Essay

Reliance on Executive Constitutional Interpretation

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INTRODUCTION

With the confirmation of a new Central Intelligence Agency Director who previously ran a black site, the CIA’s use of “enhanced interrogation” during the George W. Bush Administration is back in the news.\textsuperscript{1} Despite renewed soul-searching over past abuses, however, a key legal question presented by this program—whether executive branch legal opinions approving it immunized participants against future liability—remains unanswered.

Furthermore, although no public plans to resume such interrogation exist, numerous other controversial government activities, from overseas drone strikes and electronic surveillance to ethics arrangements and spending for diplomacy, national security, or law enforcement in violation of appropriations restraints, likely depend on internal legal opinions concluding, as the Justice Department’s Office of Legal Counsel did with respect to enhanced interrogation, that civil or criminal statutory prohibitions are inapplicable for constitutional reasons.\textsuperscript{2} As with enhanced interrogation in the Bush years, government personnel or others acting in reliance on such legal guidance might well be committing crimes, civil violations, or torts if this legal guidance turns out to be mistaken.\textsuperscript{3}

Even worse, if the basic legal issue has not gone away, the political context in which it operates has changed considerably. Though they were polarized enough in the Bush years, American politics since then have only

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\textsuperscript{1} Shane Harris & Karoun Demirjian, \textit{Gina Haspel Confirmed as CIA Chief Despite Scrutiny of Her Role in Interrogation Program}, WASH. POST (May 17, 2018).

\textsuperscript{2} See infra Part I.A.

\textsuperscript{3} See id.
grown more brutal and partisan. This trajectory considerably raises the
chances that future controversies will not be resolved through informal
means, such as the prosecutorial forbearance applied to exempt Bush
Administration interrogators from sanction. Next time, key constituencies
may well demand heads on spikes, leaving it to courts to sort out whether past
reliance affords any current legal defense. Meanwhile, roughly parallel
questions seem to be routinely arising at the state and local level: police
departments and other officials must decide whether to take actions, ranging
from adopting a stop-and-frisk program to firing an employee over
controversial public statements, that could potentially violate the federal
constitution—and they must do so in an environment in which perceptions of
both policing and constitutional law are increasingly polarized. All these
situations raise an important and substantially unresolved question: Is the
executive branch lawyer’s power to advise ever also a power to immunize?

This essay explores the appropriate legal framework for resolving this
question. In hopes of providing guidance ahead of the next crisis (and
perhaps even forestalling it altogether), the essay aims to address the problem
outside the heat of any immediate controversy, while nonetheless using real-
world examples as illustrations. As I will explain, case law has recognized
reliance defenses, based on due process in the penal context and qualified
immunity in the civil tort context, that are potentially available to government
officials or others who relied on internal guidance to take actions later
deemed unlawful. Yet past accounts viewing these defenses as either
categorically available or categorically unavailable in the federal context
are mistaken. Instead, crafting any sound reliance defense requires
navigating between three complex and largely incommensurate structural
principles, each with constitutional underpinnings.

The first, and most intuitive, is a fairness principle. All else being equal,
providing official assurance that planned actions are lawful renders it grossly
unfair to turn around and hold those who undertook such actions to account for
lawbreaking. The second, which conflicts with the first, is what I call an anti-
suspending principle. One basic limitation on federal executive authority
under our system of separation of powers is that executive officials may not

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4 See infra Part I.B.
5 See, e.g., Daniel L. Pines, Are Even Torturers Immune from Suit? How Attorney
General Opinions Shield Government Employees from Civil Litigation and Criminal
 Prosecution, 43 WAKE FOREST L. REV. 93 (2008) (purporting to “demonstrate that, in
 virtually every situation, government employees who rely on an Attorney General opinion
in taking action will likely be absolved from any legal sanction”).
6 See, e.g., David Kurtz, Mark This Day, TALKING POINTS MEMO (Feb. 7, 2008),
https://talkingpointsmemo.com/edblog/mark-this-day; see also JACK GOLDSMITH, POWER &
CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 at 234 (2012) (describing civil
rights advocates’ push for prosecution of interrogators despite OLC opinions).
hold unchecked authority to eliminate (or “suspend”) governing legal requirements. Any reliance doctrine in this context must take account of this principle too. The third, which is unique to the particular problem addressed here, is a departmentalism principle. Under longstanding constitutional theory and practice, each branch of the federal government holds some authority to interpret the Constitution for itself in performing its central constitutional functions. In at least some instances, this principle might support protecting individuals’ reliance on an authoritative executive branch view even if courts, as a distinct branch of government, would have reached a different legal conclusion de novo.

In the federal context, I will argue, appropriately balancing these three principles should cash out in three basic doctrinal rules:

(1) At least insofar as the advice in question was reasonable (judged from the perspective of past executive branch opinions), reliance on a formal OLC or Attorney General opinion should provide a complete due process defense in any subsequent civil or criminal government enforcement action.

(2) In contrast, reliance on any other executive directive, including presidential signing statements and legal determinations reached through interagency dialogue, should support a reliance defense in any subsequent penal enforcement suit only insofar as the legal conclusions at issue reflect objectively valid reasoning rooted in prior executive branch opinions.

(3) In other litigation contexts, including third-party prosecutions or enforcement actions and private damages suits against federal officers, reliance on executive-branch legal conclusions should receive no particular protection, except insofar as past executive branch practice and precedent properly inform courts’ own independent legal interpretations.

These ground rules, I will argue, appropriately adapt existing reliance case law to the background constitutional principles that are necessarily implicated in this context. My proposal, furthermore, may draw strength from governing principles in other related areas. In particular, under the familiar *Chevron* and *Mead* doctrines from administrative law, maximum judicial deference to executive legal determinations depends on both the institutional identity of the interpreter (whether it is interpreting a statute it administers) and the degree of process the interpreter followed (whether it
employed notice-and-comment procedures). Here, by rough analogy, the degree of after-the-fact judicial deference, in the form of reliance protection for potential defendants, should track whether the executive decision-making process was both institutionally and procedurally designed to give maximum force to legal values. At the same time, so as to preserve overall judicial primacy in constitutional interpretation, courts should retain authority to formulate independent legal conclusions in at least some litigation contexts.

With respect to state and local governments, in contrast, the reliance calculus should be simpler. In that setting, considerations of departmentalism and the anti-suspending principle drop out, leaving a more straightforward balance between individual fairness and the supremacy of federal law over state policy. Accordingly, although one recent account argues that a professional legal opinion should all but guarantee immunity, in fact state and local executive legal opinions should carry no such immunizing power. Correctly framing the structural analysis thus reveals differences between federal and state contexts that should shape the scope of reliance doctrines, affording greater protection in some settings to federal officials—and thereby inducing appropriate caution on the part of non-federal lawyers.

My argument here for these conclusions is essentially doctrinal. I aim to sketch the path forward that, by tacking between “justification” and “fit” in conventional Dworkinian fashion, best adapts existing case law to relevant structural considerations and normative values that should shape its further elaboration. Apart from its practical utility, however, my analysis contributes to some important theoretical debates. As a function of partisan polarization and the deep substantive disagreements animating American politics, legal and constitutional interpretation appears to be growing more fractious, with different institutional actors—federal executive agencies, courts, members of Congress, states, and commentators—vying to shape public perception of legal issues. At the same time, some recent scholarship suggests the federal executive branch’s own decision-making is growing

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8 For elaboration of this point, and rebuttal of counter-arguments, see infra Part III.A.
9 Edward C. Dawson, Qualified Immunity for Officers’ Reasonable Reliance on Lawyers’ Advice, 110 NW. U. L. REV. 525 (2016).
10 See Ronald Dworkin, Hard Cases, 88 HARV. L. REV. 1057 (1975). Dworkin at times advocated conducting this inquiry with explicit reference to moral advancement. See, e.g., RONALD DWORKIN, LAW’S EMPIRE 225-50 (1986). The approach I adopt here, which I take to be the conventional approach to precedent in the American legal system, employs Dworkin’s basic method of seeking an attractive normative justification that fits existing legal authorities, but eschews the overt moral perspective and instead seeks a justification rooted in the legal materials themselves. Cf. Thomas Merrill, Interpreting an Unamendable Text, 71 VAND. L. REV. 547, 592 & n. 179 (2018) (characterizing this approach to precedent as “Burkean”).
more “porous,” with multiple rivalrous actors vying internally with OLC and the Justice Department to shape ultimate legal positions. The analysis offered here provides a concrete case study of how our legal system might accommodate these pressures without abandoning its own basic commitments. If legal decision-making is indeed becoming both more rivalrous and more flexible, we may well need to think about executive constitutionalism with Oliver Wendell Holmes, Jr.’s “bad man” in mind, focusing not so much on what outcomes would be ideal in any single instance as on what remedial understandings may best preserve institutional structures and constrain tactical behavior in the long run. This essay undertakes that effort.

My argument proceeds as follows. First, in Part I, I provide a lay of the land by highlighting the range of contexts in which reliance on executive constitutional interpretation may come into play. I also offer a brief overview of existing case law and scholarship and their shortcomings. Part II then turns to normative analysis of reliance on federal executive constitutional interpretation. It begins in subpart A by briefly describing the three key principles identified earlier—fairness, anti-suspending, and departmentalism—and exploring their interaction in this context. Subpart B then articulates and defends a doctrinal framework that, by better accounting for the interplay between these key considerations, could mold existing doctrines into forms appropriate to the institutional setting of federal executive-branch constitutional interpretation. Part III briefly addresses self-authorizing constitutional interpretation at the state and local level. It explains why, contrary to some recent assertions, such interpretive opinions

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12 Oliver W. Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 461 (1897).

13 I do not directly address here the question whether executive-branch lawyers themselves should be subject to discipline or civil liability for flawed constitutional advice. Such sanctions or liability could serve to maintain appropriate professional standards for executive lawyers, but would not vindicate the primary conduct prohibitions that lawyers advised government officials or others they could disregard. For analysis of lawyers’ potential liability, see, e.g., Peter M. Shane, Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis, 5 J. NAT’L SECURITY L. & POL’Y 507, 520 (2012) (“There are strong reasons for the public to insist on higher standards, both to guide government attorneys in the future, and to assure a commitment to democracy, constitutional government, and the rule of law.”); HAROLD H. BRUFF, BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR 294-95 (2009) (advocating ethical discipline for lawyers involved in torture controversy); Mark Stepper, Note, A Government Lawyer’s Liability Under Bivens, 20 CORNELL J. OF L. & POL’Y 441 (2010) (addressing potential civil liability for government lawyers).
should not hold even the limited immunizing effect of federal executive constitutional interpretation. The essay closes with a brief conclusion reflecting on this framework’s relevance in navigating ongoing partisan and inter-governmental conflicts over constitutional meaning.

I. SKETCHING THE PROBLEM

To help ground the inquiry and provide examples for later analysis, I begin here in subpart A by sketching a variety of circumstances in which officials or private parties may place reliance on executive constitutional interpretation. My examples are illustrative rather than exhaustive; I aim simply to sketch the problem’s basic contours. Subpart B then briefly surveys existing case law and scholarship, highlighting how neither provides an adequate framework for analyzing the reliance problems my examples in subpart A may generate.

A. Executive Interpretation’s Many Manifestations

While CIA interrogation is a particularly acute recent example, reliance on executive constitutional interpretation is potentially extensive and arises across a variety of domains.

In the interrogation episode itself, CIA officials and other personnel engaged in coercive interrogation techniques in reliance on OLC opinions (known to history as the “Torture Memos”) concluding that applicable statutory prohibitions could not constitutionally be applied to them.\textsuperscript{14} In particular, although an Act of Congress prohibits torture, defined in the relevant provision as action “under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering

incidental to lawful sanctions) upon another person” in custody, OLC opinions formulated in the pressured aftermath of the September 11 attacks not only construed this prohibition narrowly, but also concluded that applying any such statute to punish interrogations ordered by the President under the circumstances would violate the President’s Article II constitutional authorities.

The Office itself later withdrew these opinions as unsound; the next administration actively considered legal action against officials who relied on them to engage in arguable torture; and an internal Justice Department ethics investigation concluded that the opinions reflected “poor judgment” and “overstate[d] the certainty of their conclusions.” In the ethics investigation, the Department ultimately deemed it a “close question” whether the key lawyer involved “intentionally or recklessly provided misleading advice to his client.” It stopped short of finding professional misconduct mainly because the positions advanced in the opinions were sincerely held by their lead author.

As for criminal prosecution, although the administration appointed a special prosecutor to investigate officials who exceeded the Justice Department’s legal authorizations, the President and Attorney General declined to pursue officials who acted in accordance with authoritative OLC opinions. At the same time, Congress enacted legislation to immunize the officials in question from civil liability.

