the acts committed in the photos was a point of spirited public contention. As hard evidence, of course, the pictures condemned as criminals those officers directly involved in the acts. Several of the lower-ranking officers were arrested and court-martialed, decommissioned and dishonorably discharged.⁴ Yet a lack of clarity still encircled a single, troubling question: Were the acts shown in these photos an aberration, a break from standard operating procedure enacted by errant soldiers, or were they in fact the ground level expression of official United States policy in the war on terror? Military and White House officials were quick to offer the former answer, declaiming the military officers involved as a “few bad apples.”⁵ This was an isolated event, completely out of synch with official detention policy, they said,

and the officers responsible for the abuses portrayed were to be dealt with according to the strictest interpretation of military law.

In time, however, the official White House response was challenged by mounting evidence to the contrary. On May 4, about a week after the leak of the photographs, Major General Antonio M. Taguba released the results of his investigation of allegations of prisoner abuse at Abu Ghraib, an investigation initiated by General Ricardo Sanchez that had been in progress since fall of 2003.⁶ Among other findings, Major General Taguba discovered some fifty interrogation techniques available to the MPs at Abu Ghraib, many of which were depicted in the photos.⁷ Importantly, Taguba also reported that the guards at Abu Ghraib were under-trained and received “little or no direction or supervision” from their superiors in the use of those techniques.⁸ As such, he attributed blame for the acts to Janis Karpinski, brigadier general in charge of running Abu Ghraib prison.⁹ In turn, Karpinski suggested that she was a scapegoat for the failures of *her* superiors.¹⁰ Thus, the problem of attribution spiraled further up the chain-of-command.

The leak of the Jay S. Bybee “torture memo” on June 8, 2004, supported Brigadier General Karpinski’s allegations that the events at Abu Ghraib were rooted in policies established at higher levels of government.¹¹ The memo outlined new boundaries for interrogation methods allowed for use in the war on terror.¹² More importantly, because the memo was written by executive branch lawyers in service of the attorney general, it revealed a crucial link between the acts performed at Abu Ghraib and the highest authorities in American government, including the offices of the President and Vice President.¹³ More and more, the photos looked less the result of a “few bad apples,” and more like the inevitable outcome of an expansive and secretive policy on interrogation

authored by the highest officials in the executive branch. In effect, the detention policy on showcase at Abu Ghraib had its origins in the joint efforts of the White House and its lawyers in the Office of Legal Counsel.

The anecdote above introduces the central foci of this thesis. At its center, this is a history of the interactive relationship between the presidency and the lawyers responsible for authoring a series of legal opinions—like the one “leaked” on June 8, 2004—that played an integral role in the development of policy rhetoric in the presidency of George W. Bush. Those lawyers belong to a formerly little-known agency in the executive branch called the Office of Legal Counsel (OLC). As will be demonstrated in Chapter 2, the OLC is and has since its inception been an historically vital force in the creation and implementation of executive policy. Yet the OLC remains an under-theorized and underappreciated force in the creation of executive policy rhetoric, a fact made especially stark when considered alongside the rhetorical discipline’s considerable history of minutely detailed analyses of presidential rhetoric.¹⁴

Toward bridging this research gap, Chapter 2 provides a detailed institutional history of the OLC-White House relationship, beginning with its inception under President Franklin Delano Roosevelt and ending with its absorption of considerable interpretive authority under President William Jefferson Clinton. This history demonstrates that the OLC has always served as legal advocate-to-the-president unless compelled to “neutrality” by external political pressure. Thus, Chapter 2 casts the White House-OLC relationship as routinely collaborative and, barring significant controversy, normally prone to expanding presidential power. Chapter 3 then focuses on the moment in the OLC’s history when the agency reached the zenith of its interpretive powers; namely, in

the months immediately following the terrorist attacks on New York and Washington, D.C. in September, 2001. Together with Bush White House officials, I argue, the OLC “co-invented” new language that formed the bases for domestic and foreign policies, such as those on detention and interrogation that were the rhetorical antecedents of the events at Abu Ghraib prison.

By concerning itself primarily with the problem of attribution, the Abu Ghraib case speaks also to the thesis’ central focus on rhetorical invention—or the strategic, processual development of arguments by rhetors—as the point of origin for rhetoric’s material effects. Through mapping events backward to their rhetorical origins, or by approaching political events as the outcome of strategized rhetorical processes, one is lead inexorably to invention, the moment of rhetorical creation. This approach parallels one proposed by Martin J. Medhurst in “Presidential Speechwriting: Ten Myths that Plague Modern Scholarship”: “To understand any presidential utterance, one must be willing to go *beyond or behind* the words to discover their real significance and meaning [emphasis added].”¹⁵ This thesis takes the notion of getting “behind the words” as a sort of critical reverse-engineering. Such an approach is especially useful for analyses of controversy where attribution is a central and complicated problem, as in the case of the policy origins of the abuses depicted in the Abu Ghraib photos. This is because a focus on invention is also necessarily a focus on authorship, on authors and their efforts in crafting authoritative arguments.¹⁶ Thus, Chapter 2 begins with an overview of the dynamics of rhetorical co-invention between the presidency and the OLC—policy co-authors, each—and then surveys the effects of policies co-invented from presidents Franklin Roosevelt through William Clinton. In the third chapter, I revisit the policies of

the second Bush administration as particularly salient examples of rhetorical co-invention with real political effects; effects mapped best, I argue, from the perspective of rhetorical hermeneutics.

The sections below provide a more in-depth explication of each of the core assumptions outlined above. First, the concept of invention is explored in greater detail, and its link to what I have termed “co-invention” made more apparent. For some time now, it will be shown, the rhetorical presidency has benefited from engaging in joint inventive efforts with informed assistants, such as speechwriters. But, I will argue, the truly co-inventive relationship is dissimilar from the speechwriter-president relationship in important ways. To get at the particulars of this fundamentally secretive relationship, I will discuss my choice to employ the dramaturgic perspective of sociologist Erving Goffman in the analysis of Chapter 3. Dramaturgy, I argue, offers a useful frame for conceptualizing how the White House-OLC relationship has been operationalized, with invention “backstage” founding and supporting rhetorical acts offered “frontstage.” Finally, the introduction ends by situating the notion of interpretive invention with the framework of rhetorical hermeneutics as outlined in Stephen Mailloux’s *Rhetorical Power*, a book with which the thesis is aligned both conceptually and methodologically.

(co-)Invention

Aristotle famously defined rhetoric as “the faculty of observing in any given case the available means of persuasion.”¹⁷ Rhetorical scholars have long noted that this definition frames the art of rhetoric in heuristic terms, especially as it emphasizes the art’s fundamental interest in the discovery of persuasive arguments.¹⁸ For Aristotle, rhetoric is

an inventional process of discovery, a productive art or *techne* useful for locating and deploying one's rhetorical resources toward the goal of successfully persuading one's audience. Accordingly, he devotes the whole of two books in his *Rhetoric* to laying out inventional *topoi*, commonplaces that serve as potential resources for would-be practitioners of the art of rhetoric. Several centuries later, Marcus Tullius Cicero would play off of Aristotle's heuristic definition of rhetoric toward identifying *inventio* as the first in the rhetorical canon.¹⁹ Though invention would be supplanted by stylistic concerns in his later works, such as *de Oratore* and the *Brutus*, the canon of invention would nevertheless remain a common theme for Cicero.

For the purposes of this thesis, the operative definition of invention is informed by both Aristotle and Cicero, but is focused more on the hermeneutic, or interpretive, dimension of invention. Many rhetorical scholars have surveyed the overlap between interpretation and invention. Indeed, for rhetorical thinkers like Augustine in the Middle Ages, interpretation of theological texts was the primary mode of inventive practice. Through invention, or *modus inveniendi*, Augustine approached the scriptures as a set of topics or commonplaces that would found his sermons.²⁰ But the selection of a topic would not have been enough: Augustine also discussed in book one of his *de Doctrina Christiana* how one should interpret the topic in a way that fits well with the goals of the sermon.²¹ There are thus in this view of invention two steps: (1) selection of a topic; and (2) the strategic interpretation and adaptation of that topic for a particular audience. Famed recent rhetors such as Reverend Martin Luther King Jr. have evoked this mode of rhetorical invention as interpretive/ hermeneutic discovery, but the scope of application for this view is not limited to interpretation of biblical texts.²² Indeed, any foundational

text—from a classic literary work, to a canonical film, to the U.S. Constitution—may serve as a default set of commonplaces useful for rhetorical invention. Constitutional lawyers, such as those in the OLC, are, in fact, constantly (re)engaging the U.S. Constitution toward rendering different interpretations of the text that may better oblige their own ideological ends. In any of these examples, the interpretive/inventive moment may be of great ethical consequence, as those interpretations may be employed with or without regard to interpretive probity. In the context of global politics, for example, the strategic interpretation of extant policy (legislation as *topoi*) may lead to effective, yet ethically ambivalent, rhetorics.

Salient examples of policy rhetoric derived from the strategic interpretation of legislation may be drawn from Philip Wander’s work on the subject. According to Wander, American foreign policy rhetoric “has, over the last half century, set aside whole worlds of fact and contained, when it did not encourage, some of the most disturbing events in American history.”²³ Wander identifies two modes of foreign policy rhetoric—“prophetic dualism” and “technocratic realism”—both in play during the period of United States military involvement in Vietnam. Though fundamentally at odds with each other in terms of ideology, these modes of foreign policy rhetoric both functioned for the same purpose: justifying the continued military presence of the United States in Vietnam, regardless of human cost.²⁴ Recalling the Abu Ghraib case above, one continues to see such ethically complicated foreign policy still in play in the 21st century. While Wander does not seem interested in providing a full account of the inventional origins of these modes of policy rhetoric, he nevertheless makes the case for observing those origins as collective, made up of several different voices. That is, in both modes, the final product

of foreign policy rhetoric was the result of the inventional efforts of more than one rhetorical strategist. Indeed, rarely, if ever, has foreign policy been the product of rhetorical invention on the part of a single political actor. Instead it has almost always been the product of collaborative inventional effort, of something I hereafter refer to as “co-invention.”

Co-invention may be preliminarily defined as the processual selection, interpretation, and development of rhetorical texts that occurs between two or more rhetors toward achieving a shared objective. Though this seems a fairly intuitive concept, it has not yet been directly addressed or treated as a distinct phenomenon in the literature of rhetorical studies. This is not to say that considerable work has not been done in the realm of what may fairly be considered as studies in co-invention. Indeed, much research in presidential rhetorical studies has been devoted to processes that appear co-inventive in nature, such as presidential speechwriting.²⁵ This thesis differs most obviously from such studies in three ways: (1) its non-traditional object of study; (2) its explicit treatment of interpretation as rhetorical invention; and (3) its emphasis on the often collaborative nature of invention. In the first case, this is a study of the *formal-inventional relationship* between the presidency and the OLC, rather than the *personal-inventional relationship* of presidents and their speechwriters. That is, where other “co-inventive” studies focus on the dialogic invention of speeches or policies between a given president and his speechwriters or advisers, this study forgoes the personal to examine the institutional. At issue here is how the OLC developed as an agency with the purpose of co-invention within the executive branch, rather than how interpersonal and contextual factors influenced the outcomes of speechwriter-president relationships. Accordingly, Chapter 2

provides an institutional history of the OLC-White House co-inventional relationship with little emphasis on the particulars of the individuals in those relationships. In effect, Chapter 2 is a history of an important but as yet unexamined inventional process within the institution of the executive branch.

The second point of departure from other “co-inventive” studies of presidential rhetoric is this thesis’ explicit treatment of the concept of rhetorical invention. While most studies of presidential speechwriting, for example, do pay attention to the process of rhetorical invention, few (if any) acknowledge that theirs is, fundamentally, a case study in rhetorical invention.²⁶ This means that those studies do not usually purport to elaborate theories of invention, though they may offer insights on the inventional process, perhaps inadvertently. In this study, due attention will be given to invention as such, and a working theory of the dynamics of shared inventive efforts—co-invention—is offered. More than simply the process of developing arguments, this thesis views invention as a fundamentally interpretive endeavor.

Finally, the third difference rests in this thesis’ emphasis on the *co*-inventional process, wherein two or more rhetors collaborate to formulate and enact a rhetorical performance. While the project is fundamentally a study in invention as such, the *co*- in co-invention highlights the division of rhetorical labor in the inventional process as it was enacted in the White House-OLC relationship—where the White House selected a topic, and the OLC interpreted extant law to support that topic. Though in the end one might justifiably choose to identify the process as simply inventional, such a perspective misses out on the nuanced perspective offered by an emphasis on collaboration. In Chapter 3, I will explicate the co-inventional relationship of the Office of Legal Counsel and the

second Bush White House. In that case, it will be shown, the President identified the desirable lines of argument, while it was left to the OLC to discover and implement the historically relevant resources in the history of U.S. federal case law to support and reinforce those desired arguments. To effectively map these co-inventive and interpretive efforts, I will employ the practical and theoretical perspective offered by rhetorical hermeneutics.

Co-invention and Rhetorical Hermeneutics

Close attention to rhetorical invention—and interpretation as a mode of invention—leads naturally to the theoretical-practical approach employed throughout this thesis: rhetorical hermeneutics. Rhetorical hermeneutics (alternately called *hermeneutical rhetoric*), as defined by Michael Leff, is the theory of invention as “a complex process that allows historical texts to serve as equipment for future rhetorical production.”²⁷ Framed this way, rhetors in the stage of rhetorical invention draw from available resources, including historical texts, which they then interpret and refigure based on existing circumstances. There is thus in rhetorical hermeneutics a great deal of attention paid to the intertextuality of rhetorical texts, which are themselves linked together by the “complex process” of invention.²⁸ Such an approach gels nicely with Augustine’s inventional engagement with scripture: through drawing from historical texts like the Christian Bible, toward creating new interpretations for contingent situations, Augustine’s sermons were also fundamentally intertextual. OLC opinions draw from the Constitution and federal and international law to equal intertextual effect. Leff’s notion of hermeneutical rhetoric is an alternate phrasing of Steven Mailloux’s own theory of

rhetorical hermeneutics, but both concepts are functionally similar in that they focus on invention as the process of forming arguments to address contemporaneous concerns through reinterpreting historical texts.²⁹ Accordingly, rhetorical hermeneutics is also a theoretical framework for tracing rhetorical histories. According to Mailloux,

[A]cts of persuasion always take place against an ever-changing background of shared and disputed assumptions, questions, assertions, and so forth. Any thick rhetorical analysis of interpretation [or invention] must therefore describe this tradition of discursive practices in which acts of interpretational [or inventional] persuasion are embedded. Rhetorical hermeneutics always leads to rhetorical histories . . .³⁰

A rhetorical history of interpretation, then, is in effect also a history of rhetorical invention.

Outline of the Study

A word on the structure of this thesis will further clarify the utility of rhetorical hermeneutics as its conceptual approach to the White House-OLC co-inventional relationship. As Mailloux suggests above, rhetorical hermeneutics is fundamentally concerned with accounting for acts of interpretation which occur against a backdrop of shared discursive histories. Accordingly, Mailloux begins his own rhetorical history of literary interpretation in *Rhetorical Power* by providing a synoptic institutional history of literary criticism. Then, in chapter three he develops the analysis further by focusing on a specific moment within that history's "cultural conversation."³¹ This thesis is structured according to Mailloux's model in *Rhetorical Power*: Chapter 2 will establish the broad institutional history of White House-OLC co-invention, identifying two "Types" of OLCs

(Advocate and Neutral), as well as three discursive themes within OLC opinions: (1) the expansion of presidential power in international affairs, (2) the expansion of presidential power in domestic affairs, and (3) the assertion of executive priority over the judicial and Legislative branches of United States government. Chapter 3's in-depth analysis of George W. Bush's White House-OLC co-inventive efforts will function as a significant case study within that history. Toward accounting for the formal dynamics of the special case of the Bush White House-OLC relationship, I find use in Chapter 3 also for Erving Goffman's conceptual framework of dramatic "regions" in public life. In line with Mailloux's pragmatic focus, however, the use of dramaturgy "never leaves off theorizing" even as it "uses theory to do history."³² That is, the dramaturgic framework is used more as a heuristic tool *for* rather than the theoretical approach *of* the analysis. Put simply, this thesis conducts a rhetorical history of the White House-OLC co-inventive relationship through adopting the framework of hermeneutical rhetoric.³³ Yet within this approach there is room also for, as I believe I demonstrate in Chapter 3, the development of still other critical frameworks on the inventive process. The conclusion of the thesis summarizes the various observations on White House-OLC co-invention offered in Chapters 2 and 3.

Notes

- ¹ “The Abu Ghraib Pictures,” *The New Yorker*, May 3, 2003, http://www.newyorker.com/archive/2004/05/03/slideshow_040503#slide=1; Scott Higham and Joe Stephens, “New Details of Prison Abuse Emerge,” *Washington Post*, May 21, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A43783-2004May20.html>.
- ² Rebecca Leung, “Abuse of Iraqi POWs by GIs Probed,” *60 Minutes II*, April 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>.
- ³ Duncan Gardham and Paul Cruickshank, “Abu Ghraib abuse photos ‘show rape,’” *Telegraph.co.uk*, May 27, 2009, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5395830/Abu-Ghraib-abuse-photos-show-rape.html>; Jeff Zeleny and Thom Shanker, “Obama Moves to Bar Release of Detainee Abuse Photos,” *New York Times*, May 13, 2009, <http://www.nytimes.com/2009/05/14/us/politics/14photos.html>.
- ⁴ Eric Schmitt, “Four Top Officers Cleared by Army in Prison Abuses,” *New York Times*, April 23, 2005, http://www.nytimes.com/2005/04/23/politics/23abuse.html?_r=1.
- ⁵ Transcript, “Deputy Secretary Wolfowitz Interview on the Pentagon Channel,” *United States Department of Defense*, May 4, 2004, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2970>; Philip Carter, “The Road to Abu Ghraib,” *Washington Monthly*, November 2004, <http://www.washingtonmonthly.com/features/2004/0411.carter.html>;
- ⁶ “U.S. Army Report on Iraqi Prisoner Abuse,” *NBC News*, May 4, 2004, <http://www.msnbc.msn.com/id/4894001/>.
- ⁷ Joe Burlas, “Taguba Faults Leadership for Iraqi Detainee Abuse,” *Army News Service*, May 12, 2004, http://www.au.af.mil/au/awc/awcgate/army/052704_taguba.htm.
- ⁸ Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html#ThN1.15>, 36.
- ⁹ Taguba, *Article 15-6 Investigation*, 36.
- ¹⁰ Schmitt, “Four Top Officers”

¹¹ Mike Allen and Dana Priest, "Memo on Torture Draws Focus to Bush," *Washington Post*, June 8, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A26401-2004Jun8.html>.

¹² Jay S. Bybee, "Memorandum for Alberto R. Gonzales Counsel to the President," August 1, 2002, news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf.

¹³ Allen and Priest, "Memo on Torture Draws Focus to Bush"

¹⁴ In studies on inaugurals, such as Davis W. Houck and Mihaela Nocasian, "FDR's First Inaugural Address: Text, Context, and Reception," *Rhetoric and Public Affairs* 5, no. 4 (2002), 649-678; on deliberation, such as Michael Leff, "Lincoln at Cooper Union: Neo-classical Criticism Revisited," *Western Journal of Communication* 65, no. 3 (2001), 232-249; and in campaigns, such as Robert L. Ivie and Oscar Gliner, "American Exceptionalism in a Democratic Idiom: Transacting the Mythos of Change in the 2008 Presidential Campaign," *Communication Studies* 60, no. 4 (2009), 359-375; and on the speechwriting process, as found in *Presidential Speechwriting: From the New Deal to the Reagan Revolution and Beyond*, edited by Kurt Ritter and Martin J. Medhurst (College Station, TX: Texas A&M University Press, 2003).

¹⁵ This approach parallels the approach proposed by Martin J. Medhurst in Martin J. Medhurst, "Presidential Speechwriting: Ten Myths that Plague Modern Scholarship," in *Presidential Speechwriting: From the New Deal to the Reagan Revolution and Beyond*, edited by Ritter and J. Medhurst, 3-19 (College Station, TX: Texas A&M University Press, 2003), 12: "To understand any presidential utterance, one must be willing to go *beyond or behind* the words to discover their real significance and meaning [emphasis added]." This thesis takes the notion of getting "behind the words" as a sort of critical reverse-engineering.

¹⁶ Martin J. Medhurst, "Ghostwritten Speeches: Ethics Isn't the Only Lesson," *Communication Education* 36 (July 1987), 241-249.

¹⁷ Aristotle, *The Rhetoric*, translated by W. Rhys Roberts (New York: McGraw-Hill, Inc., 1984), 24.

¹⁸ Wayne N. Thompson, "An Expanded View of Aristotle's Invention," *Rhetoric Society Quarterly* 12, no. 1 (1982), 16-18; Harold Barrett, *Rhetoric and Civility: Human Development, Narcissism, and the Good Audience* (Albany, NY: SUNY Press, 1991), 1; "Invention" in "Silva Rhetoricae," <http://rhetoric.byu.edu/canons/Invention.htm>.

¹⁹ Marcus Tullius Cicero, *De Inventione*, translated by H. M. Hubbell (Cambridge, MA: Loeb Classical Library, 1949).

²⁰ Thomas M. Conley, *Rhetoric in the European Tradition* (Chicago: The University of Chicago Press, 1990), 76.

²¹ Conley, *Rhetoric in the European Tradition*, 76.

²² For King's hermeneutic approach, see Richard Benjamin Crosby, "Kairos as God's Time in Martin Luther King Jr.'s Last Sunday Sermon," *RSQ: Rhetoric Society Quarterly* 39, no. 3 (2009), 260-280.

²³ Philip Wander, "The Rhetoric of American Foreign Policy," *Quarterly Journal of Speech* 70, no. 4 (1984), 339.

²⁴ For Wander, both modes draw from different resources to similar effect. For prophetic dualism, an appeal to good and evil is common; for technocratic realism, a mechanistic, technical logic is employed.

²⁵ In essays such as Houck and Nocasian, "FDR's First Inaugural Address," and volumes such as *Presidential Speechwriting: From the New Deal to the Reagan Revolution and Beyond*, edited by Ritter and J. Medhurst.

²⁶ A notable exception to this claim is found in Medhurst, "Ghostwritten Speeches." Medhurst draws attention to the controversy that surrounded the ethics of speechwriting as an opportunity to teach about the inventional process. In Ritter and Medhurst, *Presidential Speechwriting*, however, "invention" is given explicit treatment in the first essay ("Ten Myths"), but is then treated only perfunctorily in proceeding essays.

²⁷ Michael Leff, "Hermeneutical Rhetoric," in W. Jost and M. J. Hyde (eds.) *Rhetoric and Hermeneutics in Our Time: A Reader* (New Haven, CT: Yale University Press, 1997): 201.

²⁸ James Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Studies* (Thousand Oaks, CA: Sage Publications, 2001), 95.

²⁹ Steven Mailloux, "Rhetorical Hermeneutics Revisited," *Text and Performance Quarterly* 11, no. 3 (1991), 233-248.

³⁰ Steven Mailloux, *Rhetorical Power* (Ithaca, NY: Cornell University Press, 1989), 17-18.

³¹ Mailloux, *Rhetorical Power*, 19-86.

³² Mailloux, *Rhetorical Power*, ix.

³³ Steven Mailloux, "Rhetorical Hermeneutics," in *Interpreting Law and Literature*, edited by Sanford Levinson and Steven Mailloux (Evanston, IL: Northwestern University Press, 1988), 356.