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15 18 U.S.C. §§ 2340(a), 2340A(a).
16 Unclassified Bybee Memo at 2 (“in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President’s authority to conduct war”); Yoo Memo at 1 (applying criminal laws of general applicability under the circumstances “would conflict with the Constitution’s grant of the Commander in Chief power solely to the President”).
17 Margolis Memo at 67, 68.
18 Margolis Memo at 67, 68.
19 Margolis Memo at 67 (“I fear that John Yoo’s loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client.”).
20 U.S. Justice Department, Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (Aug. 24, 2009), https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees (“the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees”). For general background on this decision, see GOLDSMITH, POWER & CONSTRAINT, supra note __, at 233-36.
21 Due to statutes enacted in 2005 and 2006, federal law now provides:

In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United
Although the torture episode was thus ultimately resolved by political action, without any litigation over reliance defenses, the basic phenomenon it illustrates is pervasive. To highlight another salient example, one recent OLC opinion controversially rejected statutory and constitutional objections to use of drones to launch military strikes overseas against American citizens suspected of plotting terrorist attacks.\textsuperscript{22} Other public OLC opinions in recent years have authorized diplomatic activities in defiance of specific appropriations limitations, an extensive military campaign in Libya without congressional authorization, and a controversial form of immigration relief for millions of undocumented immigrants—all based on disputed theories of executive authority.\textsuperscript{23} To the extent the legal and constitutional analysis underlying these actions is flawed, officials carrying out these policies might well be violating applicable statutory restraints. Drone strikes, for example, could conceivably violate statutory prohibitions on murder and war crimes.\textsuperscript{24} In addition, all these actions—if undertaken without sound constitutional justification—would violate the Anti-Deficiency Act (“ADA”), a penal statute barring any expenditure or obligation of federal funds without specific

States person, arising out of the officer, employee, member of the Armed Forces, or other agent’s engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.


\textsuperscript{24} See Drone Memo.
congressional authority. Indeed, in a controversial prisoner exchange in 2014, the Obama Administration transferred prisoners held at the Guantanamo Naval Base in open defiance of statutory limits on such transfers. When the Government Accountability Office determined that this action violated the ADA, the executive branch responded by asserting that the appropriations limits should be read counter-textually to avoid constitutional concerns.

Beyond OLC, Presidents routinely issue signing statements and other directives claiming authority to defy various putatively unconstitutional provisions in particular bills. In just his first signing statement, President Trump asserted constitutional authority to defy statutory appropriations restrictions on activities as varied as diplomacy, military detention, military command control, and marijuana enforcement. Recent accounts of executive branch legalism, furthermore, have highlighted alternative mechanisms for formulating executive legal positions that may circumvent OLC and the Justice Department altogether, even on important constitutional questions. During the Obama Administration, for instance, important national security questions were apparently often resolved by a “Lawyers Group” composed of multiple agency lawyers, often without seeking any formal legal guidance from OLC (or anyone else). In addition, in a notorious example, the president obtained testimony from the State Department Legal Adviser, instead of OLC, to justify continuing a bombing campaign in Libya beyond the sixty-day limit in the War Powers Act.

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25 31 U.S.C. §§ 1341-42, 1350. The ADA includes a criminal provision for “willful” violations. Id. § 1350. Given that willfulness generally requires consciousness of wrongdoing, reliance on an OLC opinion would normally prevent criminal liability under this provision, so long as the official in question had no reason to know the legal opinion was flawed. Other administrative sanctions under the statute, however, do not require this mens rea. In such cases, therefore, only a due process reliance defense could bar liability. In addition, government officials may sometimes be personally responsible for unlawful expenditures.


29 See Renan, supra note __.

30 CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY 64 (2015); Renan, supra note __, at 837-38.
All these examples illustrate how highly consequential legal judgments, potentially even regarding the constitutionality of legal restraints on the executive branch, may be formulated without any signed legal opinion from the Justice Department.

Meanwhile, some have suggested that executive officials should extend the practice of self-authorizing constitutional interpretation to parties outside the government as well. One commentator, for example, suggested in a blog post that the Justice Department might cease enforcing federal narcotics laws against intra-state marijuana possession and distribution based on a reading of the Necessary and Proper Clause that the U.S. Supreme Court previously rejected. Before Congress repealed the Affordable Care Act’s controversial “individual mandate” imposing tax penalties on taxpayers without health insurance, the administration might have considered suspending enforcement of that law as well, based on the constitutional theory (also previously rejected by the Supreme Court) that its individual mandate was unconstitutional. Any such action, like an action authorizing statutory violations by government personnel, would risk a sharp whipsaw for any parties who relied on it. Whether in the government or outside of it, a party relying on an executive constitutional view to violate an applicable statute might well risk either future official enforcement, or in some cases private tort damages, if a later administration or private party chose to bring suit and a court rejected the prior executive view.

Outside the federal government, finally, a roughly parallel problem may arise for state and local officials. Police and other non-federal officials often rely on internal opinions from their own government regarding the constitutionality of various practices and policies. Such guidance may relate to everything from the validity of particular actions, such as individual searches and arrests, to such general matters as stop-and-frisk search methods. Indeed, one recent survey indicates that such reliance is surprisingly common: state and local officials frequently depend on lawyers’ constitutional guidance not only with respect to law enforcement actions but also such matters as firing particular employees based on their exercise of First Amendment rights. In such contexts, too, if the legal guidance fails to support any reliance defense, officials who relied on it may have risked future federal prosecution, or at least personal liability for constitutional torts, simply for doing what they were directed to do through proper legal channels.

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33. Dawson, supra note __.
B. Mismatched Case Law and Scholarship

Reliance on executive constitutional interpretation, then, is pervasive. At both federal and state levels of government, executive officials going about their business may be required, in some cases on pain of termination or other penalties, to rely on constitutional determinations by other officials within their own government. Likewise, in at least some circumstances, private parties could find themselves effectively entrapped by one administration’s constitutional views if a later administration chooses to repudiate them.

While the political system, to date, has generally prevented such whipsaws and thus informally protected officials’ or private parties’ reliance on flawed executive constitutional determinations, the country’s fraying political cohesion may well increase the odds that such sharp reversals will occur in the future. At the federal level, future administrations may feel compelled to vindicate previously disregarded laws retroactively, sacrificing individual defendants on the altar of legal compliance (as perceived by the new administration and its constituents). Even if the federal government fails to act, moreover, any number of partisan legal entrepreneurs—whether state attorneys general or interest groups or others—may feel compelled to fill the breach by seeking retribution through other means. The question for courts in any such public or private litigation will be whether and to what degree past reliance on executive constitutional views should provide a legal defense.

Although courts have never yet grappled adequately with this problem, several existing doctrines—most notably the due process defenses of “entrapment by estoppel” and “public authority,” administrative law retroactivity principles, the constitutional tort defense of qualified immunity, and limits on the duty to disregard unlawful orders in the military context—address related problems. Some past scholarly accounts have accordingly seized onto one or the other of these doctrines as the correct foundation for analysis. Yet this enterprise is misguided: while these areas of law provide important legal material to work with, they ultimately arose in different contexts and thus are mismatched to the particular problem at issue here.

34 See, e.g., Mark W.S. Hobel, Note, “So Vast an Area of Legal Irresponsibility”? The Superior Orders Defense and Good Faith Reliance on Advice of Counsel, 111 COLUM. L. REV. 574 (2011) (advocating approach based on superior orders defense); Pines, supra note __ (advocating reliance defenses against civil and criminal liability in “virtually every situation”).

35 One past account similarly observed that the “immunizing effect of OLC opinions is ambiguous as a doctrinal matter” under existing case law, yet this survey offered no affirmative analysis beyond noting existing doctrinal ambiguity. Note, The Immunity-Conferring Power of the Office of Legal Counsel, 121 HARV. L. REV. 2086 (2008).
To clear the ground for a more accurate analysis, I address briefly here each of these areas of law and their limitations.

1. Anti-Entrapment Criminal Defenses

Of the available doctrines, the most directly applicable general framework is due process. Under the modern fairness-oriented conception, the Due Process Clauses of the Fifth and Fourteenth Amendments (as well as the federal Administrative Procedure Act’s related protection against “arbitrary and capricious” government action) are often held to preclude retroactive or unforeseeable liability. Thus, for example, the Supreme Court has invalidated vague criminal statutes, required “fair warning” of administrative constructions, protected reliance on past enforcement policies that reflect an apparent interpretation of governing law, and generally adopted a robust presumption (if not an outright prohibition) against retroactive imposition of liability on previously lawful conduct. Most relevant here, in a trilogy of due process cases from 1959 to 1973, , , and , the Court held that in some circumstances due process precludes subsequent punishment for conduct government agents specifically invited with assurances of legality.

These decisions provide grounding in case law for the intuitive unfairness of holding government officials to account for actions their superiors assured them were lawful and directed them to undertake. If, as the Supreme Court has held, it would amount to “the most indefensible sort of entrapment” to punish a witness for asserting a privilege the regulatory body itself said was valid, or to prosecute misconduct that applicable regulatory guidance deemed lawful at the time, then it surely raises considerable fairness concerns to punish intelligence officials or military officers for employing tactics that their superiors assured them were lawful, or for that matter to

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36 See, e.g., Landgraf v. USI Film Prods., 511 U.S. 244, 268 (1994) (adopting strong presumption against retroactive application of statutes).
40 See, e.g., Landgraf, 511 U.S. at 268.
41 360 U.S. 423 (1959).
44 For my prior analysis of these cases, see Zachary S. Price, Reliance on Nonenforcement, 58 WM. & MARY L. REV. 937, 971-77 (2017).
45 Raley, 360 U.S. at 438.
46 PICCO, 411 U.S. at 657.
punish officials for authorizing expenditures that the President himself indicated they could undertake. Such officials, after all, might have faced sanctions, or at least adverse career repercussions, had they refused to take the actions in question.

Nevertheless, these cases are not entirely on point here, for the simple reason that fairness is not the only relevant consideration in this context. As we shall see, departmentalist and anti-suspending considerations must also come into play at the federal level, and federal supremacy must factor into assessment of state actors’ conduct. Accordingly, although some commentators have suggested these doctrines provide a clear defense in this context, that cannot be true as a general matter. A government official’s reliance on the government’s own self-authorizing legal opinions raises concerns that are simply absent when the only issue is the governmental bait-and-switch of mistakenly assuring some private party that particular planned conduct is lawful.

2. Administrative Law Doctrines

Relatedly, some federal administrative-law decisions have addressed when new or unexpected administrative interpretations may apply retroactively to unsuspecting regulated parties. Courts generally disfavor retroactive application of new regulations, and some recent decisions have protected reliance on apparent past agency interpretations of governing agency-administered laws or regulations. On the other hand, however, the Supreme Court recently held in City of Arlington v. FCC that agencies may receive judicial deference under Chevron even with respect to self-authorizing agency interpretations of their own jurisdiction.

All these cases provide useful analogies in grappling with constitutional reliance questions, but they are again far from dispositive. The defining feature of all these administrative contexts is that Congress (at least

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47 For further discussion of this point, see infra Part. II.B.1.b.
48 See, e.g., Pines, supra note __, at 97-98 (advocating general defense); Martin S. Lederman, A Dissenting View on Prosecuting the Waterboarders, BALKINIZATION (Feb. 8, 2008), https://balkin.blogspot.com/2008/02/dissenting-view-on-prosecuting.html (suggesting these cases stand for “the broad proposition that criminal culpability may not be imposed for conduct undertaken in reasonable reliance upon the representation of government officials that the conduct was lawful”).
49 Cf. id. (noting potential exception “if the OLC memos on torture, and the subsequent CIA General Counsel directives, were so patently wrong that any reasonable CIA operative or contractor should have been aware of that fact”).
50 See, e.g., Epilepsy Found. of N. Ohio v. NLRB, 268 F.3d 1095, 1102-03 (D.C. Cir. 2001).
notionally) intended to delegate interpretive discretion to the executive branch. That structure raises questions about how agencies may exercise that authority—whether they may exercise it to impose unexpected liabilities, whether they can reverse previously settled understandings, and whether they can exercise it to aggrandize their own power. As we shall see, departmentalist practice supports some executive authority of constitutional interpretation at the federal level. Yet the premise of executive interpretive supremacy underlying all these problems in the administrative context is simply absent with respect to executive constitutional interpretation. On the contrary, when it comes to constitutional law, courts are generally presumed to hold superior institutional competence on such questions, leaving executive officials to a predictive and interstitial role.

3. Qualified Immunity

Another relevant doctrine, at least in suits seeking to impose civil liability, is the defense of qualified immunity. To the extent conduct in question violates some constitutional protection, such as Fourth Amendment limitations on unreasonable use of force, a private victim could sue the individual officer for civil damages under the implied right of action recognized in *Bivens v. Six Unknown Federal Narcotics Agents*.\(^{53}\) The Supreme Court has recently cast doubt on this cause of action’s viability without more explicit authorization from Congress (more on that below).\(^{54}\) Yet private damages suits and other tort remedies remain available in at least some settings, and constitutional tort suits remain authorized by statute with respect to state and local officials. In all such litigation, the defense of qualified immunity shields individual officers from liability except insofar as their conduct violated clearly established constitutional law, in the sense of prior case law establishing a clearly applicable rule of prohibition.\(^{55}\)

This defense is itself controversial and its precise foundations are unclear; it is probably best understood as a constitutional common-law doctrine of debatable validity.\(^{56}\) The key point here, however, is that qualified immunity arose to address a quite different problem from executive constitutional self-authorization: it addresses the unfairness and potential chilling effects of holding individual officers personally liable for actions that they could not anticipate courts would consider unlawful. Efforts to apply this principle wholesale to create a defense of reliance on government lawyering thus miss

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\(^{53}\) 403 U.S. 388 (1971).
the mark as well.\textsuperscript{57}

4. “Superior Orders” Defenses and the Law of War

A last related doctrine invoked by some commentators relates to the problem of unlawful orders in the military context.\textsuperscript{58} Under the modern law of war, the so-called “Nuremberg defense” of superior orders is insufficient to excuse actions that “manifestly” violate fundamental laws of war, such as prohibitions on deliberate killing of civilians.\textsuperscript{59} Here, finally, we have an example oriented towards the problem of government officials eliminating lawful restraints on their own conduct by inviting reliance on mistaken directives. Even apart from its inapplicability to domestic constitutional contexts, however, this body of international law presents yet another problem of mismatch.

Foreclosing Nuremberg defenses for law-of-war violations serves principally to encourage basic law-of-war instruction for military personnel while also inculcating a culture of compliance with certain basic and readily understandable rules that accord with ordinary moral intuitions. Soldiers, after all, are normally entitled to presume their orders are lawful; the “superior orders” defense must give way only if under the circumstances the order is “so manifestly unlawful that no reasonable combatant would have misperceived [its] criminality.”\textsuperscript{60} It is not obvious what comparably intuitive standard non-lawyers (or even many lawyers) could apply in assessing whether an asserted interpretation of Article II’s vague and open-ended provisions adequately justifies disregarding a statutory prohibition. Accordingly, although this international-law principle does at least support imposing personal liability for institutional failures in some circumstances, it does no more than that. The Nuremberg doctrine provides no direct help in elaborating an appropriate constitutional reliance defense for either government personnel or private parties.

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In sum, while courts have grappled with related problems in the past, existing doctrines require, at the very least, significant adjustment to match the problem of self-authorizing executive constitutional interpretation. Like Cinderella’s sisters, these doctrines must lose a heel or toe to fit the requisite

\textsuperscript{57} See Pines, supra note __, at 123-31; see also Dawson, supra note __ (advocating immunity based on reliance on legal opinions generally).

\textsuperscript{58} See Hobel, supra note __.

\textsuperscript{59} Id.

\textsuperscript{60} Id.
shoe, and the resulting bloodstains betray the need to keep searching. Meanwhile, still more extreme positions have emerged. Some commentators, for instance, have suggested that no reliance defense should be available at all, at least when the conduct in question is criminal. Still others have advocated fluid models of executive branch legal decision-making without addressing whether the outputs of such self-empowering processes can or should carry the same immunizing effect as formal internal legal opinions.

Again, however, the increasingly fractious and contested character of legal interpretation in our polarized Republic is making it more likely that future administrations and litigants will seek sanctions against officials who relied on past constitutional guidance that these litigants view as gravely flawed. To be blunt, if the Trump Administration engages in torture or some comparable statutory abuse—or indeed even if it undertakes spending or law enforcement or military action in violation of applicable statutory restraints—a future Democratic administration will face considerable pressure to make the scoundrels pay, any internal legal opinion be damned. At the same time, if federal executive-branch legal decision-making is indeed growing more “porous” and informal—if legal determinations are increasingly the outputs of a rivalrous interagency process rather than dispassionate legal reasoning—then executive legal determinations may well appear less than credible to outside observers, notwithstanding the considerable reliance both government officials and outside parties will almost inevitably place on them.

Courts confronting any resulting litigation will thus face an important task of doctrinal elaboration. In undertaking this effort, they should neither throw up their hands and reject reliance arguments across the board nor shoehorn novel reliance claims into existing doctrines developed for different purposes. The effort instead requires tacking between fit and justification, in conventional common-law fashion. That is, it requires accounting for existing legal authorities and established practices while also identifying the relevant structural and normative considerations that should shape those authorities’ application in the context at hand. In the remainder of this essay, I aim to illustrate how this analysis should properly unfold, addressing first constitutional interpretation in the federal executive branch and then interpretation of federal constitutional requirements by state and local executive authorities.

II. RELIANCE AT THE FEDERAL LEVEL

Correctly framing the judicial inquiry with respect to reliance on federal

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61 See, e.g., David Kurtz, Mark This Day, TALKING POINTS MEMO (Feb. 7, 2008), https://talkingpointsmemo.com/edblog/mark-this-day.
62 See Renan, supra note __; Bauer, supra note __.
executive constitutional interpretation requires starting not with the existing reliance case law, but instead with an account of particular institutional setting in which such interpretation takes place. Executive branch lawyers participate in a long, if contentious, tradition of executive constitutional interpretation. For both practical and theoretical reasons, this tradition necessarily entails reaching legal conclusions on questions of the highest importance without any controlling judicial precedent (and to some degree independent of it). Such legal decision-making in turn creates risks of unprincipled self-authorization, yet on the other hand exposing individual government officials to liability for relying on such governmental self-authorization risks not only gross unfairness, but also, ironically, erosion of bureaucratic mechanisms that generally promote legal compliance and accountability.

Any adequate analysis of the reliance problem with respect to federal officials must account for this complicated interplay of cross-cutting concerns. I thus begin here in subpart A by unpacking the three relevant constitutional principles that reflect these concerns—departmentalism, antisuspending, and fairness—and then turn in subpart B to articulating how these principles should cash out doctrinally in different litigation contexts.

A. Three Relevant Principles

1. The Departmentalist Tradition of Executive Constitutionalism

Courts today play the preeminent role in interpreting and enforcing the Constitution; the Supreme Court has even sometimes described this authority as exclusive (or at least conclusive once exercised). Yet the other two branches of the federal government engage in constitutional interpretation too. As we have seen, the executive branch, in particular, routinely claims authority to disregard particular statutory provisions based on its own independent judgment that such provisions are unconstitutional. Thus, to repeat earlier examples, administrations of both parties routinely claim authority to disregard limitations on conduct of diplomacy; the executive branch has developed a controversial internal jurisprudence regarding use of military force; the current administration has claimed authority to disregard funding limitations on law enforcement; and in particular instances over time the executive branch has justified disregarding statutory limits on prisoner releases, interrogation practices, and even targeted killings based on

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63 See, e.g., Cooper v. Aaron; Dickerson.
64 See Richard H. Fallon, Jr., Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age, 96 Tex. L. Rev. 487, 491 (2018) (“Our system is not, never has been, and probably never could be one of pure judicial supremacy.”).
To some degree, this executive practice of independent constitutional interpretation reflects basic practical imperatives. Because our constitutional system (unlike many others) lacks any mechanism for advisory judicial opinions on the legality or constitutionality of planned government initiatives, executive officials must make legal determinations on their own in the first instance, with fingers crossed that courts will approve their conclusions in any after-the-fact litigation. Yet executive-branch constitutional interpretation also has deeper conceptual underpinnings in the theory known as “departmentalism.”

a. Departmentalism in Theory and Practice

Departmentalism holds that, as a basic implication of separation of powers, each branch (or “department”) of the federal government may interpret the Constitution for itself in carrying out its core functions. Courts thus interpret the Constitution in the course of deciding particular cases that come before them. But Congress does so as well when deciding what laws to pass, and so does the executive branch when deciding how those laws should be executed. Article II of the Constitution, after all, obligates the President to “take Care that the Laws be faithfully executed.” Given that the Constitution is part of the nation’s laws—indeed, its paramount law—the executive branch must give effect to the Constitution, rather than any statute or other sub-constitutional law, in carrying out its core function of executing federal law. Or so at least Presidents and executive branch lawyers have long claimed.

This theory has strong and weak forms, depending on the degree of independence other branches assert from judicial interpretation. Some towering Presidents, most notably Presidents Jefferson and Lincoln, asserted the theory in strong form, claiming authority to completely disregard judicial

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65 See supra Part I.A.
67 For an early statement of this theory, see 8 WRITINGS OF THOMAS JEFFERSON 57 (Paul L. Ford ed., 1892-1899) (letter by President Jefferson asserting that the executive branch need not enforce unconstitutional laws because they are “nullit[ies]”).
precedent in formulating executive views on constitutionality. For reasons good and bad (and despite some academic criticism), actual government practice today no longer reflects strong-form departmentalism. Presidents and Congresses since at least the end of World War II have generally asserted interpretive independence only in the gaps and interstices of judicial precedent, not in outright defiance of them.

Today, indeed, even declining to defend statutes in court may provoke controversy. At the least, the Obama Administration sparked considerable outrage by declining to defend the Defense of Marriage Act against an equal-protection challenge—even though the administration sought to facilitate ultimate judicial resolution of the question by continuing to enforce the statute and pursuing appeals from adverse judgments. The political firestorm that surely would have attended a decision to disregard the statute altogether may illustrate just how far we have descended from the high-water mark of anti-Court departmentalism set by President Lincoln.

70 For a general account of this controversy, see Meltzer, supra note __.
Current political dynamics could conceivably cause departmentalist practice to strengthen. According to one leading political science account, presidential defiance of judicial constitutional understandings is particularly likely in periods of political transition, such as those that surrounded the Jefferson, Lincoln, and Franklin Roosevelt administrations. To the extent we are entering a new period of political reconfiguration, another such period of sharp conflict might well arise, making the questions addressed here particularly acute. Whether or not such adjustments occur, however, even the more modest, interstitial departmentalism of recent times still leaves considerable space for weighty independent legal determinations by Presidents and their lawyers. Again, based just on recent internal opinions and signing statements, executive officials might engage in diplomatic activities, criminal prosecutions, Guantanamo prisoner transfers, or even killings or interrogation practices based on debatable internal constitutional analysis. As the Torture Memos example illustrates, executive legal determinations in areas where judicial precedent is sparse may have considerable capacity to shape government conduct even on questions that are ultimately be subject to litigation.

b. The Justice Department’s Institutional Role

Beyond the theory and practice of departmentalism itself, another key feature of the institutional setting for such legal controversies is the Justice Department’s key role today in elaborating executive-branch constitutional views. By statute, the U.S. Attorney General holds authority to provide legal advice and opinions when requested by the President of heads of civil or military departments. This function—the Attorney General’s oldest, in fact, which predates by half a century the Justice Department’s establishment as a law enforcement agency—has long entailed effective authority to resolve contested legal questions for the executive branch. Today, by delegation from the Attorney General, the Assistant Attorney General for the Office of Legal Counsel typically exercises this function, and as a matter of practice, if not law, OLC opinions are binding throughout the executive branch, unless overturned by the President or Attorney General.

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71 Whitington, supra note __, at 23, 53-55.
74 28 C.F.R. § 0.25.
Presidents, to be sure, may also engage directly in constitutional interpretation. Through signing statements and other pronouncements, they may take positions on constitutional questions and direct subordinate executive personnel to comply. As noted, moreover, one scholar has recently argued that the traditional “formalist” model of Justice Department legal guidance, in which agencies seek guidance from OLC in the form of well-crafted legal opinions, is withering in favor of an alternative “porous” model in which executive legal positions derive from a more open-ended set of discussions between affected agencies that are deliberately suffused with considerations of politics and policy as well as law.\(^76\) Along similar lines, another scholar has highlighted ways in which the triggering event for an executive legal determination may shape bureaucratic decision-making in potentially outcome-determinative ways.\(^77\)

Even if these accounts are accurate, however, recent experience suggests at least some practical political imperative to follow the so-called formalist model on matters of significant controversy. The Obama Administration issued public OLC opinions on such matters as the permissibility of contested appointments,\(^78\) the legality of military action,\(^79\) and the validity of a controversial immigration program.\(^80\) The Trump Administration has done so with respect to employment of a close relative in the White House,\(^81\) defiance of certain congressional inquiries,\(^82\) and replacement of a high-

\(^{76}\) Renan, supra note __. Although Attorneys General (and later OLC) have issued legal opinions since the beginning of the Republic, Renan argues that the formalist model had its “heyday” during the Carter Administration, when the President and Attorney General deliberately sought to reestablish legal credibility following the Nixon Administration’s scandals. Id. at 817-18.

\(^{77}\) Rebecca Ingber, Interpretation Catalysts and Executive Branch Legal Decisionmaking, 38 YALE J. OF INT’L LAW 359 (2013).


\(^{82}\) Authority of Individual Members of Congress to Conduct Oversight of the Executive
profile acting agency director. At the same time, critics have blasted both administrations for failing to produce public opinions supporting actions of comparable gravity, such as the Obama Administration’s apparent disregard of the 60-day War Powers Resolution deadline and the Trump Administration’s use of military force in Syria. Whatever forces shape the interpretive process in other instances, this pattern suggests at least some continuing, politically enforced expectation that the White House will obtain a Justice Department opinion on key constitutional questions.

Doing so, furthermore, has institutional value—and may provide political cover on contentious legal issues—precisely because the Justice Department in general, and the Office of Legal Counsel in particular, is a bureaucratic entity whose institutional and reputational interests support adhering to lawyerly values of consistency and principle even on issues of great political import. Of course, relying on such incentives to ensure legal credibility is hardly a perfect arrangement. On the contrary, this system presents an obvious fox-guarding-henhouse problem. Indeed, it may even create a risk (arguably evident in the Torture Memos episode) that political figures will seek to capture OLC’s advice-giving function so as to silence legal objections to preferred policies and thereby advance political goals more ruthlessly.

Yet there is also reason to doubt that widespread skepticism about OLC’s objectivity is entirely justified. At the least, one survey of OLC opinions through 2009 found that the Office fairly reliably adhered to its own precedent across administrations, at least outside of key issues where administrations from different parties held principled (and well-articulated) differences of interpretation. Furthermore, although the Office’s published opinions have tended to uphold executive actions instead of disapproving them, this author attributed this pattern to a likely publication bias towards

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84 See, e.g., Justin Florence & Allison Murphy, The Syria War Powers Memo: Why It Matters, LAWFARE BLOG (Feb. 14, 2018) (advocating release of reported Trump Administration legal opinion supporting Syria strikes because of “its relevance to ongoing and potential future military actions”); Bruce Ackerman, Obama’s Illegal War in Libya, N.Y. TIMES (June 20, 2011) (faulting Obama Administration for exceeding War Powers Resolution deadline in Libya).