CHAPTER 2

THE OFFICE OF LEGAL COUNSEL: A RHETORICAL HISTORY

On September 6, 2006, President George W. Bush disclosed to the world the existence of a secret CIA program designed to detain and extract information from “high value detainees” captured in the “global war on terrorism.” This secret program, Mr. Bush revealed, operated in harmony with the United States’ “laws, our Constitution, and our treaty obligations.” To reinforce this claim, the President twice cited the thorough legal vetting of the program by appropriate authorities within the Executive branch: “The Department of Justice reviewed the authorized methods extensively and determined them to be lawful . . . This program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they’ve determined it complied with our laws.” As though there remained room for doubt on the matter, the President offered an unequivocal declaration of the United States’ compliance with global human rights law: “I want to be absolutely clear to our people and to the world. The United States does not torture. I have not authorized it, and I will not authorize it.”¹

With the benefit of non-partisan hindsight provided by the International Committee of the Red Cross’ 2007 report on torture, one can argue rather convincingly that the CIA’s secret program in fact violated several if not all of the human rights statutes Mr. Bush purported it upheld.² Yet even at the time of the speech, prevailing evidence suggested that the United States policy on interrogation had repeatedly crossed the line from interrogation to torture. Photographs of abuse and gross violations of human dignity from Abu Ghraib in Iraq; reports of detainee torture and death from Bagram in Afghanistan; numerous detainee suicides at the military prison at Guantanamo Bay, Cuba; anonymous

disclosures and “leaks” to the press from members of the Bush administration; condemnations of prisoner abuse at Guantanamo by international humanitarian groups such as Amnesty International—individually, each of these pieces of evidence belies President Bush’s statements on United States detention and interrogation policy.³ Together, they form a compelling picture of criminal misconduct.

Though its opponents have at their disposal a preponderance of damning evidence, the controversy attending the “secret” CIA program President Bush described over three years ago continues to resonate throughout the presidency of Barack Obama. From the President’s first executive order for the closure of Guantanamo Bay, to the release of still more “secret” memos disclosing the nature and scope of the program, to the current administration’s refusal to disclose photographs of further abuse and Attorney General Eric Holder’s hesitancy to launch an investigation of the torture charges, to the refusal of news outlets such as National Public Radio and the New York Times to use the word “torture” to describe the CIA’s acts—the controversy continues, showing little promise of immediate resolution.⁴

Like President Clinton’s semantic battle over the words “sex” and “is” in the Monica Lewinsky scandal, the rhetorical ground of the torture controversy involves the definition of key terms. In this case, the word “torture” lies obviously at the locus of the debate. For the Bush White House, the techniques approved for the secret CIA program were not torture at all, but “enhanced interrogation techniques.” Opponents of the program, meanwhile, decry “enhanced interrogation” as a euphemism for torture; a rhetorical cop-out akin to more nefarious military doublespeak like “collateral damage” or “police action.” This struggle over definitions has in turn come to characterize the controversy

itself. That is, the definition of torture has taken on equal importance to the question of whether the interrogation methods in question constitute torture. At both levels the implications of this definitional struggle are momentous. If, for example, those defining “enhanced interrogation” as torture were to win the day, then the Bush White House would be found to have violated several domestic laws and international treaties. Massive political and legal costs would ensue at a global level. Such a scenario is not likely to occur, however, because the Bush White House definition of “enhanced interrogation” holds a uniquely powerful advantage in this rhetorical struggle: the priority of executive legal interpretation.

The Bush White House definition of “enhanced interrogation” emerged from the legal opinions of a little-known agency within the Department of Justice called the Office of Legal Counsel (OLC). When a proposal for action within the executive branch is in question, the OLC is the executive agency called upon to determine the legality of that action. In the case of the secret CIA program, the OLC in 2002 determined that the proposed interrogation techniques fell short of what it considered torture. Instead, the OLC determined that the techniques were merely forms of “enhanced interrogation,” and thus not subject to the torture proscriptions laid out in international treaties and domestic law.

Charged with interpreting extant laws for the granting (or refusal) of executive prerogative, lawyers within the OLC compile their legal opinions from a definite number of rhetorical options. Ostensibly, the end product of OLC deliberation is an objective “yes” or “no” answer to a given president’s request for legal approval. Like all forms of interpretation, however, the opinions of the OLC under President Bush exhibited

unmistakable signs of rhetorical influence. As Michael Leff notes, “all interpretative work involves participation in a rhetorical exchange, and . . . every rhetorical exchange involves some interpretative work.”⁵ The relationship between the OLC and the Bush White House was such that the former most often crafted rhetorical interpretations of the law in ways that significantly expanded the reach and authority of the executive branch. The advantages of such an outcome are obvious, but bear emphasis: if the legality of a proposed policy was in question, the Bush White House could generally rely on the OLC to produce interpretations of extant law that would support enactment of said policy. With such support, President Bush was able to “go public” with the policy, employing arguments established in OLC legal opinions in his public addresses. In effect, then, the OLC became President Bush’s personal office of legal validation and thus a major organ in the policy- and speech-making activities of the White House. It also constitutes an ideal case study for explication of the first classical canon of rhetoric: invention, or the processual development of arguments.

The primary contention of this chapter is that the OLC is and has been an important, yet underappreciated, actor in the history of the invention of presidential oratory and executive policy-making. Prior to the controversial display of OLC power during President George W. Bush’s tenure, the office had long performed a distinctly rhetorical duty as chief legal interpreter for the White House. Since its inception the OLC has operated as an executive agency with significant influence on the constantly shifting boundaries of executive power. The nature of OLC influence on presidential rhetoric is, I argue, “co-inventional,” or obtaining shared authorial status with presidents in matters of legislative interpretation, the enactment of executive policies, and even public address. In

its more than seventy-five years in existence, the OLC has rarely acted in a capacity other than Advocate-to-the-president; as such, the goals of the Office and the presidency have generally remained consonant with one another. This co-inventional relationship has had significant effects in domestic, international, and intragovernmental affairs. Toward explicating the OLC's co-inventional role, this chapter provides a rhetorical history of OLC-White House co-invention of policy and oratory, with continued reference to case studies from the Presidencies of Franklin Roosevelt to William Jefferson Clinton to demonstrate how the OLC often intercedes in the invention of presidential rhetoric.

Although the Office of Legal Counsel has existed in its current configuration for more than seventy-five years, a complete understanding of its rhetorical power necessitates a careful review of its lineage in the history of the Office of the Attorney General and the United States Department of Justice. As Steven Mailloux suggests, "Any full rhetorical analysis of interpretation must . . . describe [the] tradition of discursive practices in which acts of interpretive persuasion are embedded. Thus, rhetorical hermeneutics leads inevitably to rhetorical histories."⁶ Such is the goal of this chapter. A rhetorical history of the OLC's legal opinion-writing tradition will spotlight not only the causes and conditions of the OLC's origin and development, but also its inheritance of considerable legal interpretative authority from the Office of the Attorney General, as well as its subsequent contributions to the history of United States legal interpretation. A thorough accounting for the OLC's prehistory begins with discussion of the origin and duties of the Office of the Attorney General. Of primary interest in this history will be the attorney general's opinion-writing function, a duty eventually delegated to the lawyers in

the OLC, and one that obtains inordinate power in the realm of legal and political interpretation.

The “Schizophrenic” Role of the Attorney General

Article II of the United States Constitution mandates that the president of the United States “take care that the laws faithfully be executed.” Because the scope of federal law is complex and expansive, a president will often require “the counsel of those skilled in legal interpretation and legal institutions” to advise him in matters of legal ambiguity and to ensure the law’s “faithful” execution.⁷ The Office of the Attorney General (OAG) was created by the Judiciary Act of 1789 to serve that end, with its incumbent designated as the president’s primary legal adviser.⁸ The 1789 Act also placed the attorney general in charge of rendering opinions for “the heads of any departments, touching any matters that may concern their departments.”⁹ Operating in this capacity, the OAG has, since its inception, issued “opinions” for the president and his cabinet on legal matters requiring clarification or interpretation before a proposed action is taken. Such clarification is necessary because, “in the drafting of legislation, a certain amount of imprecision is inescapable, which increases the need for legal interpretation.”¹⁰ That is, the laws to which the president must maintain fidelity are sometimes unclear, requiring interpretation by the OAG.

The opinions of the attorney general are not legally binding. Instead, OAG opinions operate as a form of normative law; an authoritative guideline which should be observed, but which holds no official legal status.¹¹ As political scientist Nancy V. Baker puts it, attorney general opinions “serve as the *expression of the law* unless and until they are

refuted by the courts (emphasis added).”¹² As an *expression* of the law, opinions are representative of a given body of United States legislation, but are subject to overrule by judicial review. It is worth noting, however, that official laws may also be overturned by judicial review. Thus, even though attorney general opinions are not granted full legal status, they are most often treated with a degree of “deference” in the courts.¹³ According to Luther A. Huston, the attorney general opinions

officially define the law in a multitude of cases, and they remain authoritative until withdrawn by the Attorney General or his successors or overruled by the courts. As such, they have become a body of legal precedent and exposition invaluable to lawyers in the preparation of their cases and to judges in reaching their decisions.¹⁴

Thus, unless overruled by future courts, attorney general opinions assume the capacity to act as the final word in the interpretation of United States law.

Because attorney general opinions are functionally *expressions* of the law, and not expressly legislative, neither the president nor others within the executive branch are obligated to solicit the attorney general’s opinions; nor is the president legally bound by the advice rendered. However, as Baker notes, “Presidents ignore legal advice at their own risk.”¹⁵ That is, if a president does not seek or does not comply with the attorney general’s opinions, he runs the risk of incurring full legal liability when running afoul of the law. On the other hand, adherence to the guidance provided by the attorney general represents an act of “good faith,” and will bolster a given president’s claim to the legality of his actions should future courts find occasion to challenge an executive action.

In addition to its legal advisory role, the attorney general may also be called upon to act as a President's advisory board in matters of policy. Baker identifies no less than three capacities for attorney general's advisory role: as "principal officer" in the Department of Justice, as an appointed member of the cabinet, and as potential friend or political ally of the president. In any or each of these capacities a given attorney general may be more or less involved in the policy making process of the executive branch.¹⁶ The first capacity is provided for by Section 2 of Article II in the United States Constitution, which states that the president may "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 offices." In the second capacity, as member of the cabinet, the attorney general may be involved in official discussions of United States policy for domestic or international matters. The third capacity has been filled in variable ways throughout the history of the office of the attorney general, but it is reasonable to suppose that a close relationship between an attorney general and a president would involve a good measure of political advising.

The second role as policy advisor greatly complicates the attorney general's primary role as legal adviser. Indeed, situations abound where the two roles might well come into direct conflict. This is because the ideal of objective interpretation of the law are necessarily jeopardized when political concerns enter the picture. Cornell W. Clayton provides a concise summary of the fundamental problem Justice Department officials face in the service of both law and politics: "If law cannot be interpreted objectively and neutrally, then law—like other forms of politics—simply becomes synonymous with the exercise of power. The tensions between political allegiances and professional independence affect all aspects of government lawyering."¹⁷ This fundamental tension

between the ideal of neutral law and the inherently partisan realm of politics gets at what legal scholar Robert Palmer calls the “built-in schizophrenic nature” of the office of the attorney general.¹⁸ Called upon by the president for opinions that are at once objective (generalizable, impartial, i.e. neutral) *and* subjective (contingent, partial, i.e. biased), an attorney general must “schizophrenically” serve both law and politics. Though the two masters are usually if not always inextricably linked with one another, the ideal of legal objectivity is nevertheless projected upon the opinions of the attorney general, while the political nature of those opinions is largely ignored.

Rhetorical scholars are well-versed in the politics of interpretation. Indeed, Augustine long ago identified interpretation as an inventional pathway to achieving particular and contingent political and social ends. More recently, Michael Leff’s notion of hermeneutical rhetoric, “offers a view of community as a locus of deliberating subjects who change themselves and one another by renewing and revaluing moments in their history.”¹⁹ Those historical moments are contingent and situated—i.e. rhetorical—and thus subject to political influence. The rhetorical perspective thus further illuminates the opposing roles of the attorney general: if interpretation is an inherently contingent and subjective exercise, and if the attorney general (a political appointee) routinely interprets laws at the president’s request, the resulting opinion will of necessity be anything but objective or neutral. Schizophrenic, indeed.

The dilemma of the attorney general’s duality of purpose becomes still more severe when considered in light of the attorney general’s replaceability. For any given attorney general, there are several equally capable and equally eager lawyers willing to take his or her place. At any given time, the president can dismiss political appointees from their

posts. Former Attorney General Griffin Bell relates an amusing anecdote that underscores the acuity of this pressure in the OAG. Referring to the relationship between President Andrew Jackson and one of his attorneys general, Bell tells us that “[President Jackson] consulted with his attorney general, and the attorney general expressed doubt as to the existence of any law authorizing the Executive to designate banks as a depository of U.S. funds. Whereupon Old Hickory said to him, ‘Sire, you must find a law authorizing the act or I will appoint an attorney general who can.’”²⁰ While the veracity of this anecdote remains in question, it stands as a concise summary of the tensions inherent to the AG’s office. It also demonstrates the often tenuous bond that connects a pseudo-independent DOJ with a decidedly partisan president. As with the treatment of the clinically schizophrenic, a well-defined routine with definite boundaries has been the preferred method of therapeutic coping for the “built-in schizophrenic nature” of the attorney gGeneral’s office.²¹ Presidents since the middle of the twentieth century have been more than willing to oblige their respective attorneys general the resources for such therapeutic treatment, as demonstrated in the following sections.

Coping with “Schizophrenia,” or, Choice and the Masters

Baker identifies two brands of Attorneys General: the Advocate type and the Neutral type. The Advocate type expressly serves politics; the Neutral type expressly serves the law. There will be, of course, cases in which the actions of either type are better described in terms of the other. Mostly, though, the Office of the Attorney General copes with its schizophrenic condition “therapeutically,” making clear its choice to serve either as Advocate (serving politics) or Neutral (serving the law) officer. The problem of executive power plays a central part in defining the attorney general as either Advocate or

Neutral. The Advocate, for example, finds advantage in “Embracing an expansive view of legal interpretation . . . [using] the law as a tool for advancing administration—or his own—policy goals.”²² The Neutral type, on the other hand, values “Professional eminence, nonpartisanship, and widely recognized integrity,” limiting its own and the executive’s power by refraining from involvement with “foreign affairs or domestic politics,” and having generally “a more restricted view of their own and the president’s authority.”²³

It is advisable here to briefly revisit the definition of co-invention put forth in the previous chapter. If invention may be defined as the process rhetorical discovery and adaptation of lines argument in response to expedient rhetorical problems, then co-invention is the splitting of this inventional labor down the middle. That is, co-invention sees the identification of topics as an endeavor distinct from the interpretation and adaptation of those topics for particular circumstances. In terms of the OAG’s early opinion-writing duties, the president identified the topic to be addressed in its solicitation of an OAG opinion, while the attorney general was left with the other half of the inventional equation: the support of that topic through (re)interpreting extant law. Insofar as there is some harmony in the outcome of this division of inventional labor, the president and the attorney general may rightfully be called rhetorical co-inventors. If the OAG were to fail to support the president’s topic, however, the co-inventive nature of the relationship rhetorical process would all but shut down. In other words, with the Advocate type, the president will co-invent its policies, while in the case of the Neutral type, the inventional process is halted midway and thus incomplete.

Although Baker applies the Advocate/Neutral descriptors convincingly to respective Attorneys General throughout the twentieth century, she does not fully account for the political conditions under which either type is brought to power. In the following sections, I demonstrate how attorneys general in the latter-half of the twentieth-century have served as Advocates until political pressures dictated otherwise. This is to say that, barring external political pressures on the executive for the selection of a Neutral-type attorney general, the president has almost always selected a partisan, Advocate type to fill the post. The significance of this fact for analysis of the rhetorical role of the OLC relates to an historical shift in the legal-interpretative powers of the Attorney General's Office to the OLC. Indeed, references to the historical opinion-writing role of the attorney general in this chapter could be re-read as references to the contemporary OLC. This shift is detailed below, but its importance bears emphasis here. The OLC in the latter-half of the twentieth-century has served as Advocate to the president until political pressures dictated otherwise.

The OLC's Opinions

Throughout the late eighteenth and early nineteenth centuries the advisory duties of the attorney general to the president remained consistent. Almost immediately upon its founding, however, the workload of the OAG became so burdensome that additional private attorneys were hired to serve as the AG's assistants. Following the Civil War, an exponential increase in civil litigation suits necessitated the hiring of hundreds more private lawyers to help with the burgeoning OAG case load. In order to abate the costliness of retaining the services of those private lawyers, the Congress in 1870

authored an Act that would establish a massive, centralized executive legal department.²⁴ The result of that Act was the creation of the United States Department of Justice (DOJ). The DOJ was to be overseen by the attorney general, now “head of the largest law office in the world.”²⁵ As Department head, the attorney general now supervised the work of newly created offices and officers, such as the deputy attorney general, solicitor general, and seven assistant attorneys general who in turn supervised seven new divisions of the DOJ.

The Justice Department Act of 1870 also permitted the attorney general to delegate certain of his duties to others within the DOJ.²⁶ In 1925, the OAG delegated the responsibility to author legal opinions to the Solicitor General.²⁷ The Solicitor General in turn delegated this responsibility to subordinates within the Office of the Solicitor General. In 1933, Attorney General Homer Cummings issued an order creating the Office of the Assistant Solicitor General, to which the opinion-writing buck was again passed.²⁸ The constitution of the Assistant Solicitor General’s office represents the incipient form of today’s Office of Legal Counsel, but the name of the office has been changed twice. In 1951, the office was renamed the Executive Adjudications Division and headed by an assistant attorney general. In 1953, Attorney General Brownell issued an administrative order that changed the name to the Office of Legal Counsel, which it remains today.²⁹

This brief review of the evolution of the OLC illustrates the agency’s significant role in the historically expanding legal bureaucracy of the executive branch. Though several rungs down the hierarchical-bureaucratic ladder, in terms of function, the OLC has since 1933 performed the important task of executive legal interpretation—a duty once properly reserved for the attorney general. The OLC is now and has been for some time

the functional proxy for the attorney general in its opinion-writing duties. As noted earlier, these opinions are of considerable and long-lasting political and legal consequence.

Due to the vast scope of the OLC's legal interpretive domain, however, not every OLC opinion rendered will be of remarkable import for the day-to-day operations of the United States' legal and policy systems. But because the OLC releases only the opinions the attorney general "determine[s] appropriate for publication," and then only after those opinions have operated for a given length of time, the precise legal implications of the OLC's aggregate opinions are difficult to discover, let alone analyze quantitatively or qualitatively.³⁰ The selective and delayed release of OLC opinions is perhaps the reason that the OLC remains an office of underappreciated influence in White House affairs.

Yet every so often the capacity of the OLC for generating opinions of significant import is tested, and its interpretations are published. At least a few OAG or OLC opinions from each administration from President Franklin Roosevelt to George W. Bush are accessible in government and legal databases. On occasion, opinions have been leaked to the media or discovered through Freedom of Information Act (FOIA) requests. Below are offered several significant examples from the history of OLC opinions that demonstrate what former OLC-Head Douglas W. Kmiec calls the "greatly disproportionate" influence of those opinions on domestic and international policy-making and the legal contours of the executive branch.³¹ As a rhetorical history, the case studies offered below demonstrate clearly three discursive themes of OLC opinions: (1) the expansion of presidential power in international affairs, (2) the expansion of presidential power in domestic affairs, and (3) the assertion of executive priority over the

judicial and legislative branches of United States government. These three themes are variously engaged by OLC opinions; what varies little is the great extent to which subsequent executive policy rhetoric relies on the arguments invented in those opinions.

Advocate Until Necessarily Otherwise:

OLC-White House Invention from FDR to JFK

From the OLC's founding under President Franklin Delano Roosevelt to the Cuban Missile Crisis under President John F. Kennedy, the OLC consistently served an advocacy-oriented agenda in the authorship of its legal opinions. In the case of FDR, the escalation of United States' involvement in World War II led to the President soliciting legal advice from the OLC that would yield the powers necessary to forego congressional oversight in the conducting of wartime weapons exchange. For President Eisenhower, turmoil in the American South surrounding the integration of African Americans into the school system prompted the President to ask his OLC for an opinion granting permission to deploy federal troops on domestic soil to keep the peace. For President Kennedy, the build-up of Soviet arms in Communist Cuba necessitated the invention of legalistic rationale for imposing a "quarantine" in the region. The theme that meshes these proposals with their matching OLC opinions is a re-interpretation of the boundaries of presidential power to fit the political needs of a given president for a specific moment in history. In each case, the presidents got precisely that for which they asked: namely, an OLC opinion designed to support the president's future actions and rhetorical claims. Case studies of OLC-White House co-invention from these three presidencies are grouped below according to the following principle: barring external pressures to act

otherwise, the OLC will perform its opinion-writing duties in a manner consonant with the political objectives of a given President.

The OLC Under FDR: Expanding International Power

In 1940—just seven years after the OLC was created—President Franklin D. Roosevelt consulted the OLC for an opinion on a proposal for an executive branch-driven ships-for-bases exchange program with Allied nations. With Great Britain’s war resources diminishing rapidly, President Roosevelt sought a method for funding Allied efforts against German forces without incurring significant losses in public opinion prior to the election of 1940. Signed by then-Attorney General Robert H. Jackson, the resulting OLC opinion conceded that negotiation of an exchange of “Over-Age” naval ships for army and naval bases in beneficiary countries was within the powers of the president as outlined by the Constitution.³² Mr. Roosevelt, the opinion concluded, could act without Congressional approval. The opinion cited the “delicate, plenary, and exclusive” international powers of the president that made possible the proposed plan:

The executive agreement obtains an opportunity to establish naval and air bases for the protection of our coast line but it imposes no obligation upon the Congress to appropriate money to improve the opportunity. It is not necessary for the Senate to ratify an opportunity that entails no obligation.³³

This interpretation would allow President Roosevelt to bypass Congressional vote in the implementation of the destroyers-for-bases plan. But there were also the inconvenient matters of Congressional declarations of neutrality, such as the Act passed June 15, 1917, which declared that “During a war in which the United States is a neutral nation, it shall

be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war.”³⁴ On top of this, “Congress had passed neutrality resolutions in 1935, 1936, 1937, and 1939 placing further prohibitions on the sale of war materiel to any belligerent except on a cash-and-carry basis.”³⁵ Barring US involvement in foreign wars, the 1917 Act would necessarily need to be bypassed by the OLC opinion if it hoped to achieve Mr. Roosevelt’s goal. And, perhaps unsurprisingly, the memo provides for the override in its interpretation of the 1917 Act: “it is clear that [the Act of 1917] is inapplicable to vessels, like the over-age destroyers, which were not built, armed, equipped as, or converted into vessels of war with the intent that they should enter the service of a belligerent.”³⁶ Thus bypassing the need for hard currency in the aid of Great Britain and interpreting the 1917 Act in favor of Roosevelt’s plan, in September 1940 the President engaged the United States Navy in the exchange of fifty destroyer ships for army and naval bases in seven British territories. Several months later, the President outlined the dictates of his “Lend-Lease” proposal, an Allied aid program modeled on the destroyers-for-bases program. Mr. Roosevelt’s “Great Arsenal of Democracy” fireside chat on December 29, 1940, described the need for assisting the British in their fight against the Axis powers, but also guaranteed a wary American public that the United States would not enter the war: “there is far less chance of the United States getting into war if we do all we can now to support the nations defending themselves against attack by the Axis than if we acquiesce in their defeat, submit tamely to an Axis victory, and wait our turn to be the object of attack in another war later on.”³⁷

President Roosevelt thus put the OLC—only seven years after its birth in 1933—to early use as a means for justifying the executive exercise of military power overseas

without congressional oversight. Eight years after Roosevelt's first gains in executive power as yielded by the New Deal, and as an act of international aggression signaling US investiture in World War II, this early use of the OLC corresponded with increased domestic manufacture of weapons and the development of what President Dwight D. Eisenhower would eventually call the "military-industrial complex."³⁸ These gains in presidential power were, however unsettling to a war-wary public, uncontroversial. The President's expression of reluctance at involvement in matters of war reassured the public that the ships-for-bases and lend-lease programs were not acts of war, but acts of good faith relations with British compatriots. The OLC opinions provided the legal foundations for such rhetorical claims.