85 See GOLDSMITH, POWER & CONSTRAINT, at 235, 238 (describing “brutal public criticism” and resulting “reputational, professional, and financial harm” suffered by lawyers involved in the torture memos).


revealing favorable opinions and concealing embarrassing negative rulings.\textsuperscript{88} Indeed, even when the Office has approved controversial programs, its opinions have often been crafted more narrowly than judicial opinions addressing the same topics.\textsuperscript{89}

At any rate, whatever the benefits and drawbacks of the formalist model, any system of executive legal decision-making presents concerns that it may yield unprincipled self-authorizing determinations. In particular, to the extent executive constitutional determinations are either legally or practically binding—to the extent, that is, that subordinate government officials may feel safe relying on them—presidents and their lawyers may hold the effective capacity to excuse the inexcusable and undermine the rule of law. Yet this problem, too, is not simply a matter of conventions and atmospherics. It implicates another key separation-of-powers principle: the principle that executive officials generally lack authority to suspend statutes.

2. Self-Authorizing and the Anti-Suspending Principle

Why is self-authorizing executive interpretation problematic? Naturally, any flawed legal analysis violates rule-of-law principles by licensing what should be prohibited, and licensing one’s own conduct through such analysis may further violate general ethical restrictions on self-serving, anti-social behavior. Indeed, serving as a judge in one’s own case, as executive branch interpreters effectively do by determining the law applicable to their own branch, is often described as a core background principle of natural justice and constitutional law.\textsuperscript{90}

This maxim is too often obeyed in the breach to be considered a binding general norm; Adrian Vermeule goes so far as to deride its “‘facile invocation’” as “the intellectual equivalent of burping at a dinner party.”\textsuperscript{91} At the very least, as we just saw, sound theoretical and practical considerations may support allowing federal executive authorities to interpret, at least in the first instance, constitutional limitations on their own power. Yet in the particular separation-of-powers context addressed here, concerns about self-authorization may also draw force from a more specific limit on executive power: the principle that executive officials lack authority

\textsuperscript{88} Id. at 1464-66.
\textsuperscript{90} See, e.g., R.H. Helmholz, Bonham’s Case, Judicial Review, and the Law of Nature, 1 J. LEGAL ANALYSIS 325, 335 (2009) (“There is no doubt, in the first place, that acting as a judge in one's own cause had long been regarded as a violation of the law of nature.”).
to “suspend,” or cancel, statutory restraints.

This principle is in fact at least one central meaning of the Take Care Clause itself. By obligating the President to ensure “that the Laws be faithfully executed,” \(^{92}\) this Clause makes plain that Presidents, unlike the English monarchs of old, possess no authority to suspend statutes or grant dispensations from its application. \(^{93}\) To be sure, presidents do hold authority to pardon federal criminal offenses after the fact. \(^{94}\) But they cannot license violations or cancel statutory prohibitions ahead of time; their duty is to faithfully execute statutory law, not to wipe away laws they deem unwise or inconvenient.

Early federal decisions reflect this understanding. In the 1806 case \textit{United States v. Smith}, Supreme Court Justice William Paterson, riding circuit, deemed supposed presidential approval of an alleged criminal enterprise irrelevant, for the simple reason that neither the Constitution nor applicable statutes gave a “dispensing power to the President.” \(^{95}\) Under our system of separated powers, Patterson argued, executive officials hold no constitutional power to “authorize a person to do what the law forbids”; any other rule “would render the execution of the laws dependent on [the President’s] will and pleasure,” despite Congress’s sole authority to change the law itself. \(^{96}\) Around the same time, the full Supreme Court likewise held in the famous case of \textit{Little v. Barreme} that executive “instructions . . . cannot legalize an act which without those instructions would have been a plain trespass.” \(^{97}\) The \textit{Little} Court thus upheld imposition of damages liability on an individual officer for legal violations—even though the President had issued instructions on the understanding that an applicable statute authorized the conduct in question. \(^{98}\) A few decades later, in \textit{Kendall v. United States ex rel. Stokes}, the Court went so far as to dismiss out of hand any idea that the Take Care Clause allows dispensations from statutory requirements. “To contend,” the Court wrote, “that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.” \(^{99}\)

\(^{92}\) U.S. Const. art. II, § 3.

\(^{93}\) For my defense of this view, see Zachary S. Price, \textit{Enforcement Discretion and Executive Duty}, 67 Vand. L. Rev. 671 (2014); see also Adam B. Cox & Cristina M. Rodriguez, \textit{The President & Immigration Law Redux}, 125 Yale L.J. 104, 143 (2015) (noting general agreement that “the President cannot decline to enforce altogether a law that is constitutional”).

\(^{94}\) U.S. Const. art. II, § 2.

\(^{95}\) 27 F. Cas. 1192, 1229 (C.C.D.N.Y. 1806).

\(^{96}\) Id. at 1230.

\(^{97}\) 6 U.S. (2 Cranch) 170, 179 (1804).

\(^{98}\) Id.

As I have argued at length elsewhere, this understanding of the Take Care Clause remains basic to the federal government’s structural organization and the subordination of executive officials to law.100 It explains, at a most basic level, why agencies must carry out their organic statutes and why legal restraints apply to the President. Here, though, if taken to the limit, the anti-suspending principle might suggest that executive officials should never assert constitutional authority to disregard statutory restraints, as any such assertion would amount to a suspending power by another name. One scholar, indeed, has challenged the entire practice of departmentalism on this basis.101 “The claim that a president may refuse to enforce a law on the ground that it is unconstitutional is but a reincarnation of the royal prerogative of suspending the laws,” Christopher May has argued. “The Constitution does not give the president a power to suspend the laws, not even when the chief executive may think that a particular law is unconstitutional.”102

Stated so broadly, May’s argument goes too far. Even if departmentalism itself is not inevitably implied by the constitutional separation of powers, the executive practice of disregarding at least some laws on constitutional grounds has deep roots and sound textual and theoretical underpinnings, as we have seen. In charting any path through the wilderness, departmentalism is just as much a feature of the legal landscape as is the anti-suspending principle itself. After all, insofar as the Constitution is part of the laws the President must execute, Presidents can no more suspend the Constitution than the underlying statutes and thus must interpret the Constitution as well as those statutes in carrying out their executive functions—or so at least Presidents since Thomas Jefferson have claimed.103

Nevertheless, May’s analysis does capture the essential character of the problem in a way that more recent analyses, such as recent endorsements of porous legalism, have not. The problem is not simply that executive officials will violate particular laws with impunity (though that is bad enough), but rather that presidents and their lawyers will acquire a power to wipe away statutory restraints on their own conduct through unprincipled constitutional interpretation. To the extent sound constitutional analysis cannot justify conducting diplomacy, employing particular interrogation techniques, or

100 Price, Enforcement Discretion, supra note __.
101 CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS: REVIVING THE ROYAL PREROGATIVE (1998). Other proponents of the view that Presidents hold no authority to defy duly enacted statutes include EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 72 (5th rev. ed. 1984), and Eugene Gressman, Take Care, Mr. President, 64 N.C. L. REV. 381, 382 (1986).
102 MAY, supra note __, at 37.
103 See generally BRUFF, supra note __. For a critique of this claimed authority’s historical foundations, see Matthew Steilen, Judicial Review and Non-Enforcement at the Founding, 17 U. PA. J. CONST. L. 479 (2014).
taking military action without regard to applicable statutory constraints, then
the executive branch’s asserted power to take action based on such
conclusions does indeed amount to an unconstitutional suspending power by
another name.

Standing alone, this risk would support judicial skepticism about
executive-branch constitutional views in any litigation directly contesting
them. In fact, even OLC’s track record in recent litigation is not strong:
courts have rejected its views on NLRB quorum requirements, recess
appointments, and immigration enforcement discretion, among other
things.104 Courts in such cases have exercised their own departmentalist
prerogative to resolve justiciable controversies based on legal conclusions of
their own that depart from the executive branch’s. But doing so in the context
at issue here—suits seeking sanctions or liability against officials who
themselves relied on executive branch legal guidance—implicates yet
another set of countervailing considerations: fairness and good-government
concerns about reneging on past government assurances.

3. Fairness and Good Government

The last key consideration implicated by the self-authorization problem
is the risk of unfairness and demoralization that could result from penalizing
actions the government itself previously approved. Disciplining an official
after the fact for conduct undertaken in reliance on authoritative
constitutional guidance is profoundly unfair—and yet it is this very sense of
unfairness, and the resulting impulse to protect reliance, that gives rise to the
potential anti-suspending problem addressed earlier.

To put the problem concretely, imagine yourself in the position of a
patriotic young CIA officer, someone committed to both national security and
the rule of law, but also perhaps hoping for a long tenure at the Agency,
maybe even with upward mobility. Your superiors direct you to engage in
some potentially questionable activity—enhanced interrogation, say, or a
drone strike or assassination—and they answer your misgivings about
legality with assurances that the lawyers have fully vetted the issues. What
can or should you realistically do? Or suppose instead that you are a more
senior official involved in authorizing a military operation or diplomatic

104 See NLRB v. Noel Canning, 134 S. Ct. 2550 (2014); New Process Steel, LP v. NLRB,
560 U.S. 674 (2010); Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), aff’d by an
equally divided court, 136 S.Ct. 2271 (2016). See generally Sonia Mittal, OLC’s Day in
Court: Judicial Deference to the Office of Legal Counsel, 9 HARV. L. & POLICY REV. 211
(2015) (concluding based on a survey of opinions that the Supreme Court “rarely cites to
OLC opinions” and “has resisted explicitly according them deference under Chevron and
Skidmore”).
initiative, either without congressional authorization or in defiance of statutory constraints. Under what circumstances could or should you treat the President’s say-so as insufficient reason to move forward?

In any of these scenarios, defying superior directives might well place an official at risk of termination or other sanctions, possibly even (at least in the military context) prosecution for mutiny or disobeying orders. But what if the legal guidance in question proves flawed, in the sense that subsequent public or judicial opinion confirms that the constitutional basis for disregarding statutory restraints was mistaken. Should the official then be subject to after-the-fact penalties for having done what he or she was told to do?

Intuitively, imposing personal liability in such situations may appear profoundly unfair: how can individuals be punished for engaging in conduct that their superiors assured them was legal and directed them to undertake? Imposing liability, moreover, might corrode government regularity and initiative by encouraging insubordination: if subordinate officials cannot rely on legal directives and opinions obtained through the proper channels, then they must fall back on their (potentially uninformed) intuitions, or perhaps on some form of outside legal advice, in deciding whether to follow a given directive. The result could be bureaucratic torpor at best, chaos at worst. Indeed, in this situation, officials might stop seeking legal guidance at all, to the detriment of overall legal compliance. Why seek a legal opinion if it won’t be worth the paper it’s written on?

For all these reasons, punitive discipline for actions undertaken in reliance on authoritative legal advice is troubling. Indeed, it offends basic guarantees of fair warning protected in at least some instances by the modern due process cases discussed earlier.105 And yet on the other hand this very instinct to protect the official’s reliance and withhold punishment is what creates the potential anti-suspending problem in the first place. Presidents or their lawyers may suspend legal restraints on executive branch action by adopting dubious constitutional theories and then inviting reliance upon them—reliance that is then either legally or practically protected.

We thus finally confront the full difficulty of the problem in the federal context. While departmentalism provides a theoretical basis for independent executive constitutional interpretation, this tradition creates a risk of abusive self-authorizing interpretations that improperly suspend statutory restraints on the executive itself. Yet at the same time failing to protect subordinate officials’ reliance on executive constitutional interpretations risks gross unfairness and demoralization within the executive branch.

105 See supra Part I.B.1.
B. A Calibrated Reliance Defense

Any judicial reliance protection in this context must therefore accommodate three disparate and largely incommensurate principles: (1) a departmentalism principle that supports executive-branch authority to independently interpret the Constitution; (2) an anti-suspending principle that precludes any default executive authority to eliminate disfavored statutes; and (3) a fairness principle that militates against the bait-and-switch of punishing government officials or others for relying in good faith on authoritative legal guidance. As Part I.B. indicated, existing doctrines provide some material to work with, even if they do not provide clear answers; at the least, existing doctrines recognize that reliance on executive assurances of legality may sometimes make prosecution inconsistent with due process, and relatedly that absence of fair warning may sometimes justify barring official liability for constitutional wrongs. Yet such doctrines require adjustment to address the particular interplay of considerations at stake in this context.

Adjusting fairness-oriented reliance protections to account for structural constitutional considerations may seem incongruous. For reasons I have elaborated elsewhere, however, it is in fact entirely consistent with the cases themselves. Although in Mathews v. Eldridge the Supreme Court established a general balancing framework for due process analysis, structural considerations suffuse the pattern of case outcomes, if not always the decisions’ explicit reasoning, in the reliance context. The Supreme Court, for example, has understood due process to support a robust presumption against retroactive legislation that disrupts significant reliance interests. Yet the Court has limited this presumption to so-called “primary” retroactivity, meaning imposition of unanticipated legal liabilities to completed past conduct, and not “secondary” retroactivity, meaning disruption of an expected continuation of existing laws into the future. Such secondary reliance may be quite substantial and entirely reasonable—many business plans and private investments presume that anticipated activities will remain legal and tax rates will remain stable—but due process cannot protect them because doing so would unduly infringe upon legislatures’ ongoing constitutional authority to alter existing substantive laws.