Dwight D. Eisenhower's OLC and Domestic Power

Seventeen years later, in September of 1957, President Eisenhower solicited his OLC for an opinion on the president's authority to send federal troops into Little Rock, Arkansas to "suppress resistance" to the federal court order that the United States' school system be de-segregated.³⁹ Finding that the Governor of Arkansas had acted contrary to the ruling of the Supreme Court in *Brown v. Board of Education* by its use of local police and National Guard to refuse students of color access to Little Rock high school, the OLC opinion detailed the constitutionally-based rights of President Eisenhower to send federal troops to Arkansas to "keep the peace" there. Specifically, the opinion cited sections 332, 333, and 334 of title 10 of the United States code as the bases for the president's ability to intervene in domestic uprisings.⁴⁰ On September 24, President Eisenhower issued an executive order, saying:

NOW, THEREFORE, I, DWIGHT D. EISENHOWER, President of the United States, under and by virtue of the authority vested in me by the Constitution and Statutes of the United States, including Chapter 15 of Title 10 of the United States Code, particularly sections 332, 333 and 334 thereof, do command all persons engaged in such obstruction of justice to cease and desist there from, and to disperse forthwith.⁴¹

Later that same day, President Eisenhower gave a radio address summarizing his reasons for intervention in Little Rock:

Whenever normal agencies prove inadequate to the task and it becomes necessary for the Executive Branch of the Federal Government to use its powers and authority to uphold Federal Courts, the President's responsibility is inescapable. In accordance with that responsibility, I have today issued an Executive Order directing the use of troops under Federal authority to aid in the execution of Federal law at Little Rock, Arkansas.⁴²

Thus we see the language and legal interpretations of the OLC opinion manifest in both President Eisenhower's executive order and radio address. This example of the OLC's influence on presidential rhetoric and policy-making illustrates the agency's sway not only in international affairs, as was the case with President Roosevelt's OLC, but in delimiting also the boundaries of presidential power for domestic concerns. In the Kennedy administration, both domestic and international policies and the rhetoric thereof would derive political advantage from continued exercise of OLC opinion-writing duties.

John F. Kennedy's OLC and the Co-Invention of the Soviet "Quarantine"

In 1962, President Kennedy's OLC "devised the basis for the quarantine of Cuba during the missile crisis."⁴³ In August of that year, Attorney General Robert F. Kennedy consulted the OLC for an opinion on the retaliatory options of the United States should the Soviet Union develop a missile base on the island of Cuba.⁴⁴ The resulting OLC opinion, authored August 30, 1962, suggested a "total blockade or . . . 'visit and search' procedures as appropriate reactions by the American States or by the United States to meet a threat to install missile bases in Cuba."⁴⁵ According to Assistant Attorney General and OLC-Head Norbert Schlei, when in October it became clear that the Cuban-Soviet alliance was a reality, "the legal spade work that was done [by the OLC] far in advance was very helpful."⁴⁶ On October 22, President Kennedy delivered his Cuban Missile Crisis address to the nation, declaring the United States' intentions to "halt this offensive buildup" by initiating "a strict quarantine on all offensive military equipment under shipment to Cuba."⁴⁷ The next day, President Kennedy issued his "Interdiction of the Delivery of Offensive Weapons to Cuba" proclamation, which exhibited the significant influence of the August 30 OLC opinion.⁴⁸

The interaction of the legal "spade work" done by the OLC and the rhetoric of President Kennedy's speech and executive order highlights the co-inventional nature of the relationship between the OLC and presidential rhetoric. According to Baker, "It was John Kennedy who characterized [the visit and search policy] as a 'quarantine,' which [OLC Head] Schlei considered a 'startlingly important contribution because that word conveyed to the whole world . . . what was happening.'"⁴⁹ Kennedy's "quarantine" phrasing effectively summarized the OLC opinion and made the policy more rhetorically

palatable for an international audience. The OLC laid the legal foundation; President Kennedy (or his speechwriter) needed only add to it a rhetorical flourish in his Cuban Missile crisis address. The memo and President Kennedy's phrasing thus formed two sides of the same policy coin; without the legal foundation, President Kennedy may not have articulated, or have been able to execute, his political goals. This is a strong example of just how intertwined the inventional connection between presidential rhetoric and OLC opinions may be.

In itself, this overlap of authorial work suggests that President Kennedy's was an Advocate-type OLC. In context, the appointment of Robert F. Kennedy to the post of attorney general makes the likelihood of advocacy in the DOJ more explicit. Notes Griffin Bell, attorney general under President Carter: "Pressure forced the Attorney General's [read: OLC] opinion to be hammered out in oral discussions between lawyers for the Justice and State Departments. Not surprisingly, it was favorable to the President's wishes."⁵⁰ Thus in the presidencies of Roosevelt, Eisenhower, and Kennedy we have three OLCs that acted in accordance with characteristics we might expect of the Advocate-type attorney general as outlined by Baker. There having been no points of serious controversy surrounding OLC opinions in these administrations, there were therefore no reasons for the OLC to be seen to perform its duties neutrally. The Advocate nature of the OLC continued throughout the presidency of Richard Nixon, but events leading to Nixon's resignation catalyzed the first major shift in OLC politics. Such historical-contextual insight is absent in Baker's account of the politicization of the Attorney General's Office, focusing as she does on the particular concerns of each administration's OAG without respect to the continuity of discursive practices throughout

the OLCs of those administrations. Through the lens of rhetorical history, however, the discursive practices of the DOJ clearly reveal themselves as politically motivated until challenged by external protest.

Compelled to Neutrality:

OLC-White House Relations From Nixon to Carter

Operating under the public radar during the presidencies of Roosevelt, Eisenhower, and Kennedy, the OLC was able to perform its opinion-writing function with little controversy. Watergate changed things. The definitive legal scandal of twentieth century executive branch history occurred during Nixon's second term, and altered the political environment in Washington such that the DOJ was forced to make significant adjustments to its policy-making strategies. Consequently, the OLC under Presidents Johnson, Ford, and Carter was "reformed" to fit more appropriately what Baker calls the Neutral type. Though this reformation led to decreased cooperation between the OLC and the White House, the shift in OLC culture under the Ford and Carter administrations still merits historical attention as a significant deviation in the discursive practices of the Office. Changes to the OLC's co-inventional relationship with the White House due to an externally motivated movement toward political neutrality would, in fact, lead to fierce reassertion of presidential power in the 1980s. The case studies below illuminate the contextual and institutional pressures that compelled the shift in the OLC's relationship with the White House.

Nixon's OLC: Cambodia, Watergate, and the End of OLC Advocacy

The point of interest for President Nixon's OLC begins in May 1970, in the midst of the Vietnam War and at the beginning of the military incursion of the United States into Cambodia. At the time, a young William H. Rehnquist served as Assistant Attorney General and OLC-head under Attorney General John Mitchell. On May 22, Rehnquist drafted a memorandum titled "The President and the War Power: South Vietnam and the Cambodian Sanctuaries."⁵¹ This opinion was written three weeks after the invasion of Cambodia by United States forces, and its primary purpose was to redefine the offensive as an "armed conflict short of 'war'" well within the president's "substantive power" and authority as "Commander-in-Chief."⁵² To support his claims, Rehnquist provided a number of executive precedents, specifically noting the United States' role in the Korean War under President Truman as "the high water mark of Executive action without express congressional approval."⁵³ He reasoned thus: "While the President relied upon the United Nations Charter as a basis for his action, as well as his power as Commander-in-Chief, [President Truman's] action stands as a precedent for Executive action in committing United States armed forces to extensive hostilities without any formal declaration of war by Congress."⁵⁴ Relying heavily on the example of the Korean War, Rehnquist made the following case for the legality of the President's actions in ordering US military forces into Cambodia without Congressional approval:

Only if the constitutional designation of the President as Commander-in-Chief conferred no substantive authority whatever could it be said that prior congressional authorization for such a tactical decision was required . . . the President's decision to invade and destroy the border sanctuaries in

Cambodia was authorized under even a narrow reading of his power as Commander-in-Chief.⁵⁵

Though rendered weeks after the beginning of the Cambodian incursion, the impact of Rehnquist's opinion was considerable. Traces of its fundamental argument for presidential prerogative for engaging the United States military in "extensive hostilities" would be found in public remarks issued thereafter by White House officials. But the sphere of influence for Rehnquist's memo would reach still further, into the 21st century as primary support for the "Bybee" torture memo issued by President George W. Bush's OLC in 2002.⁵⁶ The continued presence of Rehnquist's memo in OLC opinions authored more than thirty years later underscores both the long-lasting rhetorical effects of OLC opinions, as well as the coincidence of political ascendancy often enjoyed by former OLC lawyers. The lineage of the rhetoric of OLC memos deserves some attention here. As precedent for future legal opinions, OLC memos resonate throughout executive branch history as potential sources for rhetorical invention; legal commonplaces for (re)use in future rhetorical situations. There is thus a great deal of intertextuality in OLC opinions—not simply in terms of the reuse of the Constitution of federal law, but also in reinterpretations (or reinventions) of opinions authored by lawyers from previous OLCs.

Considerable tumult in the Department of Justice during President Nixon's second term all but precluded effective use of the Office of Legal Counsel as rhetorical or policy-making resource for the President. This was due in large part to the perpetual changing of the guard in DOJ management that attended the development and eventual resolution of President Nixon's Watergate scandal.⁵⁷ The battles in the DOJ under Nixon are well-documented, but records of OLC activity during the Watergate scandal are not readily

available.⁵⁸ During this time, President Nixon began to rely more and more on the counsel of lawyers in the White House, as his relationship with the DOJ became strained further by the department's charge of investigating the Watergate criminal case.⁵⁹ Only after Mr. Nixon's resignation was the OLC again propelled into action and, for the first time, into the national spotlight, when newly appointed OLC-Head Antonin Scalia authored an opinion arguing that the Watergate tapes were property of Richard Nixon, not the government.⁶⁰ That "unpopular" opinion was "firmly repudiated by Congress and the Court."⁶¹

The struggle of the second Nixon administration in the Watergate scandal may be attributed in part to the President's unwillingness to seek or abide by legal direction provided for by lawyers in the Department of Justice. The personal nature of Mr. Nixon's legal troubles, entangled as they were with questions of executive privilege, led to the President's increased dependence on White House Counsel John Dean for legal advice.⁶² According to Michael Strine, "The Justice Department's responsibility to investigate the Watergate charges also severely strained the channels of communication between the post-Mitchell Justice Department and the White House."⁶³ Whatever the cause, it is clear that the decreased use of the OLC's opinion-writing function under the Nixon White House corresponded with the administration's disastrous legal and political end. The conventional relationship effectively dissolved in the latter years of the Nixon administration. The result was a continued distancing of the OLC from the office of the president to avoid perceptions of undue political influence or corruption. Accordingly, the disposition of the Ford OLC would adjust to "Neutral," with less of a focus on the co-

invention of presidential rhetoric, and more focus on neutral-minded interpretation and exposition of the law.

Presidents Ford, Carter and the “Neutral” OLC

A significant cultural shift occurred in the Department of Justice following Nixon’s resignation. Indeed, several important DOJ reforms occurred under Presidents Ford and Carter. Baker suggests that those adjustments did not come about by external edict. Instead, newly appointed Justice officials, such as Attorneys General Edward Hirsch Levi and Griffin Bell, effected change from within the department, promoting “values of professionalism and independence at the department, especially within the OLC with regard to providing legal advice to the executive.”⁶⁴ Notes Strine, “The Nixon administration drew Congress’s special attention to the Justice Department. The Watergate scandal, the criminal convictions of two attorneys general, and the widespread perception that Nixon to an unprecedented degree had politicized the Justice Department all spurred proposals to create an independent attorney general.”⁶⁵ None of those proposals were successful, however, because many in the Democratic-controlled Congress simply attributed DOJ improprieties to President Nixon’s faulty administrative style.

If Baker is correct, then the culture shift in the DOJ under President Carter was autonomously imposed; a course-correction not determined by external conditions, but instead an adjustment brought on by the appointment of level-headed officers predisposed to serving a legal rather than political master. This observation is lacking, I believe, for its ignoring institutional and historical contexts as significant motivating forces for change. That is, Bell may have felt a sense of duty to rein in the political nature

of the DOJ, but this sense of duty would have been nothing compared to the considerable pressures exerted upon him from a public still reeling from the Watergate controversy. Though proposals to reform the DOJ following the Watergate scandal lacked overt congressional support, the public nature of the scandal and its spotlight on political corruption in the DOJ compelled Nixon's successors to reign in the advocacy-oriented nature of the executive's relationship with Justice agencies. The schizophrenic OLC could no longer serve indiscriminately political interests, not because Bell had restored it to order, but because the political master was suppressed by the forceful intercession of the politics of public opinion. As illustrated below, after Nixon the OLC simply *had to* adopt a Neutral tone in the authorship of its opinions.

President Carter pledged in his campaign to reform the DOJ into a neutral department. Many believed that the President's appointment of long-time friend and former campaigner Griffin B. Bell to the position of attorney general belied this claim. Such an appointment suggested bias and the continuation of politics-as-usual in the Justice Department. But throughout his tenure Attorney General Bell made good on his promise to ensure that Justice would "act professionally, give our best judgment and be ethical in what we do."⁶⁶ There were several indicators that Bell kept the Carter OLC in line with this view. First, Mr. Bell oversaw the publication of the first volume of OLC opinions in 1977. Such transparency was new to the OLC, and part of the larger effort by Bell to "depoliticize" the department's reputation. Further, under Bell the OLC authored at least two opinions that the White House found objectionable, one of which was actually overruled by President Carter. Taking offense to the President's incursion into what Bell called a "neutral zone," he nearly resigned his post on ethical grounds.⁶⁷ The

Carter OLC thus devoted itself to the production of neutral rather than politically motivated discourses. As a result, the co-inventional relationship between President and OLC was for the span of Carter's administration almost totally suspended.

The Reemergence of Advocacy: OLC-White House Co-invention from Reagan to Clinton

If the OLC under President Carter experienced a sudden cultural shift toward political neutrality, then President Reagan's Justice Department imposed a similarly swift return to a more advocacy-oriented culture. Motivated by the perceived loss in executive power brought about in the 1970s, the Reagan White House quickly set about the task of restoring the powers it believed were constitutionally endowed to the president. Key appointments in the Department of Justice signaled the administration's goals; according to Clayton, "during the Reagan years, ideologues were appointed to leadership positions at the Justice Department and its resources and budget were expanded. The institutional reorganizations that the department underwent during the first term also made it more responsive to central direction."⁶⁸ The authority of the Department of Justice as a whole had atrophied greatly in the years following Mr. Nixon's resignation, with Congress taking exception to more than seventy separate DOJ policies.⁶⁹ But by 1980, "the White House was again seeking to find mechanisms for centralizing bureaucratic policymaking."⁷⁰ The Heritage Foundation authored a report shortly before Ronald Reagan took office suggesting that "the war against the Department of Justice must be brought to a halt."⁷¹ Officials in the Reagan Administration, especially Attorney General Edwin Meese, took special heed of the Heritage Foundation's report, and sought to restore the powers of litigation they believed were owed the DOJ.⁷² With officials in the

DOJ now sympathetic with the Reagan Administration’s political goals, the conditions were such that the co-inventional relationship of policy and legal interpretation could resume. As shown below, the legal impact of Reagan’s Advocate DOJ would resonate throughout the legal policy-making strategies of successive presidencies.

Reagan’s OLC: Re-centralizing White House Power

An enduring contribution of the Reagan DOJ was the coining of the “Unitary Executive Theory.” Executive pushback against perceived congressional interference with executive affairs resulted in numerous disputes over policy between the branches. In response to one of those disputes, legal officers in the DOJ’s Domestic Policy Committee articulated, in a report authored at Attorney General Meese’s request, what would become known as the “Unitary Executive Theory.”⁷³ This theory held that “the White House ought to be able to exercise total control over anything in the executive branch, which could be conceived of as a unitary being with the president as its brain.”⁷⁴ According to American studies scholar Dana Nelson, “the theory of the unitary executive, first proposed under President Reagan, has been expanded since then by every president, Democrat and Republican alike.”⁷⁵ Indeed, the theory was to be a prominent theme of the George H. W. Bush White House, developed further under the aegis of military “peacekeeping” missions under President Clinton, and reach its zenith under the nurture of White House officials under President George W. Bush.⁷⁶

The second major legacy of Reagan’s DOJ—the development and implementation of signing statements as a tool for official executive interpretation of the law—functions complementary to unitary executive theory and originated in an opinion authored by the Office of Legal Counsel. Signing statements, according to Clinton OLC-head Walter

Dellinger, “[inform] Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications, or that it is unconstitutional on its face, and that the provision will not be given effect by the Executive Branch to the extent that such enforcement would create an unconstitutional condition.”⁷⁷ In effect, then, signing statements have the capacity to perform a function strikingly similar to OLC legal opinions. Just as OLC opinions function as authoritative interpretations of extant law, so would signing statements determine the extent to which extant law would be enforced by the executive branch.⁷⁸

In 1985, an aide of Attorney General Meese solicited Ralph Tarr, then-assistant attorney general and OLC-head, to “draft a memo explaining how the government had issued signing statements up until that point, and to suggest ways to improve the process.”⁷⁹ Tarr obliged, arguing in a subsequent memo that signing statements

could become far more important as a tool of Presidential management of the agencies, a device for preserving issues of importance in the ongoing struggle for power with Congress . . . The President can direct agencies to ignore unconstitutional provisions or to read provisions in a way that eliminates constitutional or policy problems. This direction permits the President to seize the initiative in creating what will eventually be the agency’s interpretation.⁸⁰

A “fuller use” of signing statements was formally advocated in a memorandum authored a few months later by OLC lawyer (and future Supreme Court Justice) Samuel Alito in February, 1986.⁸¹ This memo argued that “From the perspective of the Executive Branch, the issuance of interpretive signing statements would have two chief advantages. First, it

would increase the power of the Executive to shape the law. Second, by forcing some rethinking by courts, scholars, and litigants, it may help to curb some of the prevalent abuses of legislative history.”⁸² In the first capacity, signing statements could assist presidents in extending the reach of their powers in legislative affairs. In the second capacity, signing statements would, much like OLC opinions, become precedent for future legal decisions. To buttress this second effect, Attorney General Meese arranged to have signing statements published in *U.S. Code Congressional and Administrative News* as well as in the *Weekly Compilation of Presidential Documents*, where they would be granted status as official records of legislative history.⁸³

The Reagan OLC thus assisted the White House in the creation of an additional resource for presidential rhetorical invention. This new resource paralleled in its power the OLC opinion-writing function, insofar as both allowed for extra-judicial and extra-congressional legal maneuvering and expansive interpretations of presidential power. But this was the signing statement in its incipient form. Its implementation only newly tested, the signing statement under Reagan had not yet achieved the definitive status of OLC opinions. According to Charles Tiefer, “The Reagan Administration’s assertion of power in signing statements drew well-reasoned scholarly criticism and little defense.”⁸⁴ Missing perhaps its greatest opportunity to exercise this new legal-interpretative channel for presidential power, the Reagan Administration refrained from the use of signing statements in the Iran-Contra scandal. Tiefer again: “President Reagan could have signed the Boland Amendments [prohibiting exchange of goods with terrorist nations] into law during the key period of 1984 to 1986 with signing statements expressing . . . that the provisions were unconstitutional or did not apply to presidential power.”⁸⁵ Signing

statements could have acted as political cover for National Security Council agents in their interactions with Nicaraguan Contras; instead, those agents acted surreptitiously and illegally as they engaged in an arms-for-hostages program without express executive approval.

The case of the Reagan OLC's argument for the establishment of signing statements as a new and powerful resource for presidential rhetoric and policy-making is a particularly stark example of the co-inventional relationship between a president and his OLC provided thus far in this rhetorical history. Characterized by an explicitly unified purpose—the defense and expansion of presidential power—Reagan's advocate OLC extended its power of interpretative primacy in matters of law and policy to the White House. However, the very zenith of OLC-White House co-invention could have been its undoing. This is because the advent of presidential signing statements as legislative history melded together politics, law, and rhetoric in the executive domain such that the traditional role of the OLC's opinion-writing function, so far as it extended to matters of executive power, was very nearly rendered moot. The power of authoritative legal interpretation now resting squarely in the Oval Office, of what use would the cadre of OLC lawyers be to the cause of executive power? As shown above, however, the Reagan Administration was remiss to use the method of signing statements to its fullest potential. The OLC was thus secure in its utility for the co-invention of policy rhetoric.

The Strong and Silent 'Type': Advocacy in the OLC under George H. W. Bush and William Jefferson Clinton

No doubt affected by first-hand impressions of the previous administration's failures, newly-elected President George H. W. Bush embraced signing statements as a preferred

method for legislative interpretation.⁸⁶ During his four years in office, President George H. W. Bush used signing statements to challenge over 146 provisions of law, fully double the number issued by President Reagan.⁸⁷ This full-on embrace of signing statements could, and perhaps should have limited White House dependence upon OLC legal opinions for challenging objectionable congressional statutes. In practice, however, President Bush found continued use for engaging in co-inventional pursuits with OLC lawyers. According to political scientist Nelson Lund, “On at least four occasions, [Mr. Bush] went so far as to obtain a legal opinion from the OLC concluding that it would be lawful for him to defy a statutory provision.”⁸⁸ Although like President Nixon, President Bush relied heavily on advice from his White House Counsel (C. Boyden Gray, 1989-1993), and more so than on advice issued from the OLC, it cannot be said that the OLC opinion-writing function was neglected by his administration. The use of OLC legal opinions as support for the issue of signing statements demonstrated the continued utility and evolution of the OLC for presidential rhetoric.

Under President Clinton, the role of the OLC evolved further into an advocacy-oriented political and legal advisory agency. This evolution, properly begun at the start of the Reagan administration and supplemented by developments in the Bush administration, was one of increased defense and expansion of presidential power. For President Reagan, the focus was a re-centralization of power in the White House; for President Bush, the focus was a defense of presidential power from Congressional incursions. For President Clinton, the evolution of the OLC related most directly to the expansion of presidential power in the deployment of United States resources in armed conflicts around the world. As demonstrated below, Mr. Clinton’s OLC was primarily

engaged in matters of national security, and the militaristic implications inherent in an emphasis on the defense of United States' interests. In many ways, it will be shown, President Clinton's OLC set the stage for the elevation of George W. Bush's OLC to an indispensable organ for presidential speech- and policy-making in the "war on terror."

The differences between Bill Clinton's and George W. Bush's OLCs are negligible, according to University of Chicago law professor Eric Posner. Under Mr. Clinton, Posner demonstrates, OLC opinions justified United States military "peacekeeping" interventions into Haiti, Bosnia and Herzegovina, and Kosovo—all without, and even against, congressional resolution.⁸⁹ In these and other instances, the Clinton OLC evoked the president's authority under Article II of the United States Constitution in ways that presaged the Bush OLC's opinions regarding the engagement, detention, and rendition of enemy combatants in foreign military engagements. According to Posner, these opinions undermined and obviated in each case the will of the Congress, as well as the purported intent of extant statutory laws.⁹⁰

For example, an opinion authored November 30, 1995, by Clinton OLC-head Walter Dellinger provided the necessary legal rationale to justify United States military intervention in the conflict between Bosnia and Herzegovina. At question at the time was the President's authority to deploy troops in the war-torn region to enforce a peace treaty between the two nations without congressional approval and in compliance with the War Powers Resolution (50 U.S.C. §§ 1541-1548). The risks of deploying ground troops were significant; previously, the United States had only involved its naval and air resources in Bosnia to maintain a military presence in the skies. Now, with infantry on the ground, the probability of actual armed conflict was high. Citing an extensive history of previous

military incursions enacted on behalf of the president’s authority as Commander-in-Chief—as well as citing several previous OLC opinions as legal precedent—the Bosnia opinion concluded that “the President has the authority to order the proposed deployment of United States forces in Bosnia, under the circumstances contemplated, without express statutory authorization.”⁹¹

The Bosnia opinion ultimately provided the legal foundation for the President’s justification for United States military involvement with United Nations peacekeeping activities in the region. Nine days after the opinion was written, Mr. Clinton issued a letter to Congressional leaders notifying them of his intentions to send ground troops into the conflict.⁹² The letter was a mere formality, though, and closed with a note of contractual obligation: “I am providing this report as part of my efforts to keep the Congress fully informed about developments in the former Yugoslavia, consistent with the War Powers Resolution.”⁹³ Indeed, notifying the Congress of the President’s actions was perhaps the *only* non-controversial interpretation of the War Powers Resolution. The OLC memo interpreted the Resolution in such a way that the Congress need merely be advised of the President’s military ambitions.