106 See Price, Reliance on Nonenforcement, supra note ___.
108 Price, Reliance on Nonenforcement, supra note ___, at 967.
109 See, e.g., Landgraf v. USI Film Prods., 511 U.S. 244, 268 (1994).
111 Id.
Cases addressing reliance on executive assurances in general reflect similar structural imperatives. In particular, although the Supreme Court’s trilogy of anti-entrapment cases, \textit{Raley}, \textit{Cox}, and \textit{PICCO}, recognized that official assurances of legality may sometimes bar future prosecution, lower courts have limited these cases’ application in two important ways. First, courts have restricted them to circumstances in which government officials provide official assurance of legality, as opposed a mere promise of enforcement forbearance. 112 And second, courts have restricted their application to circumstances in which reliance is “reasonable in light of the identity of the [government] agent, the point of law misrepresented, and the substance of the misrepresentation.” 113 Though ostensibly justified by fairness, these limitations in fact reflect structural concerns. As a practical matter, non-lawyers may easily misjudge the reasonableness of assurances that the law permits particular conduct. Yet formally protecting reliance on assurances of forbearance or grossly mistaken legal guidance would obliterate the vital separation-of-powers principles reflected in the anti-suspending principle: by inviting reliance on assurances of forbearance or seriously mistaken legal advice, executive officials could acquire power to cancel substantive legal prohibitions even without adequate legislative authorization to do so.

Accordingly, due process protections for official nonenforcement assurances generally require balancing fairness considerations against separation-of-powers principles, with the scales tilted in most cases toward continued enforceability of underlying substantive laws. The same balance is implicated here, but it takes on additional dimensions when the form of legal assurance at issue is self-authorizing constitutional interpretation by the executive branch. For one thing, as we have seen, the temptation to self-authorize in this context may make concerns about establishing a de facto suspending power particularly acute. For another, insofar as executive branch lawyers are interpreting the Constitution as well as governing statutory law, the due process balance must account not only for fairness considerations and the anti-suspending principle, but also the constitutional practice of departmentalism.

The question, then, is ultimately one more familiar to administrative law than constitutional jurisprudence: How should the legal system allocate the burden of interpretive uncertainty? Should the risk of legal error fall on the parties (whether government officials or private individuals) who are themselves targets of statutory regulation, or should their reliance on flawed constitutional analysis by government lawyers provide immunity from after-
the-fact liability? How, furthermore, should courts answer this question in cases where conventional interpretive considerations point in different directions, or where the executive branch holds settled views that courts might not embrace in the first instance? Suppose, for example, that the original understanding of war powers is at odds with longstanding executive practice, or that longstanding executive views on presidential authority over diplomacy are in tension with the constitutional text and structure. Should presidents and their lawyers get to make the choice, with the consequence that officials carrying out policy may violate statutory restraints with impunity? Or should courts have the last word, as they normally do on constitutional questions in litigation?

In fact, under the best view of the law, formed by tacking between relevant case law and the background structural and normative considerations I have outlined, these questions should have different answers in different litigation settings. I will now therefore address three litigation settings in turn: reliance on a formal Justice Department opinion in penal litigation; reliance on other executive legal determinations in such litigation; and reliance on either form of executive guidance in constitutional tort suits, third-party enforcement actions, and other common types of litigation.

1. Official Reliance on OLC in Penal Litigation

A first possible litigation context is a public enforcement suit seeking civil or criminal penalties for past legal violations undertaken by public officials in reliance on a formal legal opinion from OLC or the Justice Department. Although I am aware of no recent prosecution fitting this description, this scenario is precisely what some hoped for—and indeed advocated as a necessary vindication of the rule of law—following the torture memos’ repudiation. Torture, after all, is prohibited by a federal criminal statute, yet OLC’s controversial opinions not only construed the statutory prohibition narrowly, but also deemed any broader construction inconsistent with Article II constitutional authorities of the Executive. In principle,

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117 Unclassified Bybee Memo at 2 (“in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President’s authority to conduct war”); Yoo Memo at 1 (applying criminal laws of general applicability under the circumstances “would conflict with the Constitution’s grant of the Commander in Chief power solely to the President”).
given the Anti-Deficiency Act’s penal provisions, this same issue could arise any time a government official violates a statutory spending restriction based on flawed constitutional guidance.118 While to date prosecutorial self-restraint has always sufficed to protect government officials’ reliance in such circumstances, self-restraint could readily fall casualty to partisan bitterness and the widening partisan divides over legal and constitutional interpretation.

So should due process bar prosecution in such cases? Except when the advice in question was not only wrong but unreasonable, the answer should be yes. This result not only appropriately balances the key structural considerations, but also draws strength from analogous administrative law cases and anti-entrapment precedent.

a. Structural Analysis

To begin with the structural analysis, the fairness and departmentalism principles identified earlier should generally outweigh anti-su spending concerns in this context, thus yielding a rule of strong deference to executive conclusions in after-the-fact litigation.

Fairness concerns, after all, are at their apex in penal suits reneging on prior authoritative guidance. That is so not only because of the penal character of the remedies at issue, but also because reliance on a formal legal opinion obtained from an office dedicated to this purpose presents the most compelling case for individual good faith. Indeed, assuming at least a modicum of professionalism within the federal bureaucracy, protecting reliance on such formal legal guidance should generally advance the good-government objective of legal compliance. Why? Because if seeking advice provides greater legal security, government officials will have greater incentive to seek it—even when doing so means being bound by advice that particular planned initiatives are unlawful.

Of course, even if a legal green light does not provide such immunity, officials might still seek legal guidance on close questions so as to accurately gauge their own legal exposure (or simply to ensure compliance with the law). Some might thus argue that, just as with private legal advice, an official legal opinion should provide security against future punishment only insofar as it accurately predicts courts’ eventual view of the law. This view,

118 31 U.S.C. §§ 1341-42, 1350. The ADA’s criminal provision applies only to “willful” violations. Id. § 1350. Given that willfulness generally requires consciousness of wrongdoing, reliance on an OLC opinion would normally prevent criminal liability under this provision, so long as the official in question had no reason to know the legal opinion was flawed. Other administrative sanctions under the statute, however, do not require this mens rea. In such cases, therefore, only a due process reliance defense could bar liability. In addition, government officials may sometimes be personally responsible for unlawful expenditures.
however, could place government personnel in an untenable position. For one thing, such officials will typically lack adequate legal understanding to judge the quality of official legal opinions on abstruse constitutional or statutory topics. Unlike many private parties, however, they cannot readily obtain accurate external advice. Even if some private lawyer could be found who possesses the relevant expertise, government secrecy requirements could often preclude consulting external counsel. Furthermore, insofar as formal legal opinions from OLC and other official guidance is binding on the executive branch, defying such guidance could mean risking removal or other sanctions for insubordination.

In any event, on top of all these fairness and good-government concerns, the departmentalism principle further weighs in favor of protecting reliance in this context. The executive branch’s authority to interpret the Constitution for itself in the first instance would be a dead letter if criminal prosecution were possible based on subsequent judicial disagreement with executive-branch attorneys’ conclusions. Executive branch lawyering would then be reduced to a matter of accurately predicting future judicial conclusions, rather than interpreting the Constitution for itself in keeping with its own traditions and past decisions.

It is true that judicial-executive disagreement could often arise in the first place only if the executive branch chose, at a later point in time, to pursue criminal or civil enforcement, notwithstanding its own prior advice. The executive branch thus could protect the departmentalism principle for itself by depriving courts of any justiciable controversy. Indeed, a pure theory of departmentalism might suggest courts should never take executive branch opinions into account, as courts have an independent responsibility to decide cases presented to them based on their own best view of the law.

Relying on a later executive branch to protect an earlier one, however, ultimately provides inadequate protection for the functional and practical values that departmentalism advances. In effect, this approach would privilege the executive prosecutorial function over whatever other functions were initially implicated in the advice at issue. At time two, the executive branch may judge that legal violations warranting prosecution occurred, but at time one it necessarily judged that the law allowed whatever executive function government personnel performed—whether it was protecting national security, gathering intelligence, or administering some federal program.

Given the current acute partisanship and resulting risks of sharp institutional reversals, an operative theory of departmentalism must protect the executive branch’s autonomy in exercising its ongoing functions at any given moment and not only its later judgments about retrospective prosecution. Government personnel, after all, must decide in the moment
whether to act prospectively on the basis of current advice. Accordingly, even apart from fairness and good-government concerns, failing to protect government officials’ reliance in the event of future prosecution would only erode the executive branch’s long term autonomy in performing functions other than prosecution.

On the other side of the balance, to be sure, anti-suspending concerns are also acute in this context. To the extent formal legal guidance will support a later reliance defense against enforcement, senior officials may have reason to orchestrate sham opinions that approve planned initiatives on specious grounds—or at least to appoint lawyers known in advance to hold an ideology or disposition that makes such approval likely. Recent controversies over the torture memos and other opinions suggest this risk is real and not hypothetical. What is more, the very difficulty of many legal issues addressed by OLC and other government offices, particularly when combined with sharp partisan divides over legal and constitutional interpretation, may create risks of biased decision-making.

Nevertheless—and this point is crucial to distinctions I draw later119—the formalist model of OLC decision-making carries institutional safeguards that may help mitigate these risks. Much as is true of public opinion-writing by courts, an obligation to articulate how conclusions follow from generally accepted legal premises necessarily rules out some results that might otherwise be rubber-stamped. Some conclusions, as they say, just won’t write—at least not in a way that external observers would accept as professionally valid. Indeed, in the torture memo example, the lead lawyers only narrowly escaped professional discipline for their flawed advice, and the Department’s internal critique of their work centered on their failure to account for obvious contrary authorities and counter-arguments.120

OLC’s institutional position, furthermore, reinforces this discipline. Again, OLC’s value within the government bureaucracy is its institutional self-understanding as an office devoted to providing professionally competent, objective legal advice. While that self-understanding surely does not inoculate the Office and its politically appointed leadership against all pressures to approve politically sensitive initiatives, it does support an ethos in which adhering to past Office positions and rejecting proposed initiatives comports with the Office’s own sense of mission.121

119 See infra Part II.B.2.
120 Margolis Memo.
121 See, e.g., Morrison, supra note __, at 1722 (“Put simply, if OLC says yes too readily to its clients, it will no longer be useful to them. OLC maintains its position as the most important centralized source of legal advice within the executive branch not because any provision of positive law makes it so, but because its legal advice is uniquely valuable to its clients.”).
Given these institutional protections and the values of fairness and departmentalism advanced by protecting reliance, background structural considerations should generally support shielding officials from penal sanctions when they relied in good-faith on formal OLC advice. Doing so may carry costs to the rule of law insofar as OLC guidance is sometimes mistaken, and indeed in the long-run may systematically skew towards permissive conclusions. But institutional constraints provide some assurance of professional reasonableness, the fairness and demoralization costs of throwing government officials under the bus for relying on advice they sought in good faith are high, and allowing later punishment by an administration with different leanings would disrupt departmentalist practices on which all executive-branch legal interpretation ultimately depends. For all these reasons, the overall balance of relevant considerations generally favors protecting reliance.

On the other hand, a rule of absolute reliance protection would nonetheless go too far. Such absolute protection could enhance the very risks it aims to avoid: if reliance protection were guaranteed, no matter how flawed the opinion in question, political actors could seek to capture the Office’s decision-making, with the express aim of providing immunity for legally dubious actions. To provide an ultimate backstop against such genuinely collusive, self-authorizing advice, the reliance defense here must give out at some point, and that point may best be defined in terms of whether the legal conclusions in question were reasonable (even if ultimately incorrect in a later court’s judgment). I will return momentarily to the torture memos and other examples that may usefully illustrate where this line falls. But first, to provide stronger grounding for this principle and bring existing precedent into the picture, it remains to consider how well this structural account accords with existing reliance case law.

b. Precedent from Administrative Law and Criminal Law

In fact, analogous cases from both administrative law and criminal law reinforce a rule protecting reliance on reasonable Justice Department opinions. Again, cases in neither area are squarely on point. But even recognizing their limitations, these authorities offer indirect support for elaborating reliance defenses along the lines just proposed.