Perhaps the most controversial opinion authored by the Clinton OLC, which purportedly outlined the tenets and justification for use of “extraordinary rendition,” remains classified. Information about the memo, authored by the OLC sometime during President Clinton’s tenure, can be gotten only through anecdotal or testimonial evidence.⁹⁴ There is little doubt, however, that the controversial program of “extraordinary rendition”—which allowed for the extraction of alleged terrorists from one country for trial and punishment in another country—was proposed by the Clinton

OLC. The transcripts of a 2007 hearing before a House Foreign Affairs subcommittee, for example, contain testimony from Michael Scheuer, founder of the rendition program, who dates the beginning of the rendition program in 1995.⁹⁵ The Clinton administration sought to use the program to bring key players of the terrorist organization al Qaeda to justice, regardless of questions of the United States' legal jurisdiction. According to the *9/11 Commission Report*, this secret OLC memo for the first time declared the United States' engagement in "armed conflict"—a term thinly split from "war"—with al Qaeda.⁹⁶ Osama bin Laden was the primary target of the program.

The national security trajectory of OLC opinions invented in conjunction with the Clinton administration would set the stage for the second Bush OLC's aggressively liberal interpretations of executive power. The Clinton OLC not only enabled the President to declare "armed conflict" with al Qaeda; it also exalted the Commander-in-Chief's authority to act abroad without congressional approval and granted the Commander the privilege to effectively kidnap, interrogate, and prosecute suspected terrorists in countries with a sub-democratic view of justice. The Bush OLC would not limit its White House to these interpretations or techniques, however. The precedents set down under Bill Clinton's OLC would empower the second Bush OLC to authorize still more liberal interpretations of the United States Constitution, especially with regard to the unilateral powers of the Commander-in-Chief.

Conclusion

This chapter has sought to establish the OLC as a significant historical force in presidential rhetoric. Providing a rhetorical history of the Office from its inception under

Franklin Roosevelt through the end of the Clinton administration, the chapter demonstrated through case studies the evolution of OLC influence in the co-invention of the legal, political, and rhetorical output of the presidencies of the greater part of the twentieth century. From the beginning, the OLC exerted disproportionate influence in the realm of United States legislative affairs, increasing presidential power in both domestic and international realms while compromising traditional forms of democratic deliberation, especially with regard to congressional oversight. In terms of hermeneutical-rhetorical output, the co-inventive relationship of the OLC and the White House rivals in influence the traditionally recognized relationships that presidential speechwriters and policy advisors share with presidents. Repeatedly, OLC opinions have functioned as schematics for presidential rhetoric and policy. The power of the OLC's opinion-writing duty has always been in flux, but the characterization of OLCs as either "Neutral" or "Advocate" unnecessarily complicates the matter. As I believe I have shown, the OLC is vested in its advocacy role until otherwise compelled. Currently, the OLC again finds itself in a state of adjustment, as it recovers from controversies attending its most publicized and most controversial opinions co-inventively authored with the administration of President George W. Bush. It is to those controversies that the next chapter is addressed.

Notes

¹ George W. Bush, "Remarks on the War on Terror," September 6, 2006, <http://www.gpo.gov/fdsys/pkg/WCPD-2006-09-11/pdf/WCPD-2006-09-11-Pg1569-2.pdf>.

² International Committee for the Red Cross, "ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody," February 14, 2007, <http://www.nybooks.com/icrc-report.pdf>.

³ On abuse at CIA prisons, see James Risen, "The Struggle for Iraq: Treatment of Prisoners; G.I.'s Are Accused of Abusing Iraqi Captives," *New York Times*, April 29, 2004, <http://www.nytimes.com/2004/04/29/world/struggle-for-iraq-treatment-prisoners-gi-s-are-accused-abusing-iraqi-captives.html>; For details on the abuse at Bagram prison in Afghanistan, see Emily Bazelon, "From Bagram to Abu Ghraib," *Mother Jones*, March/April, 2005, <http://www.motherjones.com/politics/2005/03/bagram-abu-ghraib>; Douglas Jehl, "Army Details Scale of Abuse in Afghan Jail," *New York Times*, March 12, 2005, <http://www.nytimes.com/2005/03/12/politics/12detain.html>; Tim Golden, "Years After 2 Afghans Died, Abuse Case Falts," *New York Times*, February 13, 2006, http://www.nytimes.com/2006/02/13/national/13bagram.html?_r=1.

⁴ Barack Obama, Executive Order, "Closure of Guantanamo Detention Facilities," January 22, 2009, http://www.whitehouse.gov/the_press_office/closureofguantanamo detentionfacilities/; "Obama Reverses Promise to Release Torture Photos," *American Civil Liberties Union*, May 13, 2009, <http://www.aclu.org/national-security/obama-administration-reverses-promise-release-torture-photos>; Daniel Klaidman, "Independent's Day," *Newsweek*, July 11, 2009, <http://www.newsweek.com/id/206300>; Glenn Greenwald, "NPR's Ombudsman: Why We Bar the Word 'Torture,'" *Salon.com*, June 22, 2009, <http://www.salon.com/opinion/greenwald/2009/06/22/npr/>; Glenn Greenwald, "The NYT's Nice, New Euphemism for Torture," *Salon.com*, June 6, 2009, <http://www.salon.com/opinion/greenwald/2009/06/06/nyt/>.

⁵ Michael Leff, "Hermeneutical Rhetoric," in W. Jost and M. J. Hyde (eds.) *Rhetoric and Hermeneutics in Our Time: A Reader* (New Haven, CT: Yale University Press, 1997): 198.

⁶ Steven Mailloux, "Rhetorical Hermeneutics," in Sanford Levinson and Steven Mailloux (eds), *Interpreting Law and Literature* (Evanston, IL: Northwestern University Press, 1988): 356.

⁷ Homer Cummings and Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* (New York: Columbia University Press, 1977): 511.

⁸ Nancy V. Baker, *Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789-1990* (Lawrence, KS: University Press of Kansas, 1992): 1, 18.

⁹ U.S. Congress, *Judiciary Act of 1789*, 1st Cong., 1st Sess. (September 24, 1789), 1 Stat. 73, § 35.

¹⁰ Baker, *Conflicting Loyalties*, 4.

¹¹ Baker, *Conflicting Loyalties*, 8.

¹² Baker, *Conflicting Loyalties*, 7.

¹³ Baker, *Conflicting Loyalties*, 7.

¹⁴ Luther A. Huston, *The Department of Justice* (New York: Frederick A. Praeger, 1968): 34.

¹⁵ Baker, *Conflicting Loyalties*, 6.

¹⁶ Baker, *Conflicting Loyalties*, 18-19.

¹⁷ Cornell W. Clayton, "Introduction," in *Government Lawyers*, edited by Cornell W. Clayton (Lawrence, KS: University Press of Kansas), 2.

¹⁸ Robert Palmer, "The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General," *Pepperdine Law Review* 11 (January 1984), 349.

¹⁹ Leff, "Hermeneutical Rhetoric," 204.

²⁰ Griffin Bell, "Office of Attorney General's Client Relationship," *Business Lawyer* 36 (March 1981), 796.

²¹ See item 1 in “Coping Guidelines for the Family,” in John M. Grohol, “Schizophrenia Treatment,” *Psych Central.com*, April 10, 2006, <http://psychcentral.com/disorders/sx31t.htm>.

²² Baker, *Conflicting Loyalties*, 67.

²³ Baker, *Conflicting Loyalties*, 126.

²⁴ The United States Department of Justice, “About DOJ,” *Justice.gov*, <http://www.justice.gov/02organizations/about.html>.

²⁵ Huston, *Department of Justice*, 33.

²⁶ This is first spelled out in US Congress, “An Act to Establish the Department of Justice,” 41st Cong., Sess. II (June 22, 1870), <http://memory.loc.gov/ll/llsl/016/0100/01980162.tif>, which states: “Questions of law submitted to the Attorney-General for his opinion, except questions involving a construction of the United States, may be by him referred to such of his subordinates as he may deem appropriate, and he may require the written opinion thereon of the officer to whom the same may be referred; and if the opinion given by such officer shall be approved by the Attorney-General, such approval so indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney-General.”; The ability for delegation was codified into law in 28 U.S.C. § 510, which states “The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.”

²⁷ Griffin B. Bell, “Foreword,” in *Opinions of the Office of Legal Counsel, 1977* (Washington, D.C.: Government Printing Office, 1977).

²⁸ US Department of Justice, *Annual Report of the Attorney General of the United States, 1934* (Washington, DC: GPO, 1934), 119.

²⁹ Huston, *The Department of Justice*, 61.

³⁰ United States Department of Justice, “Memoranda and Opinions,” *Justice.gov*, <http://www.justice.gov/olc/opinions.htm>.

³¹ Douglas W. Kmiec, *The Attorney General’s Lawyer: Inside the Meese Justice Department* (New York: Praeger Publishers, 1992), 2.

³² Robert H. Jackson, “Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers,” in *Official Opinions of the Attorneys General of the United States, 1937-1940* (Washington, D.C.: Government Printing Office, 1941), 484.

³³ Jackson, “Acquisition of Naval and Air Bases,” 487.

³⁴ Jackson, “Acquisition of Naval and Air Bases,” 494.

³⁵ Baker, *Conflicting Loyalties*, 80.

³⁶ Jackson, “Acquisition of Naval and Air Bases,” 494.

³⁷ Franklin Delano Roosevelt, “The Great Arsenal of Democracy,” December 29, 1940, <http://www.americanrhetoric.com/speeches/fdrarsenalofdemocracy.html>.

³⁸ Garry Wills, “Entangled Giant,” *The New York Review of Books*, October 8, 2009, <http://www.nybooks.com/articles/23110>.

³⁹ Herbert Brownell, Jr., “President’s Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas,” in *Official Opinions of the Attorneys General of the United States, 1949-1960* (Washington, D.C.: Government Printing Office, 1968), 313.

⁴⁰ Brownell, Jr., “President’s Power to Use Federal Troops,” 327-328.

⁴¹ Dwight D. Eisenhower, “Executive Order 10730- Providing Assistance for the Removal of an Obstruction of Justice Within the State of Arkansas,” September 24, 1957, <http://www.presidency.ucsb.edu/ws/index.php?pid=75572>.

⁴² Dwight D. Eisenhower, “September 24, 1957 Address,” <http://historymatters.gmu.edu/d/6335/>.

⁴³ Huston, *The Department of Justice*, 60.

⁴⁴ Baker, *Conflicting Loyalties*, 90.

⁴⁵ Quoted in Baker, *Conflicting Loyalties*, 90.

⁴⁶ Baker, *Conflicting Loyalties*, 90.

⁴⁷ John F. Kennedy, “Cuban Missile Crisis Address to the Nation,” October 22, 1962, <http://www.americanrhetoric.com/speeches/jfkucubanmissilecrisis.html>.

⁴⁸ John F. Kennedy, “Interdiction of the Delivery of Offensive Weapons to Cuba,” October 23, 1962, <http://www.presidency.ucsb.edu/ws/index.php?pid=8987>; Baker, *Conflicting Loyalties*, 90.

⁴⁹ Baker, *Conflicting Loyalties*, 90.

⁵⁰ Quoted in Baker, *Conflicting Loyalties*, 90.

⁵¹ William H. Rehnquist, “The President and the War Power: South Vietnam and the Cambodian Sanctuaries,” May 22, 1970, http://lawreview.stanford.edu/content/vol58/issue6/bybee_appendix.pdf.

⁵² Rehnquist, “The President and the War Power,” 2.

⁵³ Rehnquist, “The President and the War Power,” 19.

⁵⁴ Rehnquist, “The President and the War Power,” 13.

⁵⁵ Rehnquist, “The President and the War Power,” 27.

⁵⁶ Bruce Shapiro, “Rehnquist, Cambodia & Abu Ghraib,” *The Nation*, June 25, 2004, <http://www.thenation.com/doc/20040712/shapiro>.

⁵⁷ Legal scholar Cornell W. Clayton notes that “During a two-and-a-half-year period between 1972 and 1975, the Justice Department went through five Attorneys General, six Deputy Attorneys General, and two Special Prosecutors.” See Cornell W. Clayton, *The Politics of Justice* (Armonk, NY: M. E. Sharpe Inc., 1992), 100.

⁵⁸ Though Attorney General Elliott Richardson (Nixon’s third Attorney General) made reference to an OLC opinion that outlined the legality of his firing Archibald Cox, special prosecutor in the Watergate scandal, that opinion has not been published. See Ken Gormley, *Archibald Cox: Conscience of a Nation* (Cambridge, MA: Perseus Publishing, 1997), 420.

⁵⁹ For a fuller description of mounting tensions between the White House lawyers and the DOJ, see Michael Strine, “Counsels to the President: The Rise of Organizational

Competition,” in *Government Lawyers*, edited by Cornell W. Clayton (Lawrence, KS: University Press of Kansas, 1995), 262-265.

⁶⁰ “Office of Legal Counsel,” *Annual Report of the Attorney General of the United States* (1975), 44.

⁶¹ James Brian Staab, *The Political Thought of Antonin Scalia: A Hamiltonian on the Supreme Court* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2006), 10.

⁶² Michael Strine, “Counsels to the President,” 263.

⁶³ Michael Strine, “Counsels to the President,” 263.

⁶⁴ Michael Strine, “Counsels to the President,” 265.

⁶⁵ Michael Strine, “Counsels to the President,” 266.

⁶⁶ Dom Bonafede, “‘Judge’ Bell Presides Over a Changed Justice Department,” *National Journal*, February 10, 1979, 214.

⁶⁷ Baker, *Conflicting Loyalties*, 157.

⁶⁸ Clayton, *The Politics of Justice*, 200.

⁶⁹ Clayton, *The Politics of Justice*, 200.

⁷⁰ Clayton, *The Politics of Justice*, 200.

⁷¹ Clayton, *The Politics of Justice*, 201.

⁷² Clayton, *The Politics of Justice*, 201.

⁷³ Charlie Savage, *Takeover* (New York: Little, Brown and Company, 2007), 47-48.

⁷⁴ Savage, *Takeover*, 48.

⁷⁵ Dana D. Nelson, “The ‘Unitary Executive’ Question,” *Los Angeles Times*, October 11, 2008, <http://www.latimes.com/news/opinion/la-oe-nelson11-2008oct11,0,224216.story>.

⁷⁶ See Philip J. Cooper, "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements," *Presidential Studies Quarterly*, 35 (September 2005), 530-531.

⁷⁷ Walter Dellinger, "Memorandum for Bernard N. Nussbaum, Counsel to the President. The Legal Significance of Presidential Signing Statements," November 3, 1993, <http://www.usdoj.gov/olc/signing.htm>.

⁷⁸ For in-depth summary of the function of signing statements, see David S. Birdsell, "George W. Bush's Signing Statements: The Assault on Deliberation," *Rhetoric & Public Affairs* 10 (Summer 2007), 335-360; also Karlyn Kohrs Campbell and Kathleen Hall Jamieson, *Presidents Creating the Presidency* (Chicago, IL: University of Chicago Press, 2008), 195-216; Donovan S. Conley and William O. Saas, "Occultatio: The Bush Administration's Rhetorical War," forthcoming in *Western Journal of Communication* 74, no. 4, (2010).

⁷⁹ Savage, *Takeover*, 232-233.

⁸⁰ Quoted in Savage, *Takeover*, 233.

⁸¹ Samuel A. Alito, Jr., "Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law," February 5, 1986, <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>.

⁸² Alito, Jr., "Using Presidential Signing Statements," 2.

⁸³ Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Lawrence, KS: University Press of Kansas, 2002), 203.

⁸⁴ Charles Tiefer, *The Semi-Sovereign Presidency* (Boulder, CO: Westview Press, 1994), 32.

⁸⁵ Tiefer, *The Semi-Sovereign Presidency*, 33.

⁸⁶ Tiefer, *The Semi-Sovereign Presidency*, 33.

⁸⁷ Campbell and Jamieson, *Presidents Creating the Presidency*, 195.

⁸⁸ Nelson Lund, “Guardians of the Presidency: The Office of the Counsel to the President and the Office of Legal Counsel,” in *Government Lawyers*, edited by Cornell W. Clayton (Lawrence, KS: University Press of Kansas, 1995), 222.

⁸⁹ Eric Posner, “OLC in the Clinton Era—and Today,” *The Volokh Conspiracy*, February 22, 2009, http://volokh.com/archives/archive_2009_02_22-2009_02_28.shtml#1235367053.

⁹⁰ Posner, “OLC in the Clinton Era”

⁹¹ Walter Dellinger, “Proposed Deployment of United States Armed Forces into Bosnia,” in *Opinions of the Office of Legal Counsel of the United States Department of Justice, 19* (Washington: GPO, 1995), 336.

⁹² William Jefferson Clinton, “Letter to Congressional Leaders on Bosnia,” *The American Presidency Project*, December 6, 1995, <http://www.presidency.ucsb.edu/ws/index.php?pid=50861&st=bosnia&st1=clinton>.

⁹³ Clinton, “Letter to Congressional Leaders on Bosnia”

⁹⁴ A convincing summary of this evidence is found in Jack Goldsmith, *The Terror Presidency* (New York: W. W. Norton and Company, 2007): 106, fn17.

⁹⁵ United States Congress, House, Foreign Affairs Committee, *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations, Joint Hearing Before the Subcommittee on International Organizations, Human Rights, and Oversight, and the Subcommittee on Europe*, 110th Cong., 1st sess., April 17, 2007 (Washington, DC: GPO, 2007), 15.

⁹⁶ *The 9/11 Commission Report* (New York: W. W. Norton Publishing Company, 2004), 132.

CHAPTER 3
WHITE HOUSE-OLC CO-INVENTION
IN GEORGE W. BUSH'S RHETORICAL WAR

The validity of President Bush's claim in his September 6, 2006, address to the world—that the United States did not torture its captives in the “war on terror”—rested on the interpretative work of lawyers in his Office of Legal Counsel. Though this claim would be the source of some controversy for the remainder of his presidency, the use of OLC memos to found presidential claims for executive authority was not an innovation unique to the Bush White House. Indeed, as shown in the last chapter, presidents since Franklin Roosevelt had for over half a century drawn from OLC opinions the bases for their assertions of authority in affairs both domestic and foreign. Yet the nature of the OLC-White House relationship had always been largely private, as the OLC remained “little known outside the government,” and thus securely out of the public spotlight.¹ The existence of secret CIA prisons, or “black sites,” on the other hand, had been common knowledge since early 2002.² The most telling aspect of President Bush's September speech, then, was neither that it “disclosed” the existence of secret CIA prisons, nor its declaration of the legality of the United States' interrogation program. In fact, its most significant disclosure was its bringing to light what had previously only operated behind the scenes: the inner-workings of legal interpretation and rhetorical co-invention in the executive branch.

To describe the White House-OLC relationship as “behind the scenes” requires explanation. While it is true that, at least since 1968 under Attorney General Griffin Bell,

there has been some public record of OLC opinion-writing, that record remains partial, both for its incompleteness and for its selectivity or bias. Untold numbers of OLC opinions have influenced or determined untold numbers of proposed executive actions since the OLC's inception. Unlike the abundance of materials available for analysis of other modes of behind the scenes invention in presidential rhetoric—such as the speechwriting process, where several drafts of a given speech may exist ordinarily—the purported legal sensitivity of OLC documents precludes publication of the bulk of their findings. Being so limited, outsider understanding of the true scope of OLC influence in presidential affairs may always be accompanied by an air of mystery.

Published (or “leaked”) opinions, then, may be seen as representative, behind the scenes snapshots from the longstanding, co-inventional rhetorical history of the OLC. These snapshots provide scholars a small glimpse of the rhetorical mechanics, conventions, and stylistics of OLC opinions issued from beyond public purview. When taken together with consideration of the political milieu within which they were written, the exigencies to which they responded, and with an eye to their subsequent effects, available OLC memos provide invaluable insight into the dynamics of intra-executive branch rhetoric. That is, despite their limited availability, these glimpses behind the scenes nevertheless provide critical insights for illuminating the rhetorical composition of the OLC-White House relationship.

Modeled after Steven Mailloux's performative illustration of “doing” rhetorical history in *Rhetorical Power*, this chapter builds on the last by situating its analysis within a timeline of significant events from the contemporary discursive history of the OLC. That is, where the last chapter established a broad, institutional rhetorical history of the

Office, the present chapter hones its scope to bring a recent, particularized section of that history into sharper relief. It takes as its case study the presidency of George W. Bush and the co-inventional relationship with its OLC following the events of September 11, 2001. The chapter's object is to explicate key points of interpretive policy building that occurred in the first months—September, 2001 through August, 2002—of what the Bush administration quickly defined as a “war on terror.” The rhetorical performances enacted in these early months function as a representative anecdote of the broader rhetorical history of the Bush-OLC co-inventional relationship in the war on terror.

In response to a national trauma that left speechlessness and anomie in its wake, the Bush administration—in consort with its OLC—promptly cast the ensuing war in terms of a narrative of Good versus Evil. In this way, the foreign policy rhetoric of the Bush administration adhered to the familiar conservative argumentative structure of what Philip Wander calls “prophetic dualism.”³ Extracted from that narrative for analysis in this chapter are three key terms—“harbor,” “unlawful combatant,” and “enhanced interrogation”—which thread throughout post-9/11 OLC opinions and Bush White House rhetoric alike. The preliminary work done by the term harbor was significant: it allowed the United States a liberal set of standards with which to identify potential enemy states or organizations in the war on terror. This broadness of definitional scope in turn made possible the rhetorical development of future key terms in terror rhetoric, such as “unlawful combatant” and “enhanced interrogation.” This chapter traces the life of these three terms throughout President Bush's early 9/11 speeches and executive orders, as well as through OLC opinions that provided Mr. Bush's claims with the legal and rhetorical support they needed. Considerable rhetorical overlap in the texts examined

suggests that a shared ideological orientation with the White House guided the OLC's strategic interpretation of domestic and international law toward broadening the scope of executive power.

The analysis proceeds in four sections. The first section describes the political situation immediately following the 9/11 attack, underscoring the dramatic nature of post-9/11 rhetoric. In the second part, the “behind the scenes” metaphor for the OLC-White House co-inventive relationship is refined through adaptation of the dramaturgic framework outlined by Erving Goffman in *The Presentation of Self in Everyday Life*. Goffman's notion of dramatic “regions” in public life—“front stage” and “backstage”—sharpens the historical analysis by providing a nuanced framework through which to conceive the operationalization of co-invention in the case in question. The “backstage” nature of OLC opinion authorship guides the choice to adapt Goffman's dramaturgical perspective. The third part includes the case study proper, which applies Goffman's framework to the historical analysis of White House rhetoric and OLC opinions in the early months of the war on terror. From the front stage, the President provided the OLC with a particular line of argument, or *topoi*, which in turn guided the backstage opinion-writing duties of the OLC. The chapter concludes with a summary of its findings.