To begin with, in administrative law, the Supreme Court has recognized that executive statutory interpretations generally warrant greater deference when issued through more formal deliberative processes. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, courts generally defer
to reasonable agency constructions of ambiguous statutes,\textsuperscript{122} and in \textit{City of Arlington v. FCC} the Court extended this principle even to self-authorizing agency interpretations of the agency’s own jurisdiction.\textsuperscript{123} Under \textit{United States v. Mead Corp.}, however, \textit{Chevron} deference is generally appropriate only if the agency issued its interpretation in the form of a notice-and-comment rule or through some similar exercise of lawmaking authority.\textsuperscript{124} “It is fair to assume,” the Court explained, “that Congress contemplates administrative action with the effect of law when it provides a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”\textsuperscript{125} Thus, despite generally allocating the burden of legal uncertainty in administrative law to agencies’ advantage, the Supreme Court has generally limited such deference in a manner calculated to encourage greater agency care and deliberation.\textsuperscript{126}

A rough analogy supports recognizing a reliance defense here, though again only if executive constitutional views are reasonable and carry hallmarks of procedural “fairness and deliberation.” In this context, to be sure, the considerations of relative institutional competence that generally underlie \textit{Chevron} doctrine are absent. Courts, not executive agencies, are generally thought to hold paramount competence over constitutional questions. Furthermore, while \textit{Chevron} gives priority to agency views in part to protect policy-driven legal judgments by agencies with presumed competence over policy,\textsuperscript{127} policy-driven resolution of constitutional questions is generally the antithesis of principled interpretation, recent advocacy of “porous” executive decision-making notwithstanding.\textsuperscript{128}

\begin{itemize}
\item \textsuperscript{122} 467 U.S. 837 (1984).
\item \textsuperscript{123} 569 U.S. 290, 303 (2013) (noting “we have applied \textit{Chevron} where concerns about agency self-aggrandizement are at their apogee”).
\item \textsuperscript{124} 533 U.S. 218, 230-33 (2001); see also Christensen \textit{v. Harris County}, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant \textit{Chevron}-style deference.”).
\item \textsuperscript{125} \textit{Mead}, 533 U.S. at 230.
\item \textsuperscript{126} Admittedly, by declining to limit \textit{Chevron} deference to legislative rules and formal adjudications, \textit{Mead} leaves the ultimate scope of \textit{Chevron} deference notoriously unclear. \textit{See}, e.g., Lisa Bressman, \textit{How Mead Has Muddled Judicial Review of Agency Action}, 58 \textit{VAND. L. REV.} 1443 (2005). For present purposes, however, the only relevant point is \textit{Mead}’s suggestion that procedural rigor bears on the degree of judicial deference due to administrative constructions. \textit{Cf. Barhart \textit{v. Walton}}, 535 U.S. 212, 222 (2002) (identifying “the careful consideration the Agency has given the question over a long period of time” as a key factor in whether \textit{Mead} supports applying \textit{Chevron} deference).
\item \textsuperscript{127} \textit{See}, e.g., ADRIAN VERMEULE, \textit{LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE} 30 (2016) (characterizing \textit{Chevron}’s ostensible delegation rationale as a “legal fiction” that in fact “promotes expertise and accountability”).
\item \textsuperscript{128} Renan, \textit{supra} note __, at 812 (“Moral and policy dimensions of legal advice regularly
Even recognizing all these distinctions, however, *Mead’s* gloss on *Chevron* suggests the value in this context, too, of structuring reliance doctrines to encourage greater “fairness and deliberation.” After all, the federal government’s departmentalist operation presumes some executive competence over constitutional questions, even those affecting the executive branch’s own authority. Furthermore, justiciability doctrines (and the departmentalist practices they reflect) make it inevitable that the executive branch will sometimes resolve important constitutional questions on its own in advance of judicial consideration. Given these realities, *Mead’s* premise that legal validity is typically correlated with procedural rigor seems equally applicable. Indeed, when it comes to executive constitutional interpretation, the same considerations that generally suggest superior judicial competence over constitutional questions support granting primacy to the Justice Department over other executive actors. In some sense, OLC (if not the Justice Department as a whole) is the judicial body of the executive branch: it is the bureaucratic entity committed institutionally and by reputation to providing credible legal analysis of constitutional questions. Within the reasonable bounds, reliance doctrines should therefore encourage its use over more informal decision-making, just as *Mead’s* refinement of *Chevron* encourages greater deliberation in the administrative context.

As for criminal law, perhaps surprisingly, case law addressing the anti-entrapment defense has converged on roughly analogous principles. As noted, despite recognizing a due process defense when private parties rely on mistaken government assurances of legality, courts have effectively limited this defense to circumstances in which those assurances appeared reasonable under the circumstances. The Tenth Circuit, for example, recently explained that “consistent enforcement of the law requires a reasonableness limitation” on any reliance defense.\(^\text{129}\) In the Tenth Circuit’s formulation, reliance must therefore be “reasonable in light of the identity of the agent [providing legal guidance], the point of law misrepresented, and the substance of the misrepresentation.”\(^\text{130}\) In another common formulation, reliance must be “reasonable—in the sense that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.”\(^\text{131}\)

Meanwhile, in cases involving a so-called “public authority” defense—a claim that the defendant believed conduct was lawful not because officials converge with the deeply technocratic minutiae of complex legal frameworks.”).

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\(^{129}\) United States v. Rampton, 762 F.3d 1152, 1157 (10th Cir. 2014).

\(^{130}\) United States v. Bader, 678 F.3d 858, 886 (10th Cir. 2012) (quoting United States v. Apperson, 441 F.3d 1162, 1204-05 (10th Cir. 2006)).

\(^{131}\) United States v. Lansing, 424 F.2d 225, 227 (9th Cir. 1970); see also United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004) (similar).
misrepresented the substantive law, but rather because they led the defendant to believe he could break the law to aid investigative efforts—courts have collapsed the reasonableness inquiry entirely into a judgment of legality. What matters in that context is not whether the hapless defendant, having aided, say, an undercover investigation or counter-intelligence operation, reasonably believed the government had authorized his or her conduct, nor even whether government officials reasonably appeared to hold such authorizing power. What matters is only whether the officials in question had “actual authority” to license the legal violations in question.

As with administrative holdings, these formulations do not cleanly map onto the particular problem of self-authorizing constitutional interpretation. On some level, any reliance on an OLC opinion is “reasonable in light of the identity of the agent” (here the Office designated to provide constitutional guidance) and “the point of law misrepresented” (here a point of constitutional interpretation). Almost by definition, officials desirous of following the law have made the necessary “further inquiries” by obtaining an OLC opinion on uncertain questions. Nevertheless, the third consideration in the quoted Tenth Circuit formulation—the “substance of the misrepresentation”—remains an essential limitation here, as indeed in other contexts. A legal claim that is simply too outlandish, or too dangerous, to be given immunizing force is unreasonable, not in the sense that the legally untutored would not give it credence, but rather in the more absolute sense that protecting such reliance would come at too great a cost to the anti-suspending principle. It is at least plausible, furthermore, that limiting legally protected reliance in this way will induce an appropriate sense of caution on the part of those receiving legal guidance. Government officials generally cannot be expected to conduct abstruse legal analysis for themselves and it is unfair to expect them to do so. But at least with respect to conduct like torture or wiretapping that any citizen of a democracy should appreciate raises serious civil liberties questions, a reasonableness limitation on protected reliance could help stimulate demands

132 See, e.g., United States v. Sariles, 645 F.3d 315, 319 (5th Cir. 2011); United States v. Fulcher, 250 F.3d 244, 254 (4th Cir. 2001).
133 See, e.g., United States v. Alvarado, 808 F.3d 474, 484 (11th Cir. 2015); Sariles, 645 F.3d at 319; Fulcher, 250 F.3d at 254. One early concurring opinion suggested otherwise, United States v. Barker, 546 F.2d 940, 955 (D.C. Cir. 1976) (Merhige, J., concurring), but other courts have uniformly rejected this view.
134 Cf. Note, supra note __, at 2091 (noting applying these defenses to “immuniz[e] officials from government prosecution raises self-dealing concerns absent from private-party suits”).
135 Bader, 678 F.3d at 886.
136 Lansing, 424 F.2d at 227.
for extra assurance that a legal opinion allowing the conduct is credible.137 Such demands may at least ensure that lawyers’ reputations, rather than just the officials’ own, will be on the line if the opinion proves mistaken.

Although it predated the modern reliance case law and employed a different analytic framework, one key historic case in fact drew more or less this same limit on appropriate reliance. In United States v. Dietrich, a federal circuit court held in 1904 that a U.S. Senator’s contract with the federal government violated an applicable statute despite an earlier Attorney General opinion approving a similar contract (albeit on statutory rather than constitutional grounds).138 “The construction of a doubtful or ambiguous statute by the Attorney General in the discharge of his duty to render opinions upon questions of law arising in the administration of any of the executive departments,” the court held, “is always entitled to respectful consideration, and where that construction is acted upon for a long time by those charged with the duty of executing the statute it ought not to be overruled without cogent reasons.”139 Nevertheless, the court found the opinion in question patently unpersuasive. “We cannot follow or approve the opinion cited,” the judges explained. “It does not refer to the terms of the statute; the reasons assigned for the conclusion stated are brief and unsatisfactory; it is not shown that this opinion has been followed in any of the executive departments for any length of time; and we thin the statute is . . . plain and unambiguous.”140

Dietrich suggests, at least obliquely, that an executive-branch legal opinion may be reasonable, and accordingly subject to reliance, even if a court addressing the question in the first instance would give less weight to past executive practice and precedent and thus reach some different conclusion. Nevertheless, as reflected in Dietrich’s holding (if not all its reasoning), an opinion that is unreasonable even by such standards cannot exempt those who rely on it from subsequent penal remedies.

In sum, cases from two disparate areas, administrative law and criminal law, reinforce the view that when government officials rely on a formal Justice Department opinion to violate an otherwise applicable statute, the burden of interpretive uncertainty should generally fall on the later administration seeking to vindicate the statute, not on the official who relied

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137 Cf. Seana Valentine Shiffrin, Inducing Moral Deliberation: On the Occasional Virtues of Fog, 123 HARV. L. REV. 1214, 1214 (2010) (arguing that imprecise legal standards may sometimes have a “salutary impact . . . on citizens’ moral deliberation and on robust democratic engagement with law”). Some argue that this sense of caution has in fact taken hold within the intelligence community following the torture controversy. See, e.g., GOLDSMITH, POWER & CONSTRAINT, supra note __, at 238-40 (discussing indications of CIA “skittishness” following repudiation of the torture memos).
138 126 F. 671, 676 (C.C. Neb. 1904).
139 Id.
140 Id.
on the government’s prior constitutional analysis. So long as the opinion in question was objectively reasonable, officials who relied on it in good faith should be immune from penal sanctions.

c. Illustrative Applications

The key boundary here, then, is reasonableness. But what might that mean when it comes to constitutional analysis? Without attempting any definitive analysis of the many difficult questions to which this standard might apply, I will briefly suggest both some general rules of thumb and offer a few concrete illustrations.

As to general guidance, a constitutional reasonableness inquiry might properly focus on the degree of conflict between generally accepted modalities of constitutional argument in any given instance. Ongoing debates over interpretive theory notwithstanding, as a matter of practice American constitutional analysis is generally a holistic inquiry centered on five basic types (or “modalities”) of argument—text, structure, history, precedent, and policy—with a heavy emphasis in most instances on maintaining fidelity to existing judicial precedents and governmental practices. Indeed, many heated theoretical debates may be reducible to fights over the appropriate general ordering of interpretive modalities (whether, for example, text or original understanding should ever, or always, or sometimes override precedent). By the same token, many hard constitutional questions involve conflicts between these modalities. Just as a conflict between apparent legislative purpose and enacted text may present a hard question of statutory interpretation, so, too, a conflict between apparent historical understanding and dictionary meaning may present a hard constitutional question.

From this point of view, a reasonableness standard might compel courts to defer to an executive opinion’s resolution of such a conflict between accepted modalities, even if the court itself would have resolved the same conflict differently. In other words, an originalist OLC opinion might be reasonable and thus support reliance by government officials, even if a court or judge would have given greater weight to subsequent precedent and practice if it were considering the issue de novo. By the same token—and perhaps most importantly—executive branch lawyers may act reasonably in resolving disputed questions based on past executive practice and precedent, even if courts writing on a blank slate would give greater weight to other modalities.

141 For a useful account of this “mainstream” approach to constitutional interpretation, see H. Jefferson Powell, Targeting Americans: The Constitutionality of the U.S. Drone War 191-93 (2016). For the canonical account of the basic interpretive modalities of constitutional law and their relevance, see Philip Bobbitt, Constitutional Interpretation (1991).
considerations. This last point, indeed, is perhaps the central entailment of departmentalism: at least within the limits of textual plausibility and judicial precedent, the executive branch may develop and adhere to principled views of its own on constitutional meaning.  

To turn to concrete examples, then, officials who relied on recent OLC opinions authorizing them to disregard funding restrictions on participation in certain United Nations bodies or on conduct of diplomatic activities with China by the White House Office of Science and Technology Policy should be immune from penal sanctions for violating the Ant-Deficiency Act by authorizing statutorily proscribed expenditures. By the same token, in an earlier day, officials who relied on Attorney General opinions to disregard one-house or committee veto provisions in appropriations statutes should have been equally immune from such penalties. All these positions, though contestable as a matter of first principles, were nonetheless so firmly rooted in traditional executive-branch understandings that in all likelihood no reasonable executive-branch lawyer could realistically have advised otherwise.