The Political Drama of Post-9/11 Rhetoric

The September 11, 2001 terrorist attacks on the United States created the definitive rhetorical exigency of the early 21st century. Dutifully, the President and his speechwriting staff set to the task of drafting a speech to address the shaken nation later that evening. But how, exactly, should one address a national trauma of such magnitude?

That is, how could the President's speech possibly match the apparently cataclysmic rhetorical situation? Of course, presidents had taken to the pulpit following national traumas in the past, and the sentiments they shared with their traumatized audiences often became definitive rhetorical markers of their respective presidencies. Franklin Roosevelt's "nothing to fear but fear itself" during the Great Depression in his first term; his "day of infamy" speech following the attacks of the Japanese on Pearl Harbor in his second term; Lyndon Johnson's "Let us continue" speech following the assassination of John F. Kennedy; Ronald Reagan's address following the explosion of the Challenger space shuttle—President George W. Bush's speech on the evening of September 11, delivered about twelve hours after the attacks in New York, could very well have defined his presidency.

Though it is difficult to imagine the pressure that must have attended the crafting of Mr. Bush's address for the evening of 9/11, one may be sure that the tone was nothing if not highly dramatic. This was the first attack on American soil by foreigners in over half-a-century. In those early moments, only approximate body counts could be tallied as both the injured and dead were dragged from the rubble of the Twin Towers and the Pentagon. Throughout that day, over 80 million Americans sat glued to their television sets—a number that peaked during the half-hour time slot allotted for President Bush's evening address.⁴ A global audience was watching, too, with over 16 million viewers seeking news on ITV and BBC1 throughout the day.⁵ This would be Mr. Bush's largest audience since his inaugural address, which had a relatively meager domestic television audience of just over 29 million.⁶ In this difficult time, people were looking for answers, for consolation, for news about the attackers and victims alike. President Bush's response to

the situation would ideally comfort, console, and inspire those watching and listening attentively for answers. He and his speechwriters were no doubt keenly aware of this fact.

Through several drafts, President Bush and his staff finally arrived at a version they found suitable.⁷ Televised from the Oval Office, and clocking in at about four-and-a-half minutes in length, the speech summarized the day's events, casting them in a binary vision of Good versus Evil that would become a commonplace in Mr. Bush's rhetoric: "Today, our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts . . . Thousands of lives were suddenly ended by evil, despicable acts of terror." The speech also highlighted the heroism of normal American citizens: "Today, our nation saw evil, the very worst of human nature, and we responded with the best of America, with the daring of our rescue workers, with the caring for strangers and neighbors who came to give blood and help in any way they could." But the speech also promised vengeance: "The search is underway for those who are behind these evil acts. I've directed the full resources for our intelligence and law enforcement communities to find those responsible and bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them."⁸

The brief address was clear and deliberate, designed to reassure, not further frighten, the American people.⁹ Its final version was pared of some of the more reactionary language present in earlier drafts, including the passage: "This is not just an act of terrorism. This is an act of war."¹⁰ Yet there was little doubt that the President had some idea of who the main offenders were, and had resolved to go after them, as well as those who would "harbor" them. Closing by citing Psalm 23—"Even though I walk through the

valley of the shadow of death, I fear no evil, for You are with me”—cast the event in biblical terms immediately relatable to a large part of his American audience. The speech thus set the stage for what would be portrayed in months and years to come in terms of the familiar dramatic archetype of Good (us) versus Evil (them).¹¹

The purpose of this brief recounting of the 9/11 evening address is to recall the original setting that would come to shape post-9/11 political culture in the United States. This is pertinent to my study because it establishes the meta-narrative by which the Bush White House would invent its foreign and domestic policy rhetoric leading up to the war on terror. The human drama of the days and weeks following 9/11 was matched by highly dramatic rhetoric from the White House. As such, the dramaturgical perspective seems particularly well-suited to the task of historicizing the case.

The Dramaturgical Perspective

Dramaturgy is a social psychological perspective on the process of human meaning-making rooted in the intellectual tradition of Kenneth Burke's theory of dramatism. Burke's dramaturgical approach to the analysis of human motivation, in fact, inspired the work of sociologist Erving Goffman, who in turn established the dramaturgical perspective.¹² The generating principles of dramatism are Act, Scene, Agent, Agency, and Purpose.¹³ These principles may be identified in most situations where human motivation is at play, though in any case one or two may be viewed as preeminent over the others. When fewer than two may be observed in a given case, ambiguity (or mystification) is at play.¹⁴

The dramaturgic framework may be defined as the “analytic perspective that social life resembles theater or, more accurately, drama.”¹⁵ Its driving principle is that “*the meaning of people’s doings is to be found in the manner in which they express themselves in interaction with similarly expressive others*” [italics in original].¹⁶ Throughout his best known work on dramaturgy, *The Representation of Self in Everyday Life*, Goffman provides critics with a rich set of terms and principles to better comprehend the theater of everyday life. Though each term inheres a preponderance of theoretical depth, their basic usages are, like Burke’s pentad, intuitive. Performances, teams, stages, and audiences are the key elements of dramaturgy, and each is enacted on or by the social being under the aegis of impression management.

But the fundamental tenet of dramatism—taking seriously Shakespeare’s notion that the world is a stage filled with actors—which is extended through dramaturgy, allows a narrowing from the ubiquitous minutiae of “everyday life” to a focused study of culture and politics. Indeed, Goffman himself noted in *The Representation of Self* that the dramaturgic framework “is formal and abstract in the sense that it can be applied to any social establishment; it is not, however, merely a static classification. The framework bears upon dynamic issues created by the motivation to sustain a definition of the situation that has been projected before others.”¹⁷ If one may regard politics as a social establishment (or, at the least, socially established), and politicians as social actors with vested interest in sustaining particular definitions in response to different situations, then the path from “everyday life” to the political in dramaturgic analysis is clearly drawn. For his part, Goffman defined “social establishment” as “any place surrounded by fixed barriers to perception in which a particular kind of activity takes place,” a definition that

suits the political stage as much as it does his own case studies of micro-dramas in a funeral home, a hotel restaurant, and other locales common to everyday life.¹⁸ To that end, several studies by scholars “in fields as diverse as political science, sociology, criminology, psychology, mass communication, anthropology, psychiatry and the like” have narrowed the dramaturgical perspective to examine such specialized performances as those in media and politics.¹⁹ One such example, Gary C. Woodward’s textbook, *Center Stage*, examines the “stages” and “frames” of contemporary political communication through a merging of dramatic and dramaturgic perspectives.²⁰ In his book, as in this chapter, the critical tools of dramatism are matched with the theoretical suppositions of dramaturgy as the analytic lens through which to view the operationalization of political communication.

Apart from its utility for the study of politics-as-theater, the dramaturgical perspective is also useful in the practice of rhetorical history. As with Mailloux’s neo-pragmatist approach to accounting for the historical particulars of interpretive conflicts, dramaturgy’s frame of reference is also “contextualism or pragmatism—a concern for historical events.”²¹ For both rhetorical history and dramaturgy, then, the historical situation—with its particular set of actors, scripts, regions, performances, and social establishments—is at the center of the analysis. Beyond context, however, both provide useful ways of getting at the particulars of the moment or site of rhetorical invention. In terms of the site of invention, Goffman’s notion of “region management” provides a particularly useful pair of concepts—front stage and backstage—for elucidating the interactivity of rhetorical collaboration. The characters of these “regions,” which are present in most human interactions, are defined by Goffman thus:

[In a given performance] We often find a division into back region, where the performance of a routine is prepared, and front region, where the performance is presented. Access to these regions is controlled in order to prevent the audience from seeing backstage and to prevent outsiders from coming into a performance that is not addressed to them. Among members of the team we find that familiarity prevails, solidarity is likely to develop, and that secrets that could give the show away are shared and kept.²²

This summary of the “fronstage-backstage architecture” of social interaction contains several rich insights relevant to this study which require some unpacking here.²³ First, for Goffman the division of performances into front stage and backstage appears to carry with it also a division of rhetorical labor among a “team”: backstage the “routine is prepared,” while front stage the “performance is presented.”

This initial insight is important to this study because it provides a useful conceptual approach for describing the process of co-invention as it occurred among the Bush-OLC team. Viewed through the lens of dramatic regions, the “behind the scenes” metaphor introduced at the beginning of this chapter becomes not merely a passive description of the OLC’s location, but a useful conceptual approach to historicizing the co-inventive relationship of the White House and OLC. Similarly, casting the president’s public performance in terms of frontstage-backstage co-invention demands deeper analysis of the intra-executive branch dynamics of presidential rhetoric. Framed this way, full analysis of a given presidential rhetorical performance should take into consideration also what happened backstage, where that performance was prepared in consort with backstage team members. As Goffman notes:

In thinking about a performance it is easy to assume that the content of the presentation is merely an expressive extension of the character of the performer and to see the function of the performance in these personal terms. This is a limited view and can obscure important differences in the function of the performance for the interaction as a whole.²⁴

In order that one may see the whole of the interaction, in other words, one must view front and backstage *interactivity* as essential to the performance. To focus on the “content of the presentation” alone is to focus on the text without regard for motive, purpose, external influence, or even its intertextuality. In a word, then, invention matters. To ignore this fact is to “obscure important differences” between text and context, between performance and invention.

Next, Goffman notes that access to both regions “is controlled in order to prevent the audience from seeing backstage” where the “secrets that could give the show away are shared and kept.” The control of these secrets appears to depend upon appropriately securing access to the backstage region, whether through deceptive or honest practices.²⁵ The maintenance of those secrets is necessary, according to Goffman, in order that the “audience can be held in a state of mystification in regard to the performer.”²⁶ A properly mystified audience allows “the performer some elbow room in building up an impression of his [sic] own choice and allows him to function, for his own good or the audience’s, as a protection or a threat that close inspection would destroy.”²⁷ In any front stage interaction, then, some degree of mystification, or perceptive distance between performer and audience, is desirable—whether for the performer, the audience, or both. The

performance is also thus made fragile, and should be designed to foreclose or deter close inspection, which is a harbinger of its failure.

For this principle, Goffman draws heavily from Burke's notion of mystification. In *A Rhetoric of Motives*, Burke suggests that "there is always the possibility of mystification, in the sense that language can always be used to deceive," adding that "rhetorical analysis should always be ready to expose mystifications of this simple but ubiquitous sort."²⁸ In the dramaturgical perspective, mystification is not only possibly a form of linguistic deception, but also a spatial metaphor that allows critics to account for the "distance" sought or created by the actor and/or their audience. In this sense, dramaturgical mystification resembles something more than "simple and ubiquitous." That is, where Burke ties mystification to common practice, Goffman suggests that mystification is necessary and/or desirable as common experience, so that the audience may suspend their disbelief and buy into the performance, for good or ill.

Mystification was the *modus operandi* of the Bush administration's rhetoric in the war on terror. Through tactics like legalese, signing statements, redaction, and stonewalling, the Bush administration rhetorically suppressed from public view its policies on enhanced interrogation, enemy combatant detention, warrantless wiretapping, and others.²⁹ One way to do as Burke suggested, to properly demystify the historical record via rhetorical analysis, is to locate and critique some of the Bush team's "secrets," discussed here later as found in the opinions of the OLC and as subsequently suppressed in President Bush's rhetoric.

Finally, Goffman suggests that "Among members of the team we find that familiarity prevails, solidarity is likely to develop, and that secrets that could give the show away are

shared and kept.” Here, the concept of a team operating behind and for the performance is key. For Goffman, a “team” is “any set of individuals who co-operate in staging a single routine.”³⁰ Among the team, camaraderie may develop, founded on a common interest in keeping the audience appropriately at a distance and the secrets of the show safe. This shared sense of purpose resembles an ideological orientation, or a unifying set of principles or perspectives that would guide the team in crafting its performances. In turn, observing those performances may yield for critics what Edwin Black called stylistic “tokens” indicating or providing clues to the shared ideological orientation of both front stage actor and backstage team members.³¹ For the Bush White House-OLC team, the terms “harbor,” “unlawful combatant,” and “enhanced interrogation” became important ideological markers useful for the crafting of policy rhetoric in the war on terror. For critics, the presence of those terms in front stage performances provides important clues to the dramaturgic dynamics of backstage co-invention.

With this final principle of frontstage-backstage architecture the implications of the dramaturgical perspective for the OLC-White House co-inventional relationship manifest most clearly. The Bush White House-OLC team clearly exhibited a shared sense of purpose and intimate cooperation, both in concealing and controlling its secrets. Many of the opinions authored in the early months of the war on terror remain classified, and most of those available were only obtained as a result of Freedom of Information Act requests.³² Under the Obama administration, some of the more troubling memos were released voluntarily. Under Bush, however, the bulk of the OLC’s backstage justifications for front stage action were tightly guarded and kept secret.

Goffman noted of the team's inventional situation that "we commonly find that the definition of the situation projected by a particular participant is an integral part of a projection that is fostered and sustained by the intimate co-operation of more than one participant."³³ In terms of the Bush White House-OLC co-inventional relationship, the definition of the situation most often projected from front stage. OLC opinions were thus backstage responses called for by front stage performances, and offered justification for the definition of the situation offered thereof. And in a very real sense, neither performance region could exist without the other—backstage and frontstage are, in fact, co-constitutive elements of the site of invention. According to law scholar David Cole, "on every question, no matter how much the law had to be stretched, OLC lawyers reached the same results"—affirmation of the President's desired policies.³⁴ That is, what the White House asked for, the OLC opinions provided in kind. But this sharing of purpose was not unique the Bush-OLC team. As shown last chapter, presidents have long been able to depend on OLC opinions as the groundwork for enacting desired policies. According to former OLC-head Jack Goldsmith, each OLC will have a kind of "philosophical attunement" to "the basic assumptions, outlook, and goals of top administration officials."³⁵ This was one of what Goldsmith called the "powerful cultural norms" that remained constant throughout the changing in composition of respective president's OLCs.³⁶ Under President Bush, the OLC was more closely attuned to the philosophical and ideological ambitions of the White House than it had ever been. In what follows I account for this close philosophical attunement between the Bush White House and its OLC through tracing the co-invention of key terms in the early months of the war on terror.

Co-Inventing “Harbor”

When President Bush promised in his September 11, 2001, evening address to retaliate against the terrorists and those who would “harbor” them, he set in motion one of the more significant rhetorical thematics of his presidency. This was a thematic of strategic vagueness, of broad, sweeping terms applied with little regard to established denotative boundaries. Whereas the dramatic theme of prophetic dualism attempted to establish clear lines of distinction between ally and enemy, this thematic blurred those lines, establishing through opaque terminology a liberal set of standards by which the United States could implement otherwise difficult policies in the war on terror. But the rhetorical potential of this thematic was not fully realized “front stage,” in Mr. Bush’s public remarks or addresses. Indeed, as shown below, the success of the performance depended on assistance from “backstage,” through the invention of authoritative legal arguments rendered as secret OLC opinions.

Much as President Kennedy’s coining of the term “quarantine” to frame the American military response to the Cuban Missile Crisis became a defining point in the history of American foreign policy rhetoric, President Bush’s use of the word “harbor” to describe the United States’ military aspirations following 9/11 also became an important rhetorical marker in post-9/11 policy rhetoric. Also like John F. Kennedy’s “quarantine” policy, George W. Bush’s anti-harboring stance required the authoritative legal support provided for in OLC opinions. Both presidents relied upon the lawyers in the OLC for arguments that would function as rhetorical buttresses for desired policies. Yet for all their apparent similarities, the actual rhetorical functions of each term could not be more disparate: where “quarantine” was the rhetorical embodiment of a clear-cut policy of Soviet

containment, “harbor” became the metaphorical touchstone of a policy without definite boundaries for enforcement. One might be inclined to attribute this disparity to the differences in rhetorical enemy—the Soviets wore uniforms, were organized militarily, belonged to a sovereign nation; while al Qaeda operatives were less susceptible to easy identification, and thus, impossible to “quarantine.” But such a conclusion does not go far enough in terms of metaphorical unpacking. That is, as rhetorical response to the specter of international warfare, the “quarantine” metaphor sought to close off the infectious disease of war, while the vagueness of “harbor” opened up the possibility of war with any of the myriad possible ports within which al Qaeda found refuge.

First drafted into a speech only hours after the attacks on New York and Washington, and first uttered later that evening, the term “harbor” was embraced and evolved through use in several different fora the days and weeks that followed. Below, that term is defined, then traced throughout its subsequent uses in: (1) a joint-resolution of Congress passed on September 14, as well as President Bush’s comments on the resolution; (2) President Bush’s September 15 remarks to the press; (3) Vice President Dick Cheney’s comments on *Meet the Press* on September 16; (4) President Bush’s speech on September 20; (5) an OLC opinion on the president’s war powers; and (6) the President’s “with us or against us” remarks at a press conference in France. Through these six separate rhetorical performances the definition of harbor alternately expanded, contracted, and expanded again to become an important thematic in the rhetorical history of the Bush presidency.

Defining “Harbor”

As Donovan Conley notes, the verb form of “harbor” inheres a number of different meanings, including “to give shelter or refuge to,” but also “to entertain within the breast; to cherish privately; to indulge.”³⁷ Of the latter meaning, Conley suggests that “To harbor in this respect is to merely sympathize, yet it was this far vaguer sense of harbor that President Bush was invoking from the start. He was, in essence, rhetorically wedging open space—psychological, political, legal, and geopolitical space—for future usage.”³⁸ I would add only that the first definition is itself also vague, also capable of “wedging open” rhetorical space. Absent contextual information, “to give shelter or refuge to” may be a fitting description of humanitarian efforts as much as of supporting terrorists, underscoring the difficulty of defining “terrorism” or “terrorist” in a war against terror. The range of definition for the term harbor thus seems a meet illustration of the adage, “One man’s terrorist is another’s freedom fighter.” In either iteration, Conley is correct: to define the enemy as any who would “harbor” terrorists is far too vague a criterion to match the gravity of potential international warfare.

When used in a legal context, however, “harbor” takes on more definite meaning. In *Black’s Law Dictionary*, “harboring”—here a noun—carries a single definition: “The act of affording lodging, shelter, or refuge to a person, esp. a criminal or illegal alien.”³⁹ The *Black’s* definition is then supplemented with references to cases in which harboring was prosecuted as a criminal offense. This phrasing is less opaque, less vague than the phrasing in the two other definitions discussed above. Coupled with relevant criminal case references, the *Black’s* definition is certainly clearer about the inadvisability of giving shelter or refuge to “a criminal or alien.” The *Black’s* definition would no doubt

serve as the point of reference for “harboring” for lawyers concerned with legally ratified definitions. In the interest of balanced assessment, then, the *Black’s* definition will henceforth be the assumed reference-point of the Bush White House when it invoked the term in its policy rhetoric. Even granted this allowance, however, the Bush team’s (White House officials and OLC lawyers alike) scope of application for the term seems to far exceed traditional legal understanding of it.

Expanding “Harbor”

On September 14, the United States Congress passed a joint resolution, commonly referred to as the “Authorization to Use Military Force” (AUMF), which authorized the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed [the 9/11 attacks] . . . or harbored such organizations or persons, in order to prevent any further acts of international terrorism against the United States by such nations, organizations or persons.⁴⁰

This resolution granted the President ultimate authority to do whatever he deemed necessary to track down the terrorists responsible for the September 11 attacks, including using force against countries suspected simply of harboring them. The AUMF was thus as close to a blank check for war as could be expected to be issued by the Congress.⁴¹

Yet, parsed with the statements of the President and his team in the weeks following the AUMF’s passing, a nearly-blank check was insufficient for the policy goals of the White House.

Shortly after the AUMF passed on September 14, President Bush issued a statement to the press that read: “I am gratified that the Congress has united so powerfully by taking this action. It sends a clear message—our people are together, and we will prevail.”⁴² Though seemingly benign, Charlie Savage suggests that there is more at work in this statement than immediately apparent. Note, for instance, that the President said he was “gratified” that the Congress sent a “clear message” conveying the unity of the American people in passing the AUMF. Nowhere in the AUMF is the unity of the American people mentioned; nor is there a hint that the President’s gratitude was the desired object of the AUMF. The granting of nearly limitless power to wage war was an act of much graver consequence than the President seemed ready to acknowledge in his statement to the press. Savage notes further, “The wording of this statement was, upon close inspection, curiously vague—why had the White House said ‘taking this action’ rather than given a more specific description of what Congress had done, such as ‘authorized war?’ But few were paying close attention to semantics amid the day’s other dramatic events.”⁴³ Indeed, September 14 was a sufficiently dramatic day, complete with President Bush delivering a bullhorn speech to the aid workers among the the rubble of the Twin Towers. But the drama of the day’s events is not reason enough to set aside the President’s statement on the AUMF as merely distracted or without purpose.

Indeed, upon closer inspection, the vagueness of Mr. Bush’s statement reflects an ambivalence toward the AUMF shared by the whole of the Bush team. Again, Savage provides some insight on the issue:

The president’s men believed that the commander in chief *already* had the power on his own to decide whether to take the country to war over the

attacks, so ‘authorization’ from the legislative branch was at best redundant. They also believed that the War Powers Resolution of 1973, which required presidents to consult with Congress when deploying troops into hostilities, was unconstitutional. And the legal team resented especially key limitations that Congress had placed on the otherwise expansive grant of wartime authority to the president.⁴⁴

Gratitude for the “clear message” sent by Congress notwithstanding, the President and his legal advisors viewed the AUMF as an unconstitutional redundancy; an encroachment on the powers constitutionally granted his office. Fortunately for the Bush team, the rhetorical space that the President had “wedged open” through continued use and expansive definition of the term “harbor” was wide enough to oblige an ad-hoc corrective—in this case, a secret OLC memo.⁴⁵

But the anti-harboring policy still required some elaboration in front stage rhetorical performances. In at least three separate public events between September 15 and September 25, the term evolved in important ways, both contracting and expanding in definitional scope in different contexts. The day after the AUMF passed, for example, President Bush noted in his remarks to the press at Camp David that, “We will not only deal with those who dare attack America; we will deal with those who harbor them and feed them and house them.”⁴⁶ Here, we begin to see the public formation of the President’s definition of harbor: feeding and housing; shelter and refuge. The President reiterated later in the same remarks: “we’re talking about those who fed them, those who house them, those who harbor terrorists will be held accountable for this action.” Feed, house, harbor—again, the three terms are linked with one another. The emerging

definition of harbor thus seems consonant with *Black's*. But in the coming days and weeks this definition would change in important ways.

On September 16, in an interview on *Meet the Press*, Vice President Dick Cheney echoed the President's September 15 comments: "the [P]resident has been very, very clear that to harbor terrorists is to, in effect, accept a certain degree of guilt for the acts that they commit."⁴⁷ Mr. Cheney's qualification, "a certain degree of guilt," was uncharacteristically forgiving. In fact, as President Bush would later suggest, there could be no "degrees" of evil—guilt was either total or none; the world's nations were either "With us or against us." And as Charlie Savage noted of the President's comments on the AUMF's passing, the President was certainly less than "very, very clear" on the establishment of emerging anti-terror policies. Yet the Vice President's qualification remains an important one, insofar as it is a significant waypoint in the rhetorical evolution of the administration's developing thematic of rhetorical vagueness. Almost two months after Mr. Cheney's *Meet the Press* interview, on November 6, 2001, President Bush asserted that the nations of the world would either help the United States in its search for terrorists, or they would be counted as "against" the United States. Mr. Cheney's September 16 use of the qualifying clause "certain degree of guilt" introduced a sort of fine print that complicated the simplistic narrative framework of Good versus Evil. Shades of grey thus emerged in the black-and-white vision of the world that seemed the goal of the Bush team. Whatever clarity there had been to that point on the definition of "harbor" was lost by Cheney's statement. This was, then, as in the September 15 remarks of President Bush, something of a rhetorical gaffe on the part of the Vice President. Indeed, it was the second in a series of three such rhetorical missteps.

The third misstep happened four days after Cheney's *Meet the Press* appearance. In a speech delivered to a joint session of Congress on September 20, around the time that the United States had openly identified Afghanistan as the home country of the terrorists responsible for the 9/11 attacks, President Bush used the terms "harbor or support" virtually interchangeably with the phrase "aiding and abetting." Early in that speech, Mr. Bush said: "we condemn the Taliban regime. (APPLAUSE) It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists." The sponsor and shelter and supply of terrorists (i.e. criminals)—these are offenses that seem to fit with the *Black's* definition of harboring. But in the very next line Mr. Bush equates harboring with aiding and abetting: "By aiding and abetting murder, the Taliban regime is committing murder." This cautionary tone was generalized from the Taliban to the world later in the speech: "From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."

The difference between "harboring" and "aiding and abetting" is significant. The *Black's* definition of "aid and abet" ("aiding and abetting" in verb form) reads: "To assist or facilitate the commission of a crime, or to promote its accomplishment."⁴⁸ To assist in or facilitate a crime is a far cry from simply providing shelter or refuge to a criminal; that is, to harbor a criminal. Indeed, "aid and abet" denotes *direct connection with, and an active participation in, the commission of a crime in media res*, whereas "harbor" denotes an *indirect connection with, and a passive tolerance of*, a crime or criminal, after the crime has been committed. Yet in the September 20 speech Mr. Bush effectively collapsed the multiplicity of terms "sponsoring," "sheltering," "supplying," "support,"

“aiding and abetting” under the single heading “harboring.” Such a move imbued the definition of harbor, which itself refers to the passive assistance of criminals, with a more aggressively criminal connotation. Thus, by using “aid and abet” interchangeably with “harbor,” President Bush effectively equated guilty passivity with criminal aggression.

Perhaps this gradual conflation of terms was unintentional. The precise legal definitions of “harbor” and “aid and abet” may have been unimportant to President Bush and his speechwriters in drafting the September 20 speech. The process of setting out the anti-harboring policy may have been as a rhetorical snowball, an incipient idea taking into its composition any relatively like term that came in its path. Intentional or not, an OLC memo authored five days later did the legal spade work required to support the collapsed terminology. This OLC opinion co-invented a policy that the President had put forth as rhetorical *topoi* through what Goffman might call front stage improvisation in the days preceding. The script was, essentially, written in response to the performance.

Totalizing “Harbor”

To summarize the historical record provided thus far: the President first used the term “harbor” as a sweeping qualifier for enemy states in an address delivered on the evening of 9/11. Three days later, harbor was also used in the AUMF as a qualifying condition of potential enemy states. But President Bush’s remarks on the AUMF reflected his team’s opinion that the resolution not only encroached on the president’s powers, but was constitutionally redundant. In the days following the AUMF’s passing, the President and Vice President both made definite rhetorical blunders, alternately contracting or expanding its definition through conflation or qualification. And these

missteps played out on front stage. From Goffman's dramaturgic perspective, one might ask: where was the script here?

One possible answer would be that the President and Vice President deliberately sought to enact such confusion as a method of strategic ambiguity. This possibility speaks to Goffman's notion of mystification as the purposeful creation of distance between the performance and its audience. In this case, the President and Vice President may have sought to create distance between the *Black's* definition and their special interpretation of the term harbor. However, the improvised nature of their comments in remarks to the press and in a televised interview, respectively, suggests that a deliberate, unified, and conscious enactment of mystification was unlikely.

A second and more likely possibility, then, is that the performances observed in these cases were not appropriately scripted. On at least two occasions—President Bush's remarks at Camp David and Dick Cheney's comments on *Meet the Press*—there were no speechwriters involved. In both of these cases, rhetorical missteps happened. In both of these cases, the words were (at least somewhat) improvised. There was no shared definition of "harbor" yet because its special meaning for the Bush team had not yet been officially codified. But this second possibility does not explain the President's conflating "aid and abet" with "harbor" in his September 20 speech, nor does it excuse his written comments on the AUMF on September 14. It would seem, then, that the confusion of terms was the result of a combination of these two possibilities: the Bush team sought to foster ambiguity or mystify, whether through scripted or improvised rhetorical performances, or both. But in order that the anti-harbor policy be implemented, an authoritative document would need to be invented to supersede the AUMF. That is, the

Bush team’s alternately snowballing and contracting definition of harbor required codification in order that it not lose its meaning altogether. This codified document would need to do double-duty, functioning both retroactively as support for the administration’s prior comments, and proactively as precedent for future actions.

As with the evolution of “quarantine” under President Kennedy, the anti-harboring policy required elaboration and principled legal support in order that it become a credible reference-point for official United States foreign policy. It is useful here to recall Baker’s assertion, cited in the previous chapter in the section on Kennedy’s presidency, that “It was John Kennedy who characterized [the visit and search policy] as a ‘quarantine,’ which [then-OLC-head Norbert] Schlei considered a ‘startlingly important contribution because that word conveyed to the whole world . . . what was happening.’”⁴⁹ In that instance, the President invented a term that aptly summarized the designs of the 1963 OLC opinion, which in turn had “devised [or invented] the basis for the quarantine during the Cuban Missile Crisis.”⁵⁰ On September 25, 2001, the Bush OLC was similarly inspired by the word choice of its president, issuing a memo that contained no fewer than 10 iterations of “harbor.”⁵¹ With each iteration the scope of harbor was broadened, ultimately applying to any terror-harboring state, “whether or not they can be linked to the specific terrorist incidents of September 11.”⁵²

The September 25 opinion begins, as most OLC opinions do, with a summary of the question asked the Office—otherwise readable as the *topoi* set out by the White House: “You have asked for our opinion as to the scope of the President’s authority to take military action in response to the terrorist attacks on the United States on September 11, 2001.”⁵³ The paragraphs constructed thereafter attempt to provide an answer to this

straightforward but important question. In the discursive history of the OLC, the formal structure of the September 25 OLC opinion is rather unremarkable. Excepting certain editorial memos authored for the sake of historical record, most OLC opinions begin by re-stating the question asked the Office (i.e., acknowledging the desired line of argument), and then proceed with legal analysis. Neither is the length of the opinion particularly noteworthy in comparison with past OLC memos. What makes this opinion exceptional, then, has little to do with its formal character. What matters instead are the contextual factors prompting the opinion's invention and the arguments contained therein. What matters is the political setting of the performance. Put simply, this opinion was an alternative response to a question that had already been answered by Congress in the September 14 AUMF, which granted the President nearly unlimited authority to use military force abroad in the hunting of terrorists.

Unlike in President Bush's September 20 speech, where "aid and abet" and "harbor" were used interchangeably, the September 25 OLC opinion used only the term "harbor." As noted above, the term is used in the opinion ten times. Of the ten, the first and second uses are the most important, and are located early on in the preview of the opinion's findings:

[t]he President has the constitutional power not only to retaliate against any person, organization, or State suspected of involvement in terrorist attacks on the United States, but also against foreign States suspected of harboring or supporting such organizations. Finally, the President may deploy military force preemptively against terrorist organizations or the

States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.⁵⁴

As a preview, this portion of the memo summarizes the findings of the in-depth legal analysis that follows. The central claims of the whole opinion are here given, and the focal importance of the term harbor in those claims is clear. As figured by the OLC, the anti-harboring policy may be applied broadly to describe any States that support terrorists, regardless of whether they were involved in the September 11 attacks, and regardless of whether they actually aided and abetted or facilitated the crimes of those terrorists. Any state—not simply those who sponsored the terrorists responsible for 9/11—could thus be subject to United States military retaliation. This view matches well with the expansive definition of “harbor” granted by the President’s collapsing of terms in his September 20 speech. It also speaks to the advantage of adopting “harbor” over “aid and abet”: harbor requires far less evidence of direct criminal involvement with terrorists than would the latter term. The memo concludes:

it should be noted here that the Joint Resolution [AUMF] is somewhat narrower than the President's constitutional authority. The Joint Resolution's authorization to use force is limited only to those individuals, groups, or states that planned, authorized, committed, or aided the attacks, and those nations that harbored them. It does not, therefore, reach other terrorist individuals, groups, or states, which cannot be determined to have links to the September 11 attacks. Nonetheless, the President's broad constitutional power to use military force to defend the Nation, recognized by the Joint Resolution itself, would allow the President to take whatever

actions he deems appropriate to pre-empt or respond to terrorist threats from new quarters.⁵⁵

Here, the OLC finding runs parallel with the language of the AUMF, beginning with direct terrorist action and moving seamlessly to include also any nation that would harbor the terrorists involved in 9/11. But the OLC also—in support of the White House’s *topoi* and in line with the team’s expansive view of the president’s authority—broadens the anti-harboring policy from states who had sheltered the terrorists involved in 9/11, to *any nation in the world that could be considered to have “harbored” any terrorist, even in “new quarters.”* Without temporal anchor or geographical reference, the “new quarters” clause both solidified and complemented the expanded definition of harbor, by embracing the meanings invoked front stage and forwarding for the first time in official executive communication the possibility of military retaliation against any nation that might be said to have harbored, or merely sympathized with, terrorists, at any time, in any place.

At this point it is clear that Bush team’s definition of “harbor” was so expansive as to be irreconcilable with the *Black’s* definition. Framed through the language of the official OLC opinion on the president’s war powers, criminality—in the sense that a criminal is one who *actually commits a crime against someone for whom the standard of criminal law is applicable*—would no longer be a prerequisite for United States military retaliation in the war on terror. In fact, any deference to the notions of the “burden of proof” or “due process” evaporated as already vague qualifications for enemy nations accreted further vagaries in the OLC opinion. The President now had his blank check for totalized war. Thus, when Mr. Bush declared on November 6, 2001, that “You’re either with us or against us in the war on terror,” he enacted confidently on front stage the script for war

co-invented by the White House and its OLC.⁵⁶ With “harbor” now firmly in place as the vague rhetorical foundation of the war on terror, the White House-OLC team next set to the task of codifying similarly broad policies governing the detention and interrogation of vaguely defined enemies.

Co-Inventing “Unlawful Combatant” and “Enhanced Interrogation”

The strategy of rhetorical vagary employed by the Bush team’s anti-harboring policy reified the President’s authority to enact war without regard to time, space, and definition. What remained to be done, however, was a corresponding expansion of the legal standards by which the acts committed in that war would be considered lawful. That is, the President needed a second blank check, one that would support a totalized pursuit of enemies in the war on terror without fear of broaching the boundaries of international treaties and domestic law. The wedge-work of harbor did much to facilitate this second act of rhetorical expansion. Two new terms—“unlawful combatant” and “enhanced interrogation”—evolved out of and fit well within the wide rhetorical berth established by harbor. Like harbor, these terms would come to embody certain policies of the White House in the war on terror—namely, the pre-emptive exoneration of the United States for violation of international treaties, most notably the Geneva Conventions. Again, the policy rhetoric undergirding both terms would be co-invented by the Bush administration and its OLC. Again, both terms were expansive in definition and surreptitious in application. Though comprehensive study of the evolution of these terms would no doubt provide useful critical insights into the OLC-White House co-inventive relationship, limited space precludes full exposition of their adjoined rhetorical histories here. Instead,

I briefly trace below their development as the logical rhetorical progressions of the Bush team's thematic of mystification in the war on terror.

With the White House-OLC co-invention of broad grounds for military retaliation against terrorists and their sympathizers came the logical need to codify the guidelines for the detention and trial of those captured. From the start, however, the classification of enemies in the war on terror was problematic for the White House. Because no *official* declaration of war was made, there could be no “prisoners of war” in the “war” on terror. This paradox presented the Bush team with a unique set of legal issues, namely the standards by which those detained in the war on terror should be tried and held. These legal stumbling blocks and others prompted the President to again consult his OLC for clarification in the form of an authoritative legal opinion. Accordingly, on November 6, 2001—about six weeks after the September 25 OLC opinion—OLC-Head Patrick F. Philbin sketched out the arguments that would both found and support the Bush team's special front stage rhetorics of “unlawful combatants” and “enhanced interrogation” in the war on terror.⁵⁷

The November 6 memo opens generically, re-stating the topic offered the Office by the President: “You have asked us to consider whether terrorists captured in connection with the attacks of September 11 or in connection with ongoing U.S. operations in response to those attacks could be subject to trial before a military court.”⁵⁸ Here, as with “harbor,” Mr. Bush directed the OLC to the desired topic of his front stage team. Indeed, by specifically asking to use military tribunals for the trial of those detained in the war on terror, rather than asking *how the administration should proceed* in the trial and detention of alleged terrorists (including alternative methods such as courts-martial

or other criminal procedures), the President suggested a particular line of argument for OLC lawyers in authoring the resulting opinion. These are the mechanics of the White House-OLC co-inventional relationship on full display. At the point of invention, the President identified a line of argument, or *topos*, which in turn guided the fact-finding and hermeneutical activities of the OLC lawyers in writing the corresponding opinion. When completed, the President could then use the opinion as a source for justification in future policy-related addresses. It serves here to remember that the purported function of the OLC is not simply to affirm the President's wishes, or to interpret each legal question to the President's advantage. Though subject to certain cultural norms, OLC lawyers are ostensibly always "free" to conduct their legal interpretations in objective fashion. And though oppositional findings might stoke in OLC lawyers some fear of job security, the Office has never been under contractual obligation to fulfill a given president's policy wish-list. Instead, a shared ideological orientation of the OLC with the President permitted the OLC to adopt and expound on the *topoi* provided by the President.

The memo responded to the topic in by-then predictable fashion: "a declaration of war is not required to create a state of war or to subject persons to the laws of war, nor is it required that the United States be engaged in armed conflict with another nation. The terrorists' actions in this case are sufficient to create a state of war *de facto* that allows application of the laws of war."⁵⁹ But because this *de facto* war was "new" and presented a set of problems unanswered for by the Geneva Conventions of 1949, the business of enemy trial and detention was neither beholden to the Convention's proscriptions nor to domestic War Crimes law. In the section of the memo addressing directly the use of military commissions, Philbin recapitulates:

We stress at the outset that determining that the terrorist attacks can be treated under the rubric of the ‘laws of war’ does *not* mean that terrorists will receive the protections of the Geneva Conventions or the rights that the laws of war accord to lawful combatants. To the contrary . . . persons who do not comply with the conditions prescribed for recognition as lawful combatants (which include wearing a fixed insignia and bearing arms openly) are not entitled to status as prisoners of war and may be punished for hostile acts in violation of the laws of armed conflict. [emphasis in original]⁶⁰

Because the terrorists were not outfitted in the conventional regalia of modern warfare and hid their weapons (indeed, unlike those for which President Kennedy sought a “quarantine”), they were to be considered as something less than prisoners of war, as “unlawful combatants.” This term was not new. It derived from a 1942 Supreme Court decision, known as *Ex Parte Quirin*. In that decision, the Supreme Court determined lawful the use of military commissions as the method of trial for German spies, named then as “unlawful combatants,” captured in the United States.⁶¹ What was novel, then, about the use of “unlawful combatants” as a descriptor for non-uniformed, illegal combatants in the war on terror was the exemption from international treaty afforded by use of the term. The Geneva Conventions had not yet even been invented in 1942, and thus would not have applied to the captured German spies. In World War II, there were few internationally recognized guidelines for the humane treatment of prisoners. In the war on terror, however, those proscriptions *did exist*, but would not be extended to “unlawful combatants” who, by the OLC’s definition, could be denied the rights of trial and standards of detention afforded prisoners of war by the Geneva Conventions and other international treaties.

In the weeks and months that followed the November 7 OLC opinion, three related iterations of the term were used to describe those detained by the United States in the war on terror. Secretary of Defense Donald Rumsfeld alternately labeled those detained as “enemy combatants,” “unlawful combatants,” and “unlawful enemy combatants.”⁶² In an executive order issued February 7, 2002, President Bush used the OLC’s terminology to refer to them as “unlawful combatants.”⁶³ In each case, the distinction between the term in play and the alternate term “prisoner of war” was important, as the former broadened the scope of the President’s power to both detain and interrogate alleged terrorists in captivity. Where the September 25 opinion allowed the President significant authority to engage the enemy—wherever such a burden might lead to—the November 6 OLC opinion provided the means by which those enemies could be imprisoned and tried by the United States. And these means far exceeded those applied to prisoners of war. As legal scholar Allison M. Danner notes, unlawful combatant is a term “whose plasticity renders it unhelpful as a tool for legal regulation and whose indeterminacy vests vast discretion in the Executive.”⁶⁴ But it was this very sense of plasticity that the Bush team sought for its continued thematic of rhetorical vagueness.

Given the OLC’s finding that captives in the war on terror were “unlawful combatants,” and thus not subject to international proscriptions against the harmful treatment of prisoners of war, it is perhaps unsurprising that a third sweepingly vague term—“enhanced interrogation”—should have developed. The script in play front stage (co-invented as it was between the White House and its OLC) allowed for liberal interpretation of the qualifications for enemy states which, in turn, may have sympathized with specific individuals, thereafter identified as “unlawful combatants.” That the legal

boundaries for interrogation of those individuals should have also been liberally delimited was a logical third step in the progression of the Bush administration's post-9/11 strategy of rhetorical vagueness. In point of fact, the blueprints for the deliberate ambiguity of "enhanced interrogation" were, in large part, laid out in memos authored in the months immediately following 9/11.

As early as October 11, 2001, some in the United States military had called for expansion of the set of techniques available for interrogating suspects in the war on terror.⁶⁵ By designating detainees as "unlawful combatants," the November 6 memo opened up space for reconfiguring the legal boundaries of detainee trial and treatment. Succeeding OLC opinions would, in consort with official White House communications, bolster that finding. For example, an opinion authored January 9, 2002, found that international treaties did not apply to members of al Qaeda or the Taliban.⁶⁶ A January 22 OLC opinion echoed those findings, but provided further evidence that detainees did not qualify for the protections of international treaties or domestic law.⁶⁷ After some pushback on the decision to exempt detainees from Geneva protections by Secretary of State Colin Powell, White House Counsel Alberto Gonzales supported the OLC's findings and refuted Mr. Powell's arguments in a memo to the President authored on January 25.⁶⁸ On February 7, the President issued an executive order saying:

Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva

does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.⁶⁹

Though this statement was followed in the Order by a note on the President's desire to treat "unlawful combatants" in a humane manner, later OLC findings and statements by the Bush team suggest that the President held no such reservations.

On August 1, 2002, two OLC memos were issued, each justifying and outlining the details of the boundaries of the United States' interrogation of unlawful combatants. The text of the first opinion was "leaked" to the press in 2004; the second was not released to the public until early in 2009 by the Obama administration.⁷⁰ Both were guarded as close secrets of the administration, and both were published through non-administrative channels. In them were described the techniques of "enhanced interrogation," a program of coercive information-getting including such techniques as waterboarding, walling, and insects-in-a-box, among others.⁷¹ Four years after they were written, in his September 6, 2006 address, President Bush implicitly cited the arguments laid out in these memos as the basis for the legality of the United States' interrogation program.

The character of "enhanced interrogation" techniques as either torture or not was a source of considerable political dispute during Mr. Bush's tenure, and has continued as a sore spot in the Obama presidency. Many of the techniques outlined in the August, 2002, OLC opinions had historically been counted illegal in the United States' legal system, and international humanitarian groups widely condemned as torture the tactics permitted by the policy of enhanced interrogation. Given the co-expansive progression of the President's war powers and the definitions of the terms employed to grant him those

powers, however, the use of controversial techniques to extract information from “unlawful combatants” was perfectly, if perversely, logical. With power now to pursue terrorists all over the world, to detain them indefinitely, and to interrogate them without legal reservation, the Bush team, in co-inventive effort with its OLC, had secured their interpretation of presidential power.

Conclusion

Through tracing key terms in the rhetorical history of the Bush team following the events of 9/11, this chapter has demonstrated that the coining of “enhanced interrogation” and its corollary expansion of the legal parameters of the president’s war powers was the third step in a logical progression of rhetorical expansion stemming from first use of the word “harbor.” This expansive effort was executed through the co-inventive relationship of the Bush White House and its OLC. In each step, the OLC’s backstage refinement of vague definitions for key policy terms allowed the President and his front stage team a wide berth of rhetorical space within which they could perform their desired policies. This rhetorical history of the second Bush presidency confirms David Cole’s assertion that, in every instance, the OLC facilitated—that is, co-invented—the arguments backing the expansion of the president’s war powers.

Though this chapter has attempted to account for the more critically salient aspects of the White House-OLC relationship, it is by no means exhaustive in its scope. There remain several important issues in that relationship that call for critical de-mystification, or corrective historical analysis—issues too broad in scope and number to be fully considered here. As noted throughout these chapters, for example, the OLC applied a

particular hermeneutical framework to the Constitution and United States laws. That hermeneutical framework calls for closer attention. Through it, and in every instance, the OLC interpreted the Constitution and United States law in such a way as to forward an expansive view of presidential power that far exceeded historical precedent. As historian Gary Wills notes, such an expansion is problematic as it begets only further expansion *ad infinitum*, or at least until the executive loses its exclusive power to commit the nation to nuclear warfare.⁷²

Another study of the White House-OLC relationship might focus on the “cultural norms” that guide the OLC’s opinion-writing duties. Here, the classical rhetorical concept of *nomos* would seem particularly relevant. Another study might view the co-inventional relationship in terms of its impact on the health of American democratic deliberation. Still others might investigate OLC legal opinions as an important genre of executive branch rhetoric. The list of possible further studies could go on, and for each study, a myriad critical perspectives might be relevant. What I hope these chapters have offered are detailed historical insights on the White-House-OLC co-inventional relationship that provide additional in-roads to the study of how executive branch rhetoric takes fashion. As executive agencies go, critics of the modern presidency must not underestimate or ignore the significant power of the OLC to (re)interpret the Constitution and thus the boundaries of presidential power.

Notes

¹ Jack Goldsmith, *The Terror Presidency* (New York: W. W. Norton and Company, 2007), 9.

² Mark Danner, "US Torture: Voices from the Black Sites," *The New York Review of Books*, April 9, 2009, <http://www.nybooks.com/articles/22530>.

³ Philip Wander, "The Rhetoric of American Foreign Policy," *Quarterly Journal of Speech* 70, no. 4 (1984), 339-361.

⁴ "AFTER THE ATTACKS; Enormous TV Audience Peaks with Bush Talk," *NYTimes.com*, September 13, 2001, <http://www.nytimes.com/2001/09/13/us/after-the-attacks-enormous-tv-audience-peaked-with-bush-talk.html?scp=1&sq=tv+news+ratings&st=nyt>.

⁵ Jason Deans, "16m glued to news as tragedy unfolds," *Guardian.co.uk*, September 12, 2001, <http://www.guardian.co.uk/media/2001/sep/12/overnights.september112001>.

⁶ "From Nixon to Bush 43: Presidential Inauguration Ratings," *Nielsenwire*, January 16, 2009, http://blog.nielsen.com/nielsenwire/media_entertainment/from-nixon-to-bush-43-presidential-inauguration-ratings/

⁷ Bob Woodward, *Bush at War* (New York: Simon & Schuster, 2002), 30.

⁸ "Text of Bush's Address," *CNN.com*, September 11, 2001, <http://archives.cnn.com/2001/US/09/11/bush.speech.text/>.

⁹ Woodward, *Bush at War*, 30.

¹⁰ In Woodward, *Bush at War*, 30.

¹¹ There are numerous studies on President Bush's rhetoric of good and evil. Some of the most comprehensive are found in Robert L. Ivie, "Fighting Terror By Rite of Redemption and Reconciliation," *Rhetoric & Public Affairs* 10, no. 2 (2007), 221-248; Robert L. Ivie and Oscar Giner, "Hunting the Devil: Democracy's Rhetorical Impulse to War," *Presidential Studies Quarterly* 37, no. 4 (2007), 580-598; Robert L. Ivie, "Finessing the Demonology of War: Toward a Practical Aesthetic of Humanising Dissent," *Javnost- The Public* 14, no. 4 (2007), 37-54; Robert L. Ivie, *Democracy and America's War on Terror* (Tuscaloosa: University of Alabama Press, 2005); Christina M. Smith and George N. Dionisopoulos, "The Abu Ghraib Images: "Breaks" in a Dichotomous Frame," *Western*

Journal of Communication 72, no. 3 (2008), 308-328; and Christian Spielvogel, “‘You Know Where I Stand’: Moral Framing of the War on Terrorism and the Iraq War in the 2004 Presidential Campaign,” *Rhetoric & Public Affairs* 8, no. 4 (2005), 549-569.