Though these questions are closer, officials who administered the Obama Administration’s controversial deferred-action immigration programs or participated in military action against Libya should be equally safe from after-the-fact punishment for their conduct. In these cases, too, however controversial the Office’s legal conclusions, OLC provided reasoned opinions rooted in past views that took account of key legal authorities and articulated cogent limiting principles (indeed, in the immigration opinion, even disapproving one proposal), even as the opinions approved some

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142 Admittedly, courts applying Chevron deference do not always describe ambiguity as arising from this sort of conflict. Instead, courts often assert that “[a]t the first step of the Chevron analysis we employ traditional tools of statutory construction to determine whether Congress has unambiguously foreclosed the agency’s statutory interpretation.” Vill. of Barrington, Ill. v. Surface Transp. Bd., 636 F.3d 650, 659 (D.C. Cir. 2011) (internal quotation marks and citations omitted). I have elsewhere argued that, for purposes of applying the rule of lenity in the criminal context, ambiguity should turn on whether accepted interpretive criteria render competing interpretations plausible. Zachary S. Price, The Rule of Lenity as a Rule of Structure, 72 FORDHAM L. REV. 885 (2004).


proposed actions. Courts reviewing these actions de novo might well reach different conclusions—as indeed one circuit court did with respect to the immigration programs. ⑩

But when considering a reliance defense to penal sanctions, the court should view the same question through a different lens. By contrast, enhanced interrogation in reliance on the Torture Memos might constitute the rare case in which even a formal OLC opinion should not provide blanket immunity. Insofar as the Office’s conclusions bordered on recklessly flawed advice—a conclusion nearly all commentators have shared⑩—these opinions were simply too unreasonable to support an after-the-fact reliance defense. To the extent that is true, the reason is not that officials who relied on the opinions could fairly anticipate being liable; having obtained legal assurances through the proper channels, they would have been in no position to question the lawyers’ conclusions. Nor, on the other hand, is it simply because courts on their own would have reached a different view; any such theory here would run roughshod over the tradition and practice of departmentalism. The opinions’ unreliability instead derives from their sheer implausibility—from their dependence on a theory of Article II authority extending beyond even the generally permissive view of executive power reflected in past executive-branch opinions. ⑤⑧ By the same token, given limits recognized in the executive branch’s own past opinions and practice, executive lawyers might well exceed the bounds of reasonableness by approving a full-scale war without advance congressional approval,⑤⑨ or authorizing law enforcement expenditures in defiance of specific appropriations limitations like those currently barring federal

⑩ Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), aff’d by an equally divided court, 136 S. Ct. 2271 (2016).

⑩⑩ See, e.g., Richard B. Bilder & Detlev F. Vagts, Speaking Law to Power: Lawyers and Torture, 98 AM. J. INT’L LAW 689 (2004); Kathleen Clark, Ethical Issues Raised by the OLC Torture Memorandum, 1 J. OF NAT’L SEC. LAW & POLICY 455 (2005); H. JEFFERSON POWELL, THE PRESIDENT AS COMMANDER IN CHIEF: AN ESSAY IN CONSTITUTIONAL VISION 27-47 (2014); but cf. GOLDSMITH, POWER & CONSTRAINT, supra note __, at 236 (“The legality of the original CIA interrogation program under the purposefully loophole-ridden torture law was always a closer question than critics have publicly acknowledged (though some admit it in private).”).


⑤⑨ See, e.g., Shane, Executive Branch Self-Policing, supra note __, at 514 (“A competent legal memorandum on this particular point would consider the implications of constitutional text pointing conspicuously in the other direction . . . .”).

⑤⑩ For my own argument to this effect with respect to use of force in Korea, see Zachary Price, Attacking North Korea Would Be Illegal, TAKE CARE BLOG (Aug. 10, 2017).
prosecution of state-authorized medical marijuana businesses.152

In sum, applicable due process case law, read in light of the appropriate balance of fairness, departmentalism, and anti-suspending constraints in this context, supports recognizing a general reliance defense for government officials facing penal sanctions for engaging in conduct the Justice Department’s Office of Legal Counsel assured them was lawful. This defense is necessarily subject to a vague outer limit for unreasonable constitutional determinations—a limit necessary to maintain an appropriate sense of caution and restraint on all sides—but in general in this context considerations of fairness and bureaucratic regularity should win out over concerns about potential unjustified self-dealing. As we shall see next, however, other contexts implicate a different balance of concerns and thus require lesser degrees of reliance protection.

2. Reliance on Other Executive Directives in Penal Litigation

If the balance of relevant considerations, as informed by applicable case law, generally supports protecting reliance on formal OLC opinions in subsequent penal litigation, a different calculus should apply to reliance on less formal legal determinations. Here, too, the reliance calculus must balance multiple conflicting and largely incommensurate concerns, yet the overall balance supports weaker reliance protection than in the case of more formal opinions. For such legal determinations, reliance should be protected only insofar as the executive view reflects conclusions that, within the context of prior executive-branch practice and precedent, are not only professionally reasonable, but also objectively valid.

The set of legal determinations in this category should include all internal executive legal conclusions short of authoritative Justice Department guidance, up to and including presidential signing statements, White House counsel opinions, and other outputs of the “porous” legal process some accounts suggest is growing more common. While such determinations are subject to the same incentives for over-reaching that infect all self-authorizing executive opinions, they lack the procedural and institutional guarantees of validity that help assure principled constitutional analysis in a signed Justice Department opinion.153 Simply put, there is less reason to trust

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152 For my analysis of this point, see Zachary S. Price, Funding Restrictions and Separation of Powers, 71 VAND. L. REV. 357, 437-49 (2018).

153 Although any significant constitutional assertion in a presidential signing statement is likely to be vetted internally by the Justice Department, such statements are necessarily formulated on a rushed timetable and rarely supported by any substantial legal reasoning. In that context, risks of political manipulation are heightened, as are the incentives to preserve an executive position by laying down a marker, even if the position is dubious and on closer examination would provide no sound basis for departing from statutory requirements.
them, and therefore less reason to protect those who rely on them without making further inquiries. Indeed, on some level, the whole point of a more porous, policy-inflected legal process is to yield conclusions that give greater relative weight to policy in the legal calculus.\textsuperscript{154} Whatever the merits of that recalibration on other types of legal questions, there is little reason to let motivated constitutional reasoning of this sort eliminate statutory restraints on the executive branch itself. In fact, as we have seen, even in conventional administrative contexts where policy may more appropriately infect legal analysis, the degree of procedural formality factors importantly in the degree of judicial deference.

On the other hand, it is true that departmentalist values may also be at their apex in this context. In personally issuing a signing statement or selecting some view from among competing options generated through interagency deliberation, individual presidents, as heads of the executive branch, are asserting a particular constitutional view for which they are then politically accountable. From an accountability perspective, therefore, deference might be more, rather than less, warranted in this context.\textsuperscript{155}

The trouble with this view, however, is that the core value departmentalism protects is not presidential judgment for its own sake, but rather principled executive judgment on constitutional issues. From that point of view, departmentalism values are better advanced by encouraging a legal process that gives greater force to legal rather than political values. As for fairness considerations, furthermore, although punishing an individual for conduct undertaken in reliance on the President’s own assurances or directives certainly risks significant unfairness, the absence of any formal legal opinion—and indeed the very possibility that responsible senior officials could have sought stronger legal assurances yet failed to do so\textsuperscript{156}—cuts against treating the risks of entrapment here as equivalent to reliance on a formal Justice Department opinion. Again, some anti-entrapment case law treats whether “a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries,”\textsuperscript{157} as a prerequisite to recognizing a reliance defense. Here, the same consideration should foreclose protecting reliance if those at the top of an agency could have done more to protect themselves and their

\textsuperscript{154} See Renan, supra note __, at 872 (“Within a ‘zone’ of reasonable legal answers is a policy-drenched process of giving law meaning.”).


\textsuperscript{156} Cf. United States v. Lansing, 424 F.2d 225, 227 (9th Cir. 1970) (indicating that reliance defense depends on whether “further inquiries” would reasonably have been pursued).

\textsuperscript{157} United States v. Lansing, 424 F.2d 225, 227 (9th Cir. 1970); see also United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004) (similar).
Here, then, the balance of relevant considerations should support weaker reliance protection. Even so, the institutional setting, and in particular the unfairness of punishing officials for relying on presidential directives, should once again inform how courts evaluate the legal determination in question on the merits. In particular, insofar as the doctrine should appropriately aim to encourage obtaining a credible executive-branch opinion, courts should not necessarily reject a reliance defense simply because they would have reached a different legal conclusion de novo. Instead, by rough analogy to the more limited so-called Skidmore deference applicable to informal administrative determinations outside Chevron’s scope, the relevant tradeoffs may best cash out in a rule that protects reliance on presidential directives in subsequent penal enforcement suits, but only insofar as those statements reflected a principled executive branch view rooted soundly in past practice and precedent. Courts, in other words, should give the executive branch less space to formulate novel positions in this institutional setting, but at the same time courts’ analysis should not be de novo either. Instead, courts should analyze the issue from the perspective of a principled executive branch lawyer, operating within a framework of executive branch precedent, and uphold any decision that such a lawyer could embrace, whether or not it reflects the view the court would have embraced on its own as a matter of first principles.

Under this rule, judicial analysis would effectively stand in for the more complete inquiry the executive branch itself should have undertaken at the time: courts considering after-the-fact reliance defenses would stand in the shoes of a responsible executive branch lawyer, shielding government officials from personal penal responsibility insofar as their actions fell within the bounds of what such a lawyer at the time could have authorized. By doing so, courts may model the approach such lawyers should follow in general. What is more, by calibrating the level of deference in accordance with the formality of executive-branch legal decisionmaking, courts may encourage officials to seek more complete legal guidance in the first place, so as to obtain greater legal security down the road.

For the same reasons, once again, this approach gives appropriate force to departmentalist values. It is true that departmentalism’s central rationale is to encourage accountable constitutional judgments by the elected head of the executive branch, not to facilitate bureaucratic imperialism by Justice Department lawyers. Yet by the same token, as noted, departmentalism presumes presidential constitutionalism, not unprincipled self-licensing. The framework proposed here calibrates judicial deference to balance these

competing impulses. Presidents may effectively shield subordinates from penal sanction, but only insofar as their constitutional assertions accord with the broader tradition of American constitutionalism as practiced by past presidents and executive branch lawyers. Advice from executive branch lawyers—lawyers who are themselves accountable to the president, but depended upon for sound professional judgment—may push past existing precedent to a somewhat greater degree, but only because lawyers formulate advice in an institutional setting in which professional norms and internal practices may be more conducive to principled legal reasoning.

Accordingly, reliance on a presidential signing statement or other executive directives, without any supporting legal opinion, should support a reliance defense only insofar as the constitutional determination at issue reflects the best view a lawyer operating within the framework of executive precedent would have adopted. By this standard, to be concrete, directives and assertions based on the longstanding executive-branch view that conduct of diplomacy is an exclusive executive prerogative could immunize officials from subsequent penal sanctions, under the Anti-Deficiency Act or otherwise. To establish such protection, the executive branch need not restate in new formal opinions positions already established by a prior line of reasoned executive precedent—even if courts might not share the asserted view as a matter of first principles.

In contrast, more novel assertions in a signing statement or other informal directive could not have such immunizing effect. To return to a key recent example, President Trump’s recent signing statement questioning the validity of funding restrictions on federal marijuana enforcement thus could not properly be subject to reliance by subordinate officials. For reasons I have addressed elsewhere, this position is flawed on the merits, and while it may draw some support from stray comments in past reasoned opinions and prior presidential statements, no thorough legal analysis of which I am aware supports this constitutional position. Likewise, while use of military force within the parameters of prior executive-branch legal opinions may be immune to sanction under the ADA or other applicable statutes, use of military force outside those parameters should not carry the same protection absent a credible new opinion.

This understanding still risks significant unfairness to subordinate government officials. But it appropriately calibrates the level of deference to the heightened risks of unprincipled self-authorization in this institutional setting, and it responds to those risks by maintaining incentives to seek more formal legal guidance from the governmental agency with particular legal competence when the position being advanced appears novel and uncertain.

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159 See Price, Funding Restrictions, supra note __, at 440-45.
3. Civil Damages Suits and Other Litigation

Some reliance protection, then, is warranted in after-the-fact punitive enforcement suits, although the scope and character of such protection should vary according to the nature of the legal assurances at issue. It remains, however, to consider everything else: civil damages suits, enforcement against private parties, and other forms of litigation. In all such settings, the balance of relevant considerations should tip the other way, so as to support de novo judicial consideration of pertinent questions. In such litigation, in other words, prior executive-branch legal determinations, whether embodied in formal legal opinions or not, should receive no particular protection, except insofar as courts chose to defer to prior executive-branch precedent and practice in their own reasoning.

The distinguishing feature of all such non-penal actions is the presence of some private party, as opposed to the responsible government officials themselves, demanding redress or protection. To start with the easiest case, when the government itself pursues enforcement against someone else in reliance on an executive opinion or statement deeming unconstitutional any restrictions on such enforcement (such as, say, an appropriations limitation), upholding reliance on the government’s own prior constitutional conclusions would obviously mean shortchanging the current defendant’s interest in a different view prevailing. Much the same is true in a tort damages action seeking retrospective liability against the government itself or an individual officer based on unlawful official action. In such suits, the claimants hold an interest in compensation that might well depend on their view of the underlying constitutional law prevailing over the view on which the government previously relied.

Accordingly, in either type of suit, officials’ reliance on past internal executive-branch guidance provides no compelling reason to depart from conclusions the court would otherwise have reached on its own. In these cases, precisely because private interests apart from the government’s relationship with its own personnel are at issue, departmentalism weighs in favor of independent judicial consideration rather than deference. Here, in other words, respecting departmentalism does not require deferring to executive determinations on which government personnel acted, but instead, quite the opposite, giving independent force to judicial judgments about proper resolution of court cases seeking redress of private harms from the judiciary. Anti-suspending concerns, likewise, strongly support an independent judicial role here, because leaving affected private parties

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160 Cf. United States v. McIntosh, 833 F.3d 1163, 1178-79 (9th Cir. 2016) (barring prosecution based on appropriations restriction on federal marijuana enforcement).
without redress (or without an otherwise-available defense) would eliminate even indirect restraints on the executive branch’s self-dealing determination of its own powers.