¹² T. R. Young, *The Drama of Social Life: Essays in Post-Modern Social Psychology* (New Brunswick, NJ: Transaction Publishers, 1990), 10.

¹³ Kenneth Burke, *A Grammar of Motives* (Berkeley: University of California Press, 1969), xv.

¹⁴ Burke, *A Grammar of Motives*, xviii-xix.

¹⁵ T. R. Young, *The Drama of Social Life*, 9.

¹⁶ Dennis Brissett and Charles Edgley, “The Dramaturgical Perspective,” in *Life as Theater: A Dramaturgical Sourcebook*, edited by Dennis Brissett and Charles Edgley (New York: Aldine de Gruyter, 1990), 3.

¹⁷ Erving Goffman, *The Presentation of Self in Everyday Life* (New York: Anchor Books, 1959), 239.

¹⁸ Goffman, *The Presentation of Self in Everyday Life*, 238.

¹⁹ Bruce Gronbeck, “Dramaturgical Theory and Criticism,” *Western Journal of Communication* 44, no. 4 (1980), 315; For an example of dramaturgy’s application to media, see P. K. Manning, “Dramaturgy, Politics and the Axial Media Event,” *The Sociological Quarterly* 37, no. 2 (1996), 261-278; For an explicitly macro-social proposal for dramaturgy, see T. R. Young and Garth Massey, “The Dramaturgical Society: A Macro-Analytic Approach to Dramaturgical Analysis,” *Qualitative Sociology* 1, no. 2 (1978), 189-207; and for an expansion of the dramaturgical approach to the global stage, see Frank Schimmelfennig, “Goffman Meets IR: Dramaturgical Action in International Community,” *International Review of Sociology* 12, no. 3 (2002), 417-437.

²⁰ Gary C. Woodward, *Center Stage* (Boulder, CO: Rowman & Littlefield Publishers, Inc., 2007), 4.

²¹ Brissett and Edgley, “The Dramaturgical Perspective,” 2.

²² Erving Goffman, *The Presentation of Self in Everyday Life* (New York: Anchor Books, 1959), 238.

- ²³ Erving Goffman, *Frame Analysis* (Boston: Northeastern Press, 1986), 255.
- ²⁴ Goffman, *The Representation of Self in Everyday Life*, 77.
- ²⁵ Goffman, *The Presentation of Self in Everyday Life*, 114.
- ²⁶ Goffman, *The Presentation of Self in Everyday Life*, 67.
- ²⁷ Goffman, *The Presentation of Self in Everyday Life*, 70.
- ²⁸ Kenneth Burke, *A Rhetoric of Motives* (Berkeley: University of California Press, 1969), 178.
- ²⁹ See Donovan Conley and William Saas, "Occultatio: The Bush Administration's Rhetorical War," forthcoming in *Western Journal of Communication* 74, no. 4 (2010).
- ³⁰ Goffman, *The Representation of Self in Everyday Life*, 79.
- ³¹ Edwin Black, "The Second Persona," *Quarterly Journal of Speech* 56, no. 2 (1970), 109-119.
- ³² Most of the Freedom of Information Act requests were made by the American Civil Liberties Union. A compendium of their efforts may be found at ACLU, "Documents Released Under FOIA," <http://www.aclu.org/accountability/released.html>.
- ³³ Goffman, *The Representation of Self in Everyday Life*, 77.
- ³⁴ David Cole, *The Torture Memos* (New York: The New Press, 2009), 4.
- ³⁵ Goldsmith, *The Terror Presidency*, 34.
- ³⁶ Goldsmith, *The Terror Presidency*, 33.
- ³⁷ "Harbor" in *Merriam Webster's Collegiate Dictionary, Tenth Edition* (Springfield, MA: 1998), 529; Donovan Conley, "The Joys of Victimage in George W. Bush's War of Totality," forthcoming in *Cultural Studies ⇔ Critical Methodologies* 9, no. 7 (2010).
- ³⁸ Conley, "The Joys of Victimage"

³⁹ “Harboring” in *Black’s Law Dictionary, Eighth Edition*, edited by Bryan A. Garner (St. Paul, MN: Thomson West, 1999), 733.

⁴⁰ U.S. Congress, “Authorizing Use Of United States Armed Forces Against Those Responsible For Recent Attacks Against the United States,” 107th Congress, 1st sess., September 14, 2001, 2(a).

⁴¹ “Total war” has variously been called for and criticized. For a sampling, see “Total Barbarism Demands Total War,” *NY Daily News*, September 15, 2001, http://www.nydailynews.com/archives/opinions/2001/09/15/2001-09-15_total_barbarism_demands_tota.html; Conley, “Joys of Victimage”

⁴² “Congress Approves Resolution Authorizing Force,” *CNN.com*, September 15, 2001, <http://archives.cnn.com/2001/US/09/14/congress.terrorism/index.html>. Also quoted in Savage, *Takeover*, 120.

⁴³ Savage, *Takeover*, 120.

⁴⁴ Savage, *Takeover*, 120-121.

⁴⁵ The September 25 memo was kept secret for three years. Savage, *Takeover*, 121.

⁴⁶ George W. Bush, “Remarks in a Meeting With the National Security Team and an Exchange With Reporters at Camp David, Maryland,” September 15, 2001, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/index.php?pid=63199&st=&st1=>;

⁴⁷ Richard Cheney, interview by Tim Russert, September 16, 2001, *Meet the Press*, <http://www.emperors-clothes.com/9-11backups/nbcmp.htm>.

⁴⁸ “Aid and abet” in *Black’s Law Dictionary*, 76.

⁴⁹ Baker, *Conflicting Loyalties*, 90.

⁵⁰ Luther A. Huston, *The Department of Justice* (New York: Frederick A. Praeger, 1968): 60.

⁵¹ John Yoo, “The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them,” September 25, 2001, *Justice.gov*, <http://www.justice.gov/olc/warpowers925.htm>.

⁵² John Yoo, “The President’s Constitutional Authority,” 1.

⁵³ In this sense, OLC opinions as “backstage” genre may be viewed as formal answers issued in response to questions from front stage. This means, also, that there is a backstage for the OLC, where arguments are prepared for presentation front stage, to those who solicited the opinion. Lack of space prevents further elaboration in this essay; Yoo, “The President’s Constitutional Authority,” 1.

⁵⁴ Yoo, “The President’s Constitutional Authority,” 1.

⁵⁵ Yoo, “The President’s Constitutional Authority”

⁵⁶ “You are either with us or against us,” *CNN.com*, November 6, 2001, <http://archives.cnn.com/2001/US/11/06/gen.attack.on.terror/>.

⁵⁷ Patrick F. Philbin, “Legality of the Use of Military Commissions to Try Terrorists,” November 6, 2001, <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf>.

⁵⁸ Philbin, “Legality of the Use of Military Commissions to Try Terrorists,” 1.

⁵⁹ Philbin, “Legality of the Use of Military Commissions to Try Terrorists,” 1.

⁶⁰ Philbin, “Legality of the Use of Military Commissions to Try Terrorists,” 36.

⁶¹ *Ex Parte Quirin*, 317 U.S. 1, 87 (1942).

“Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.”

⁶² See *HAMDI V. RUMSFELD* (03-6696) 542 U.S. 507 (2004); Monica Whitlock, “Legal Limbo of Guantanamo’s prisoners,” *BBC News*, May 16, 2003, <http://news.bbc.co.uk/2/hi/americas/3034697.stm>;

⁶³ George W. Bush, “Humane Treatment of Taliban and al Qaeda Detainees,” February 7, 2002, http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

⁶⁴ Allison M. Danner, “Defining Unlawful Enemy Combatants: A Centripetal Story,” *Texas International Law Journal* 43 (Fall 2007), 1-2.

⁶⁵ Jerald Phifer, “Request for Approval of Counter-resistance Strategies,” in *The Iraq Papers*, edited by John Ehrenberg, J. Patrice McSherry, Jose Ramon Sanchez, and Caroleen Marji Sayej (New York: Oxford University Press, 2010), 415-416.

⁶⁶ John Yoo and Robert J. Delahunty, “Application of Treaties and Laws to Al Qaeda and Taliban Detainees,” January 9, 2002, http://upload.wikimedia.org/wikipedia/en/9/91/20020109_Yoo_Delahunty_Geneva_Convention_memo.pdf

⁶⁷ Jay S. Bybee, “Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees,” January 22, 2002, <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>.

⁶⁸ Alberto Gonzales, “Decision Re Application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban,” January 25, 2002, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>.

⁶⁹ Bush, “Humane Treatment of Taliban and al Qaeda Detainees”

⁷⁰ Dana R. Priest and R. Jeffrey Smith, “Memo Offered Justification for Use of Torture,” *Washington Post*, June 8, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>; Mark Mazzetti and Scott Shane, “Interrogation Memos Detail Harsh Tactics by the C.I.A.,” <http://www.nytimes.com/2009/04/17/us/politics/17detain.html>.

⁷¹ Mark Danner, “The Red Cross Torture Report: What it Means,” *NY Review of Books*, April 30, 2009, <http://www.nybooks.com/articles/22614>.

⁷² Gary Wills, *Bomb Power: The Modern Presidency and the National Security State* (New York: Penguin, 2010).

CHAPTER 4

EPILOGUE

At the time of this writing, it is over a year since the George W. Bush administration left office, and the Office of Legal Counsel is still missing its head. Nominated to fill the post of Assistant Attorney General in charge of the OLC in January 2009 was Dawn Johnsen, Indiana University law professor and former OLC lawyer under President Clinton. Approved by the Judiciary Committee in March 2009, her nomination was nullified after nine months of failure in the Senate to render a confirmation vote.¹ The reasons for the stalled nomination seem routine enough: members of the opposition Republican Party believed that Johnsen's previous record on hot-button social issues like abortion risked contaminating the objective mission of the OLC.² She was an ideologue, they suggested, a liberal whose previous opposition to the opinions rendered by the Bush OLC led Senator John Cornryn (R-TX) to dismiss her as a "hardened partisan."³ Echoing the Senator, some in the media opposed her nomination as having the capacity to "politicize" the OLC.⁴ The irony of this statement aside—the OLC was as politicized as it had ever been under the previous administration—Dawn Johnsen had long been a vocal advocate of reforming the OLC to something like what is labeled in chapter 2 of this thesis as a Neutral type following the second Bush presidency. Her platform for OLC reform is best captured in her 2008 testimony before the U.S. Senate Committee on the Judiciary Subcommittee on the Constitution:

[The Bush] OLC has been widely and deservedly criticized for the substance of its legal interpretations, which at least at times have not

reflected principled, accurate assessments of applicable legal constraints, but instead were tainted by the Administration’s desired policy ends and overriding objective of expanding presidential power. In addition, OLC has been terribly wrong to withhold the content of much of its advice from Congress and the public—particularly when advising the executive branch that in essence it could act contrary to federal statutory constraints.⁵

Given these remarks, one can infer that a Johnsen-headed OLC would at least seek to make “principled, accurate assessments of applicable legal constraints,” and disclose “the content of much of its advice” to the Congress and the public. It would seem, in fact, that Johnsen sought to *de*-politicize the OLC as much as possible.

In complement to the definition offered in chapter 1 of invention as a site of often grave ethical consequence, Johnsen’s testimony represents a reflection on the effects of the policies co-invented by the Bush White House and OLC. The primary effect was the creation and keeping from the public a number of what Johnsen called “secret laws,” the opinions that were rhetorical antecedents for, among other things, the use of the waterboard on suspected terrorists. Johnsen again:

recall that it is only because of government leaks that the public first learned—years late—of the Bush administration’s legal opinions and policies on extreme methods of interrogation . . . the government’s domestic surveillance program . . . and the use of secret prisons overseas to detain and interrogate (even waterboard) suspected terrorists. The Bush administration continues to keep secret, without adequate justification,

some important advice on these and other issues, even as Congress continues to struggle to legislate in a vacuum.⁶

Here, Johnsen uses the Bush OLC as an example to champion the value of transparency in OLC opinion-writing, and to underscore the threat of secrecy as a precursor for closing off democratic deliberation. These opinions underwrote policies of serious consequence, and should thus have been subject to—at the least—Congressional review, according to Johnsen.

Given the political extremes of the Bush White House-OLC relationship, and what Johnsen viewed as the negative effects of that relationship, she cautioned that the next administration's OLC should rein in its politics and move toward neutrality and increased transparency. Such an attitude is consistent with the hypothesis offered in chapter 2 of this thesis: that the OLC acts as Advocate-to-the-president until compelled otherwise. Much as Attorney General Griffin Bell's attempts to reform the Department of Justice after the Nixon administration were a reaction to the negative attention drawn to the internal legal procedures of the executive branch after Watergate, Johnsen's call for a return to OLC neutrality signals a more oppositional trend for President Barack Obama's OLC. Since the Reagan presidency, the scope of the OLC's opinion-writing powers have grown with every new administration, with those powers culminating under George W. Bush. Why, then, would the nomination of someone whose ostensible goal is the reform of the Office be so controversial?

The answer, I believe, lies in the special nature of the OLC under President Bush. As demonstrated in chapter 3, the OLC, with the Bush White House, co-invented and cultivated a rhetorical strategy of deliberate vagueness in the rhetoric and policy of the

war on terror. As noted by Johnsen above, the particulars of this strategy were kept secret in classified legal opinions not intended for public distribution. Upon the leak of those memoranda, however, the OLC became—like the DOJ after Watergate—the focal point of loud and virulent criticism, leveled by politicians and media pundits alike. Many called for impeachment of OLC lawyers; others called for the resignation of Secretary of Defense Donald Rumsfeld, with some success; still others suggested those responsible for the policies behind the photos at Abu Ghraib be tried for war crimes.⁷ More recently, however, a five-year Justice Department investigation of the principle authors of the more controversial Bush OLC memos—Jay S. Bybee and John Yoo—ended, exonerating the opinion’s authors of any guilt.⁸ Associate Deputy Attorney General David Margolis’ report on the investigation found that, while “flawed,” the Bush OLC opinions did not violate ethics laws.⁹

Whereas—as related in Chapter 2—Watergate cast a spotlight on the DOJ in general, and thus precipitated a retreat to neutrality in the OLC, the “terror memo” scandal under President George W. Bush drew attention narrowly to the lawyers who were directly responsible for writing the memos. Accordingly, the OLC after the leak of the opinions became a much more high-profile agency than the OLC after Watergate. Further, while the Watergate controversy was eventually resolved with a note of finality, the “terror memo” controversy continues to stoke public criticism and doubt as to how the United States conducts its military affairs in the war on terror. Put differently, the vague policies of the Bush White House-OLC co-inventional relationship seem to have taken on a life of their own. And though the OLC is more recognizable now as an important organ in or

institution of executive policy-making, its opinion-writing function continues to spark curiosity and suspicion in American politics and media.

And so it seems appropriate, given the current state of confusion surrounding the goals and nature of the OLC, and given the OLC's relative and recent high-profile presence in American politics, that there should be some debate regarding the nomination of its next leader. Indeed, though Johnsen seems to desire a return to neutrality consistent with the history of the OLC, her experience as OLC-head during the administration of William Clinton should inspire some pause and reflection. And though this is not the appropriate place for such reflection, it does bear mentioning that Johnsen was the co-author of several Clinton OLC opinions with expansive interpretations of executive power.

Conclusion

Ultimately, Dawn Johnsen's stalled nomination is just one of the lingering institutional effects of the White House-OLC co-inventional relationship under President Bush. To recall the policies co-invented in chapter 3, the United States is now engaged in war with Afghanistan and Iraq, countries argued as having "harbored" terrorists. Those captured in the war on terror were defined as "unlawful combatants," without uniforms and thus without the privilege of war-time detention conventions. Once in custody, they were subject to "enhanced interrogation" methods such as the waterboard, walling, slamming, and prolonged sleep deprivation. These effects were material not only for their happening in the real world, but also for their happening *to real people*. In a very real sense, the co-invented policies held dire consequences for the bodies and minds of those

to whom they were applied. To be sure, the policy co-inventors may have had the best intentions, desiring as they must have in the days following 9/11 a sense of the United States' security against future attacks. But without venturing too far into the realm of political judgment, one might easily argue that other means could have been employed to ensure such security. However, authored as they were "backstage," behind the scenes of the political spectacle of presidential public address, there was never much chance for alternative suggestion. Not even the Congress was privy to the sorts of policies the President suggested the OLC support with special interpretations of extant law. In this way, the White House-OLC relationship under President Bush may be the ultimate case study of co-invention; of collaborative inventive efforts toward shared rhetorical goals, and free of much reflection, deliberation, or conflict.

As a result, the direction of the White House-OLC relationship remains uncertain. Toward understanding why, and as argued in chapter 2, scholars of the presidency would do well to turn their attentions to historicizing the OLC as a crucial piece of the broader policy-making puzzle. Through the rhetorical history provided in this thesis, I have drawn conclusions that may guide such studies, especially with respect to the discursive trends that have over time constituted the OLC as a vital organ of executive policy-making.

In Chapter 2 I showed that, though the White House-OLC relationship came under some scrutiny during the Bush administration, it has, in fact, operated under-the-radar for over seventy years. From the opinion-writing duties of the first attorney general of the United States, to the birth of the OLC under FDR, to the contemporary issues facing the OLC under Barack Obama, the OLC's history is evolutionary, and it is tied intimately with attempts to expand presidential power through in both domestic and foreign policy-

making. Access to the OLC's opinions may be limited, but those that are available nevertheless provide valuable snapshots of the dynamics of executive legal interpretation and the "behind the scenes" co-invention of presidential rhetoric. Once crafted, these policies become the scripts for rhetorics performed "frontstage," by political actors for audiences with severely limited or no access to the inventive origins of those rhetorics. As demonstrated in Chapter 3, this co-inventional relationship—where a member of the White House identifies the inventional topic, for which the OLC interprets and adapts extant law—reached its peak under the Bush administration. Once iterated in the White House's frontstage rhetorics, the definitional wiggle room of the term "harbor" provided space for still further expansive and vague policies, such as "unlawful combatant" and "enhanced interrogation." Some might argue the close reading of those policies is akin to legal hair-splitting. Yet I believe that the close, nearly microscopic history of co-invention provided in Chapter 3 gets to what may rightly be called the heart of the matter: the political consequences of nonreflective and strategically vague rhetorical invention. And as I believe the rhetorical history in this thesis has demonstrated, the White House-OLC relationship far too often falls into that category.

Notes

¹ Ed O’Keefe and Scott Butterworth, “Senate Confirms More Than 30 U.S. Posts, Sends Six Back,” *Washington Post*, December 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/24/AR2009122402793.html>.

² “A Senate Vote For Courtesy,” *Washington Post*, December 23, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/22/AR2009122203142.html?wpisrc=nl_opinions.

³ “Judiciary Panel Clears Johnsen for OLC Post,” *National Journal*, March 19, 2009, <http://lostintransition.nationaljournal.com/2009/03/judiciary-panel-clears-johnsen.php>.

⁴ Andrew McCarthy, “Lawyer’s Lawyer, Radical’s Radical,” March 9, 2009, *National Review*, <http://nrd.nationalreview.com/article/?q=YzcyODUwNjAwNzg3YTYyZjBiOWU3ZTQwZmYzOGIwOGQ=>;

⁵ Dawn E. Johnsen, “Testimony of Dawn E. Johnson Before the U.S. Senate Committee on the Judiciary Subcommittee on the Constitution: ‘Secret Law and the Treat to Democratic and Accountable Government,’” April 30, 2008, *Judiciary.Senate.gov*, http://judiciary.senate.gov/pdf/08-04-30Johnsen_Dawn_testimony.pdf, 1.

⁶ Johnsen, “Testimony,” 1-2.

⁷ “The Torturer’s Manifesto,” *New York Times*, April 18, 2009, <http://www.nytimes.com/2009/04/19/opinion/19sun1.html>; Andrew S. Ross, “Army Times: ‘Time for Rumsfeld to Go,’” *San Francisco Chronicle*, November 3, 2006, http://www.sfchroniclemarketplace.com/cgi-bin/blogs/foreigndesk/detail?blogid=16&entry_id=10582; Adam Zagorin, “Charges Sought Against Rumsfeld Over Prison Abuse,” *Time*, November 10, 2006, <http://www.time.com/time/nation/article/0,8599,1557842,00.html>.

⁸ Eric Lichtblau and Scott Shane, “Report Faults 2 Authors of Bush Terror Memos,” *New York Times*, February 19, 2010, <http://www.nytimes.com/2010/02/20/us/politics/20justice.html>.

⁹ David Margolis, “Memorandum for the Attorney General, The Deputy Attorney General,” *U.S. Department of Justice, Department of the Attorney General*, January 5, 2010,

<http://graphics8.nytimes.com/packages/pdf/politics/20100220JUSTICE/20100220JUSTICE-DAGMargolisMemo.pdf>.

BIBLIOGRAPHY

- “The Abu Ghraib Pictures.” *The New Yorker*. May 3, 2003.
http://www.newyorker.com/archive/2004/05/03/slideshow_040503#slide=1
- “A Senate Vote for Courtesy.” *Washington Post*. December 23, 2009.
http://www.washingtonpost.com/wp-dyn/content/article/2009/12/22/AR2009122203142.html?wpisrc=nl_opinions.
- “AFTER THE ATTACKS; Enormous TV Audience Peaks with Bush Talk.” *The New York Times*. September 13, 2001. <http://www.nytimes.com/2001/09/13/us/after-the-attacks-enormous-tv-audience-peaked-with-bush-talk.html?scp=1&sq=tv+news+ratings&st=nyt>.
- “Congress Approves Resolution Authorizing Force.” *CNN.com*. September 15, 2001.
<http://archives.cnn.com/2001/US/09/14/congress.terrorism/index.html>.
- “Invention” in *Silvae Rhetoricae*. <http://rhetoric.byu.edu/canons/Invention.htm>.
- “Judiciary Panel Clears Johnsen for OLC Post.” *National Journal*. March 19, 2009.
<http://lostintransition.nationaljournal.com/2009/03/judiciary-panel-clears-johnsen.php>.
- “Obama Reverses Promise to Release Torture Photos.” *American Civil Liberties Union*. May 13, 2009. <http://www.aclu.org/national-security/obama-administration-reverses-promise-release-torture-photos>.
- “Text of Bush’s Address,” *CNN.com*. September 11, 2001.
<http://archives.cnn.com/2001/US/09/11/bush.speech.text/>.
- “The Torturer’s Manifesto.” *New York Times*. April 18, 2009.
<http://www.nytimes.com/2009/04/19/opinion/19sun1.html>.
- “Total Barbarism Demands Total War.” *NY Daily News*. September 15, 2001.
http://www.nydailynews.com/archives/opinions/2001/09/15/2001-09-15_total_barbarism_demands_tota.html.
- “U.S. Army Report on Iraqi Prisoner Abuse.” *NBC News*. May 4, 2004.
<http://www.msnbc.msn.com/id/4894001>.
- “You are either with us or against us.” *CNN.com*. November 6, 2001.

<http://archives.cnn.com/2001/US/11/06/gen.attack.on.terror>.

Alito, Jr., Samuel A. "Using Presidential Signing Statements to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law." February 5, 1986. <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>.

Allen, Mike and Dana Priest. "Memo on Torture Draws Focus to Bush." *Washington Post*. June 8, 2004. <http://www.washingtonpost.com/wp-dyn/articles/A26401-2004Jun8.html>.

American Civil Liberties Union. "Documents Released Under FOIA." <http://www.aclu.org/accountability/released.html>.

Aristotle. *The Rhetoric*. Translated by W. Rhys Roberts. New York: McGraw-Hill, 1984. 24.

Baker, Nancy V. *Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789-1990*. Lawrence, KS: University Press of Kansas, 1992.

Barrett, Harold. *Rhetoric and Civility: Human Development, Narcissism, and the Good Audience*. Albany, NY: SUNY Press, 1991. 1.

Bazon, Emily. "From Bagram to Abu Ghraib." *Mother Jones*. March/April 2005. <http://www.motherjones.com/politics/2005/03/bagram-abu-ghraib>.

Bell, Griffin B. "Foreword" in *Opinions of the Office of Legal Counsel, 1977*. Washington, D.C.: Government Printing Office, 1977.

Bell, Griffin B. "Office of Attorney General's Client Relationship." *Business Lawyer* 36 (March 1981). 791-799.

Birdsell, David S. "George W. Bush's Signing Statements: The Assault on Deliberation." *Rhetoric & Public Affairs* 10 (Summer 2007). 335-360.

Black, Edwin. "The Second Persona." *Quarterly Journal of Speech* 56, no. 2 (1970). 109-119.

Black's Law Dictionary, Eighth Edition. Edited by Bryan A. Garner. St. Paul, MN: Thomson West, 1999.

- Bonafede, Dom. “‘Judge’ Bell Presides Over a Changed Justice Department.” *National Journal*. February 10, 1979.
- Brissett, Dennis and Charles Edgley. “The Dramaturgical Perspective,” in *Life as Theater: A Dramaturgical Sourcebook*, edited by Dennis Brissett and Charles Edgley. New York: Aldine de Gruyter, 1990.
- Brownell, Jr., Herbert. “President’s Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas.” In *Official Opinions of the Attorney General of the United States, 1949-1960*. Washington, D.C.: Government Printing Office, 1968.
- Burke, Kenneth. *A Grammar of Motives*. Berkeley: University of California Press, 1969.
- Burke, Kenneth. *A Rhetoric of Motives*. Berkeley: University of California Press, 1969.
- Burlas, Joe. “Taguba Faults Leadership for Iraqi Detainee Abuse.” *Army News Service*. May 12, 2004. http://www.au.af.mil/au/awc/awcgate/army/052704_taguba.htm.
- Bush, George W. “Humane Treatment of Taliban and al Qaeda Detainees.” *Pegc.us*. February 7, 2002. http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.
- Bush, George W. “Remarks in a Meeting with the National Security Team and an Exchange with Reporters at Camp David, Maryland.” *The American Presidency Project*. September 15, 2001. <http://www.presidency.ucsb.edu/ws/index.php?pid=63199&st=&st1=>;
- Bush, George W. “Remarks on the War on Terror.” *United States Government Printing Office*. September 6, 2006. <http://www.gpo.gov/fdsys/pkg/WCPD-2006-09-11/pdf/WCPD-2006-09-11-Pg1569-2.pdf>.
- Bybee, Jay S. “Memorandum for Alberto R. Gonzales Counsel to the President.” *Findlaw.com*. August 1, 2002. news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf.
- Bybee, Jay S. “Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees.” January 9, 2002. <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>.

- Campbell, Karlyn Kohrs, and Kathleen Hall Jamieson. *Presidents Creating the Presidency: Deeds Done in Words*. Chicago, IL: University of Chicago Press, 2008.
- Carter, Philip. "The Road to Abu Ghraib." *Washington Monthly*. November 2004. <http://www.washingtonmonthly.com/features/2004/0411.carter.html>.
- Cheney, Richard. Interview. *Meet the Press*. September 16, 2001. <http://www.emperors.com/9-11backups/nbcmp.htm>.
- Cicero, Marcus Tullius. *De Inventione*. Translated by H. M. Hubbell. Cambridge, MA: Loeb Classical Library, 1949.
- Clayton, Cornell W. *The Politics of Justice*. Armonk, NY: M. E. Sharpe Inc., 1992.
- Clayton, Cornell W. "Introduction" in *Government Lawyers*, edited by Cornell W. Clayton. Lawrence, KS: University Press of Kansas, 1995.
- Clinton, William Jefferson. "Letter to Congressional Leaders in Bosnia." *The American Presidency Project*. December 6, 1995. <http://www.presidency.ucsb.edu/ws/index.php?pid=50861&st=bosnia&st1=clinton>.
- Cole, David. *The Torture Memos*. New York: The New Press, 2009.
- Conley, Donovan S., and William O. Saas. "Occultatio: The Bush Administration's Rhetorical War." Forthcoming in *Western Journal of Communication* 74, no. 4 (2010).
- Conley, Donovan. "The Joys of Victimhood in George W. Bush's War of Totality." Forthcoming in *Cultural Studies & Critical Methodologies* 9, no. 7 (2010).
- Conley, Thomas M. *Rhetoric in the European Tradition*. Chicago: The University of Chicago Press, 1990. 76.
- Cooper, Philip J. *By Order of the President: The Use and Abuse of Executive Direct Action*. Lawrence, KS: University Press of Kansas, 2002.
- Cooper, Philip J. "George W. Bush, Edgar Allan Poe, and the Use and Abuse of

- Presidential Signing Statements.” *Presidential Studies Quarterly* 35 (September, 2005). 515-532.
- Crosby, Richard Benjamin. “Kairos as God’s Time in Martin Luther King Jr.’s Last Sunday Sermon.” *RSQ: Rhetoric Society Quarterly* 39, no. 3 (2009). 260-280.
- Cummings, Homer and Carl McFarland. *Federal Justice: Chapters in the History of Justice and the Federal Executive*. New York: Columbia University Press, 1977.
- Danner, Allison M. “Defining Unlawful Enemy Combatants: A Centripetal Story.” *Texas International Law Journal* 43 (Fall 2007).
- Danner, Mark. “The Red Cross Torture Report: What it Means.” *New York Review of Books*. April 30, 2009. <http://www.nybooks.com/articles/22614>.
- Danner, Mark. “US Torture: Voices from the Black Sites.” *The New York Review of Books*. April 9, 2009. <http://www.nybooks.com/articles/22530>.
- Deans, Jason. “16m glued to news as tragedy unfolds.” *Guardian.co.uk*. September 12, 2001. <http://www.guardian.co.uk/media/2001/sep/12/overnights.september112001>.
- Dellinger, Walter. “Memorandum for Bernard N. Nussbaum, Counsel to the President: The Legal Significance of Presidential Signing Statements.” November 3, 1993. <http://www.usdoj.gov/olc/signing.htm>.
- Dellinger, Walter. “Proposed Deployment of United States Armed Forces into Bosnia.” In *Opinions of the Office of Legal Counsel of the United States Department of Justice, 1995*. Washington: Government Printing Office, 1995.
- Eisenhower, Dwight D. “Executive Order 10730- Providing Assistance for the Removal of an Obstruction of Justice Within the State of Arkansas.” *The American Presidency Project*. September 24, 1957. <http://www.presidency.ucsb.edu/ws/index.php?pid=75572>.
- Ex Parte Quirin*, 317 U.S. 1, 87 (1942).
- Gardham, Duncan and Paul Curickshank. “Abu Ghraib abuse photos ‘show rape.’”

Telegraph.co.uk. May 27, 2009.

<http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5395830/Abu-Ghraib-abuse-photos-show-rape.html>.

Goffman, Erving. *The Presentation of Self in Everyday Life*. New York: Anchor Books, 1959.

Golden, Tim. "Years After 2 Afghans Died, Abuse Case Falters." *New York Times*. February 13, 2006.

http://www.nytimes.com/2006/02/13/national/13bagram.html?_r=1.

Goldsmith, Jack. *The Terror Presidency*. New York: W. W. Norton and Company, 2007.

Gonzales, Alberto. "Decision Re Application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban." January 25, 2002.

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>.

Gormley, Ken. *Archibald Cox: Conscience of a Nation*. Cambridge, MA: Perseus Publishing, 1997.

Greenwald, Glenn. "NPR's Ombudsman: Why We Bar the Word 'Torture.'" *Salon.com*. June 22, 2009. <http://www.salon.com/opinion/greenwald/2009/06/22/npr/>.

Greenwald, Glenn. "The NYT's Nice, New Euphemism for Torture." *Salon.com*. June 6, 2009. <http://www.salon.com/opinion/greenwald/2009/06/06/nyt/>.

Grohol, John M. "Schizophrenia Treatment." *PsychCentral.com*. April 10, 2006. <http://psychcentral.com/disorders/sx31t.htm>.

Gronbeck, Bruce. "Dramaturgical Theory and Criticism: The State of the Art (or Science?)." *Western Journal of Communication* 44, no. 4 (1980). 315-330.

HAMDI V. RUMSFELD (03-6696) 542 U.S. 507 (2004).

Higham, Scott and Joe Stephens. "New Details of Prison Abuse Emerge." *Washington Post*. May 21, 2004. <http://www.washingtonpost.com/wp-dyn/articles/A43783-2004May20.html>.

Houck, Davis W. and Mihaela Nocasian. "FDR's First Inaugural Address: Text, Context, and Reception." *Rhetoric and Public Affairs* 5, no. 4 (2002). 649-678.

- Huston, Luther A. *The Department of Justice*. New York: Frederick A. Praeger, 1968.
- International Committee for the Red Cross. "ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody." *NYBooks.com*. February 14, 2007. <http://www.nybooks.com/icrc-report.pdf>.
- Ivie, Robert L. "Fighting Terror by Rite of Redemption and Reconciliation." *Rhetoric & Public Affairs* 10, no. 2 (2007). 221-248.
- Ivie, Robert L. "Finessing the Demonology of War: Toward a Practical Aesthetic of Humanising Dissent." *Javnost- The Public* 14, no. 4 (2007). 37-54.
- Ivie, Robert L. and Oscar Giner. "Hunting the Devil: Democracy's Rhetorical Impulse to War." *Presidential Studies Quarterly* 37, no. 4 (2007). 580-598.
- Ivie, Robert L. and Oscar Gliner. "American Exceptionalism in a Democratic Idiom: Transacting the Mythos of Change in the 2008 Presidential Campaign." *Communication Studies* 60, no. 4 (2009). 359-375.
- Ivie, Robert L. *Democracy and America's War on Terror*. Tuscaloosa: University of Alabama Press, 2005.
- Jackson, Robert H. "Acquisition of Naval and Air Bases in Exchange for Over-age Destroyers" in *Official Opinions of the Attorney General of the United States, 1937-1940*. Washington, D.C.: Government Printing Office, 1941.
- Jasinski, James. *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Studies*. Thousand Oaks, CA: Sage Publications, 2001.
- Jehl, Douglas. "Army Details Scale of Abuse in Afghan Jail." *New York Times*. March 12, 2005. <http://www.nytimes.com/2005/03/12/politics/12detain.html>.
- Johnsen, Dawn E. "Testimony of Dawn E. Johnsen Before the U.S. Senate Committee on the Judiciary Subcommittee on the Constitution: 'Secret Law and the Threat to Democratic and Accountable Government.'" *Judiciary.Senate.gov*. April 30, 2008. http://judiciary.senate.gov/pdf/08-04-30Johnsen_Dawn_testimony.pdf, 1.
- Kennedy, John F. "Cuban Missile Crisis Address to the Nation, October 22, 1962." *AmericanRhetoric.com*. <http://www.americanrhetoric.com/speeches/jfkcubanmissilecrisis.html>.

- Kennedy, John F. "Interdiction of the Delivery of Offensive Weapons to Cuba, October 23, 1962." *The American Presidency Project*.
<http://www.presidency.ucsb.edu/ws/index.php?pid=8987>.
- Klaidman, Daniel. "Independent's Day." *Newsweek*. July 11, 2009.
<http://www.newsweek.com/id/206300>.
- Kmiec, Douglas W. *The Attorney General's Lawyer: Inside the Meese Justice Department*. New York: Praeger Publishers, 1992.
- Leff, Michael. "Hermeneutical Rhetoric." In *Rhetoric and Hermeneutics in Our Time: A Reader*. Edited by Walter Jost and Michael J. Hyde, 196-214. New Haven, CT: Yale University Press, 1997.
- Leff, Michael. "Lincoln at Cooper Union: Neo-classical Criticism Revisited." *Western Journal of Communication* 65, no. 3 (2001). 232-249.
- Leung, Rebecca. "Abuse of Iraqi POWs by GIs Probed." *60 Minutes II*. April 28, 2004.
<http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>.
- Lichtblau, Eric and Scott Shane. "Report Faults 2 Authors of Bush Terror Memos." *New York Times*. February 19, 2010.
<http://www.nytimes.com/2010/02/20/us/politics/20justice.html>.
- Lund, Nelson. "Guardians of the Presidency: The Office of the Counsel to the President and the Office of Legal Counsel," in *Government Lawyers*, edited by Cornell W. Clayton, 209-256 Lawrence, KS: University Press of Kansas, 1995.
- Mailloux, Steven. "Rhetorical Hermeneutics Revisited." *Text and Performance Quarterly* 11, no. 3 (1991). 233-248.
- Mailloux, Steven. "Rhetorical Hermeneutics." In *Interpreting Law and Literature*. Edited by Sanford Levinson and Steven Mailloux, 345-362. Evanston, IL: Northwestern University Press, 1988.
- Mailloux, Steven. *Rhetorical Power*. Ithaca, NY: Cornell University Press, 1989.
- Manning, P. K. "Dramaturgy, Politics and the Axial Media Event." *The Sociological Quarterly* 37, no.2 (1996), 261-278.
- Margolis, David. "Memorandum for the Attorney General, the Deputy Attorney

General.” *U.S. Department of Justice, Department of the Attorney General*.
January 5, 2010.

<http://graphics8.nytimes.com/packages/pdf/politics/20100220JUSTICE/20100220JUSTICE-DAGMargolisMemo.pdf>.

Mazzetti, Mark and Scott Shane. “Interrogation Memos Detail Harsh Tactics by the C.I.A.” *New York Times*. April 17, 2009.

<http://www.nytimes.com/2009/04/17/us/politics/17detain.html>.

McCarthy, Andrew. “Lawyer’s Lawyer, Radical’s Radical.” *National Review*. March 9, 2009.

<http://nrd.nationalreview.com/article/?q=YzcyODUwNjAwNzg3YTYyZjBiOWU3ZTQwZmYzOGIwOGQ=>;

Medhurst, Martin J. “Ghostwritten Speeches: Ethics Isn’t the Only Lesson.”

Communication Education 36 (July 1987). 241-249.

Medhurst, Martin J. “Presidential Speechwriting: Ten Myths that Plague Modern Scholarship.” In *Presidential Speechwriting: From the New Deal to the Reagan Revolution and Beyond*. Edited by Kurt Ritter and Martin J. Medhurst. College Station, TX: Texas A&M University Press, 2003.

Nelson, Dana D. “The ‘Unitary Executive’ Question.” *Los Angeles Times*. October 11, 2008. <http://www.latimes.com/news/opinion/la-oe-nelson11-2008oct11,0,224216.story>.

Nielsen Ratings Company. “From Nixon to Bush 43: Presidential Inauguration Ratings.” *Nielsenwire*. January 16, 2009.

http://blog.nielsen.com/nielsenwire/media_entertainment/from-nixon-to-bush-43-presidential-inauguration-ratings/

O’Keefe, Ed and Scott Butterworth. “Senate Confirms More than 30 U.S. Posts, Sends Six Back.” *Washington Post*. December 25, 2009.

<http://www.washingtonpost.com/wp-dyn/content/article/2009/12/24/AR2009122402793.html>.

Obama, Barack. “Closure of Guantanamo Detention Facilities.” *White House Press Office*. January 22, 2009.

http://www.whitehouse.gov/the_press_office/closureofguantanamo detention facilities/.

- Phifer, Jerald. "Request for Approval of Counter-resistance Strategies," in *The Iraq Papers*. Edited by John Ehrenberg, J. Patrice McSherry, Jose Ramon Sanchez, and Caroleen Marji Sayej, 415-416. New York: Oxford University Press, 2010.
- Philbin, Patrick F. "Legality of the Use of Military Commissions to Try Terrorists." *Justice.gov*. November 6, 2001. <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf>.
- Plamer, Robert. "The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General." *Pepperdine Law Review* 331 (January 1984). 331-391.
- Posner, Eric. "OLC in the Clinton Era—and Today." *The Volokh Conspiracy*. February 22, 2009. http://volokh.com/archives/archive_2009_02_22-2009_02_28.shtml#1235367053.
- Presidential Speechwriting: From the New Deal to the Reagan Revolution and Beyond*. Edited by Kurt Ritter and Martin J. Medhurst. College Station, TX: Texas A&M University Press, 2003.
- Priest, Dana R. and Jeffrey Smith. "Memo Offered Justification for Use of Torture." *Washington Post*. June 8, 2004. <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>.
- Rehnquist, William H. "The President and the War Power: South Vietnam and the Cambodian Sanctuaries." May 22, 1970. http://lawreview.stanford.edu/content/vol58/issue6/bybee_appendix.pdf.
- Risen, "The Struggle for Iraq: Treatment of Prisoners; G.I.'s Are Accused of Abusing Iraqi Captives." *New York Times*. April 29, 2004. <http://www.nytimes.com/2004/04/29/world/struggle-for-iraq-treatment-prisoners-gi-s-are-accused-abusing-iraqi-captives.html>.
- Roosevelt, Franklin Delano. "The Great Arsenal of Democracy, December 29, 1940." *AmericanRhetoric.com*. <http://www.americanrhetoric.com/speeches/fdrarsenalofdemocracy.html>.
- Ross, Andrew S. "Army Times: 'Time for Rumsfeld to Go.'" *San Francisco Chronicle*. November 3, 2006. http://www.sfchroniclemarketplace.com/cgi-bin/blogs/foreigndesk/detail?blogid=16&entry_id=10582.

- Savage, Charlie. *Takeover*. New York: Little, Brown, and Company, 2007.
- Schimmelfennig, Frank. "Goffman Meets IR: Dramaturgical Action in International Community." *International Review of Sociology* 12, no. 3 (2002), 417-437.
- Schmitt, Eric. "Four Top Officers Cleared by Army in Prison Abuses." *New York Times*. April 23, 2005. http://www.nytimes.com/2005/04/23/politics/23abuse.html?_r=1.
- Shapiro, Bruce. "Rehnquist, Cambodia & Abu Ghraib." *The Nation*. June 25, 2004. <http://www.thenation.com/doc/20040712/shapiro>.
- Smith, Christina M. and George N. Dionisopoulos. "The Abu Ghraib Images: 'Breaks' in a Dichotomous Frame." *Western Journal of Communication* 72, no. 3 (2008). 308-328.
- Spielvogel, Christian. "'You Know Where I Stand': Moral Framing of the War on Terrorism and the Iraq War in the 2004 Presidential Campaign." *Rhetoric & Public Affairs* 8, no. 4 (2005). 549-569.
- Staab, James Brian. *The Political Thought of Antonin Scalia: A Hamiltonian on the Supreme Court*. Lanham, MD: Rowman & Littlefield Publishers, 2006.
- Strine, Michael. "Counsels to the President: The Rise of Organizational Competition," in *Government Lawyers*, edited by Cornell W. Clayton. Lawrence, KS: University of Kansas Press, 1995.
- Taguba, Antonio M. "Article 15-6 Investigation of the 800th Military Police Brigade." *Findlaw.com*. <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html#ThN1.15>, 36.
- The 9/11 Commission Report*. New York: W. W. Norton Publishing Company, 2004.
- Thompson, Wayne N. "An Expanded View of Aristotle's Invention." *RSQ: Rhetoric Society Quarterly* 12, no. 1 (1982), 16-18.
- Tiefer, Charles. *The Semi-Sovereign Presidency*. Boulder, CO: Westview Press, 1994.
- Transcript. "Deputy Secretary Wolfowitz Interview on the Pentagon Channel." *United States Department of Defense*. May 4, 2004. <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2970>.

- U.S. Department of Justice. "About DOJ." *Justice.gov*.
<http://www.justice.gov/02organizations/about.html>.
- U.S. Congress, House, Foreign Affairs Committee. *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact of Transatlantic Relations, Joint Hearing Before the Subcommittee on International Organizations, Human Rights, and Oversight, and the Subcommittee on Europe*. 110th Cong., 1st sess., April 17, 2007. Washington, D.C.: Government Printing Office, 2007.
- U.S. Congress. "An Act to Establish the Department of Justice." 41st Cong., Sess. II (June 22, 1870). <http://memory.loc.gov/ll/llsl/016/0100/01980162.tif>
- U.S. Congress. "Authorizing Use of United States Armed Forces Against Those Responsible for Recent Attacks Against the United States." 107th Cong., 1st sess. September 14, 2001.
- U.S. Congress. *Judiciary Act of 1789*. 1st Cong. 1st Sess. (September 24, 1789). 1 Stat. 73 § 35.
- U.S. Department of Justice. "Memoranda and Opinions." *Justice.gov*.
<http://www.justice.gov/olc/opinions.htm>.
- U.S. Department of Justice. *Annual Report of the Attorney General of the United States, 1934*. Washington, D.C.: Government Printing Office, 1934).
- Wander, Philip. "The Rhetoric of American Foreign Policy." *Quarterly Journal of Speech* 70, no. 4 (1984). 339-361.
- Whitlock, Monica. "Legal Limbo of Guantanamo's Prisoners." *BBC News*. May 16, 2003. <http://news.bbc.co.uk/2/hi/americas/3034697.stm>.
- Wills, Gary. "Entangled Giant." *The New York Review of Books*. October 8, 2009.
<http://www.nybooks.com/articles/23110>.
- Wills, Gary. *Bomb Power: The Modern Presidency and the National Security State*. New York: Penguin, 2010.
- Woodward, Bob. *Bush at War*. New York: Simon & Schuster, 2002.
- Woodward, Gary C. *Center Stage*. Boulder, CO: Rowman & Littlefield publishers, Inc.,

2007.

- Yoo, John and Robert J. Delahunty. "Application of Treaties and Laws to al Qaeda and Taliban Detainees." January 9, 2002.
http://upload.wikimedia.org/wikipedia/en/9/91/20020109_Yoo_Delahunty_Geneva_Convention_memo.pdf
- Yoo, John. "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them." *Justice.gov*. September 25, 2001. <http://www.justice.gov/olc/warpowers925.htm>.
- Young, T. R. and Garth Massey. "The Dramaturgical Society: A Macro-Analytic Approach to Dramaturgical Analysis." *Qualitative Sociology* 1, no. 2 (1978), 189-207.
- Young, T. R. *The Drama of Social Life: Essays in Post-modern Social Psychology*. New Brunswick, NJ: Transaction Publishers, 1990.
- Zagorin, Adam. "Charges Sought Against Rumsfeld Over Prison Abuse." *Time*. November 10, 2006.
<http://www.time.com/time/nation/article/0,8599,1557842,00.html>.
- Zeleny, Jeff and Thom Shanker. "Obama Moves to Bar Release of Detainee Abuse Photos." *New York Times*. May 13, 2009.
<http://www.nytimes.com/2009/05/14/us/politics/14photos.html>.

VITA

Graduate College
University of Nevada, Las Vegas

William O'Donnal Saas

Degrees:

Bachelor of Arts, Communication Studies, 2006
University of Nevada, Las Vegas

Publications:

“Occultatio: The Bush Administration’s Rhetorical War.” Co-authored with
Donovan Conley. Forthcoming in *Western Journal of Communication* 74, no. 4 (Fall
2010).

Thesis Title:

A Rhetorical History of the Office of Legal Counsel

Thesis Committee:

Chairperson, Donovan Conley, Ph. D.
Committee Member, Tom Burkholder, Ph. D.
Committee Member, David Henry, Ph. D.
Graduate Faculty Representative, David Fott, Ph. D.