Finally, while damages claims against individual officers (if not also other types of litigation) may raise significant fairness concerns—concerns that have shaped the doctrine of qualified immunity—such concerns are nowhere near as acute as in enforcement suits seeking criminal liability or other punitive action. In all likelihood, after all, the government will indemnify individual officers for any personal liability, and while such potential indemnity may not spare officials the burdens and reputational costs of a lawsuit or adverse judgment, it may at least mitigate fairness concerns about holding them to account. Furthermore, although some qualified immunity case law suggests the immunity’s purpose is to protect officials’ subjective good faith, the doctrine might better be understood, more along the lines of administrative law deference doctrines, as protecting officials’ freedom of action within objectively reasonable bounds. Reflecting this tension in qualified immunity’s rationale, lower courts are generally split over whether and to what degree reliance on an internal legal opinion should guarantee immunity to front-line officers. Whatever the merits of the pro-

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164 See Buade, supra note __, at 60-61 (“[I]nstead of the subjective inquiry into intent or motive that marked the good-faith inquiry, qualified immunity has become an objective standard based on case law. This means that even the official who acts in bad faith is entitled to the defense if a different official could have reasonably made the mistake.”).
165 Compare, e.g., In re County of Erie, 546 F.3d 222, 229 (2d Cir. 2008) (refusing to consider “reliance upon advice of counsel”), with, e.g., Cox v. Hainey, 391 F.3d 25, 35 (1st Cir. 2004) (deeming advice of counsel relevant to the immunity calculus unless “an objectively reasonable officer would have [had] cause to believe that the prosecutor’s advice was flawed, off point, or otherwise untrustworthy”), and Kelly v. Borough of Carlisle, 622 F.3d 248, 255-56 (3d Cir. 2010) (“we hold that a police officer who relies in good faith on a prosecutor’s legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause”). The Supreme Court has suggested in dicta that reliance on advice of counsel may be relevant to qualified immunity in some circumstances. See Messerschmidt v. Millender, 565 U.S. 535, 553 (2012) (“the fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause”). For a general survey of the case law and courts’ varied approaches, see Dawson, supra note __, at 528-29, 543-53.
immunity position in other contexts, here the cost to competing departmentalist and anti-suspending values is simply too great to provide blanket immunity for reliance on self-authorizing executive legal judgments.

This analysis permits straightforward resolution of questions arising in any third-party enforcement action, and indeed courts have had little trouble disagreeing with OLC or Attorney General opinions in that context. In the 1939 case *Perkins v. Elg*, for example, the Supreme Court enjoined a deportation it considered unlawful, even though doing so meant disagreeing with an Attorney General opinion on which the Labor Secretary relied.\(^{166}\) Noting that the Attorney General had himself disregarded past practice and failed to consider key features of birthright citizenship under the Fourteenth Amendment, the Court held that, though “reluctant to disagree with an opinion of the Attorney General,” in this case “the conclusions of that opinion [were] not adequately supported and [were] opposed to the established principles which should govern disposition of the case.”\(^{167}\) Likewise, more recently, in *Larel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, the D.C. Circuit vacated an order issued by just two members of the National Labor Relations Board, notwithstanding a prior OLC opinion concluding that two members were sufficient for a quorum.\(^{168}\)

By the same logic, President Trump’s marijuana signing statement should have no bearing on whether courts enforce appropriations limits on federal marijuana enforcement. During the Obama Administration, the federal government in fact pursued criminal prosecution and civil forfeiture against certain marijuana offenders who claimed their actions complied with state law and thus fell within the scope of an appropriations restriction barring use of justice department funds “to prevent [certain listed states] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”\(^{169}\) Although the government argued that this appropriations ban applied only to enforcement against state officials rather than private parties, the Ninth Circuit rejected that reading and barred continued litigation against the defendants in these cases.\(^{170}\) In the meantime, President Trump issued his signing statement raising doubts about whether Congress holds authority to deny funds for executive enforcement of

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\(^{166}\) 307 U.S. 325, 347 (1939).

\(^{167}\) *Id.* at 348-49.

\(^{168}\) 564 F.3d 469, 476 (D.C. Cir. 2009) (“we acknowledge that the case before us presents a close question”); *see also Noel Canning*.


\(^{170}\) United States v. McIntosh, 833 F.3d 1163, 1178–79 (9th Cir. 2016).
Had prosecutors relied on any such presidential view, however, its existence, or even its formulation in a formal legal opinion from OLC or some other executive body, would have provided no reason for the court to reach a different result. The primacy of anti-suspending concerns over any valid reliance consideration in this context provides adequate justification for disregarding the executive branch view and considering the question de novo—as indeed courts have done in the other cases noted earlier raising questions previously considered by OLC or the Attorney General.

As for civil damages suits, such litigation may well become less common even without any broad reliance defense. Historically, as James Pfander has demonstrated, damages litigation was a primary vehicle for elaborating and enforcing constitutional restraints on the executive branch, and in its landmark 1971 *Bivens v. Six Unknown Federal Narcotics Agents* decision the Supreme Court recognized a tort cause of action for constitutional violations. In subsequent decisions culminating in *Ziglar v. Abbasi*, however, the Court has all but disclaimed any such cause of action, concluding that in general “the Legislature is in the better position [than courts] to consider if the public interest would be served by imposing new substantive legal liability.”

To the extent *Ziglar* precludes liability for constitutional tort damages apart from unlawful searches, the analysis offered here might provide yet another reason to reconsider the Court’s holding. The Court in *Ziglar*, after all, based its holding in part on concerns that “high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis.” Yet giving such overwhelming primacy to reliance concerns here entails shortchanging other competing principles identified as central to the analysis here.

In any event, to the extent liability otherwise remains possible, the balance of relevant principles militates against recognizing an automatic qualified immunity defense based on reliance on executive legal assurances. Though some have argued to the contrary, any such absolute defense would go beyond what sound analysis justifies even in the penal enforcement context, let alone with respect to civil liability. Here, moreover, because

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172 JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR (2017); see also JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LAW 100 YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).


174 *Ziglar*, 582 U.S. at ___ (slip op. at 12) (internal quotation marks omitted).

175 *Id.* at ___ (slip op. at 22).

176 See Pines, *supra* note __; Dawson, *supra* note __.
offsetting departmentalist and anti-suspending considerations are so powerful, fairness cannot provide the exclusive basis for analysis—particularly when fairness considerations do support recognizing a reliance defense with respect to penal litigation. To the extent reliance defenses preclude penal prosecution, as I argued earlier, some alternative mechanism of after-the-fact legal accountability may well be important to disciplining executive constitutional analysis. As Professor Pfander (among others) has argued, the “imperfection” of internal constraints on lawless government action, as evidenced most notably in the torture controversy, “suggests a continuing need for some form of external judicial test for the legality of government action.”

Finally, for similar reasons, any reliance by private parties on executive constitutional interpretation should likewise lack automatic due process protection. In that context, too, fairness considerations are more attenuated, given that such parties, unlike official defendants, faced no compulsion to rely on executive-branch assurances rather than underlying statutory prohibitions. At the same time, anti-suspending concerns are acute in this context, as federal officials otherwise could readily exercise an unbounded interpretive power to eliminate legal burdens on their constituents. To be sure, the problem here is not self-authorization per se; private parties rather than government officials are the ones here being liberated from statutory constraints. Yet the political and institutional risks are nonetheless parallel, particularly in our era of sharply divided, tribal politics. After all, freeing constituents from disfavored laws that Congress nonetheless fails to repeal may carry significant political benefits, as evidenced by executive officials’ increasing reliance on other forms of nonenforcement to show progress on their constituents’ key policy goals. Here, too, then, to hold such bad-faith action in check, any reliance defense should track the courts’ own view of the merits, rather than the executive branch’s.

In sum, recognizing a limited reliance defense in penal litigation highlights the value in maintaining external de novo consideration of constitutional questions in other litigation contexts, including suits seeking private damages from individual government officials. Congress may adjust such liabilities or provide indemnities as appropriate, but such suits may provide an important mechanism for external judicial consideration of potentially self-serving interpretations of Article II developed within the executive branch itself.

177 See supra Part III.A.
178 PFANDER, supra note __, at 97; see also, e.g., Baude, supra note __.
179 I have discussed this dynamic in Price, Enforcement Discretion, supra note __.
III. RELIANCE AT THE STATE AND LOCAL LEVEL

Reliance defenses at the federal level, then, require a complicated calibration to account for multiple cross-cutting considerations, each with constitutional underpinnings. By contrast, parallel reliance questions at the state and local level are far easier to answer. Unlike the federal executive branch, state executive officials have no well-supported authority over federal constitutional interpretation.

Framing the federal inquiry correctly thus casts questions about state and local liability in proper light, exposing errors in recent calls to recognize comparable self-authorizing authority in such governments: at the state and local level, the federal balance between departmentalism and the anti-suspending principle collapses into a single principle of federal-law supremacy, leaving only concerns about individual fairness on the other side. After first elaborating why the Constitution supports no principle comparable to departmentalism at the state and local level, I will thus argue that federal supremacy should always override individual fairness concerns in this context, except insofar as otherwise applicable general doctrines, like mens rea and qualified immunity, support limiting individual officers’ liability.

A. Against State Departmentalism

The U.S. Constitution includes a straightforward declaration of federal supremacy over state law. Under the Supremacy Clause, the federal constitution itself, as well as the laws and treaties established under it, “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”180

Unlike the President, furthermore, states hold no obligation to ensure faithful execution of federal law. Far from it, under the anti-commandeering doctrine of New York v. United States and Printz v. United States,181 the federal government cannot compel state officials to assist federal enforcement even if it wants to. Accordingly, the structural foundation for executive departmentalism at the federal level—the inference that responsibility for enforcing federal law necessarily entails independent authority to interpret the federal constitution—is simply absent with respect to state and local officials. Though such officials must respect the supremacy of federal law, the constitutional structure fails to support inferring authority to interpret the constitution independently from federal authorities in doing so.

180 U.S. Const. art. VI, cl. 2.
To be sure, at least one leading scholar has argued to the contrary. According to Michael Stokes Paulsen and his son Luke Paulsen, “state governmental actors are legitimate constitutional interpreters” and, as such, may act based on constitutional understandings at odds with governing federal understandings. The Paulsens appear to derive this view from two features of the Constitution: first, the Oath Clause’s requirement that state officials swear to support and defend the Constitution; and second, a structural inference that states serve as checks on the federal government, just as the federal government serves as a check on them. Neither inference is persuasive. State officials’ oath (which federal officials also must swear) seems designed principally to prevent treason: it requires simply that all state and federal officials be “bound by Oath or Affirmation[] to support [the federal] Constitution.” From that point of view, the oath, far from empowering state obstruction of federal authority, serves principally to bar subversives from holding state or federal office.

The Paulsens’ oath theory, moreover, would prove far too much. On their view, senior state officials (like governors and attorneys general) would hold authority to interpret the Constitution independently. But so, too, would every other state, local, and federal official who swears the same constitutionally mandated oath. The resulting interpretive chaos would be entirely at odds with Oath Clause’s own apparent purpose of ensuring governmental stability.

As for the states’ checking function, such power today consists principally in the authority, protected by the anti-commandeering doctrine, to decline assistance to federal law enforcement efforts. It does not legitimately entail power to affirmatively obstruct federal enforcement, much less to nullify federal law, as interpreted and applied by federal authorities. Across the sweep of American history, after all, federal officials have repeatedly suppressed such efforts, by force when necessary. Were any further

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183 See id. at 135.
184 U.S. Const. art. VI, cl. 3.
185 Id.
186 See John Dinan, Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism, 74 Alb. L. Rev. 1637, 1639 (2011) (arguing that recent examples of state resistance to federal authority “fall short of invoking the clearly discredited doctrine of nullification” embodied in historical examples). Two scholars have recently advanced a contrary view that state nullification of federal law, though likely “still dead as far as the U.S. Supreme Court is concerned,” may have “at least rejoined the ranks of the undead” in recent years. James H. Read & Neal Allen, Living, Dead, and Undead: Nullification Past and Present, in Nullification & Secession in Modern Constitutional Thought 91, 95 (Sanford Levinson, Ed., 2016). Among other recent developments, California’s attempt to criminalize voluntary cooperation with federal immigration enforcement could
justification needed, furthermore, states’ historic pattern of resisting federal authority based on unfounded and idiosyncratic constitutional understandings provides a strong normative and historical reason to fear how states might use a self-authorizing interpretive power. Indeed, as Tara Leigh Grove has recently highlighted, state defiance of federal court orders in the civil rights era widely discredited such assertions of state interpretive autonomy.\(^{187}\)

Today, in consequence, a strong political convention ensures that states comply with adverse federal court decisions.\(^{188}\) It may well be true, as Grove argues, that this conventional expectation is more recent and fragile than is commonly supposed. Nevertheless, its continuing strength, so long as it lasts, further reinforces the conclusion here that federal courts have clear authority to contradict constitutional views asserted by state authorities.\(^{189}\)

In fact, even the Paulsens recognize that federal authorities necessarily retain the ultimate power to assert their own constitutional interpretations against state actors who take different views. While independent state interpretive authority is “legitimate,” they argue, it is not “supreme.”\(^{190}\) Hence, in their view, “[n]o state, group of states, or state actor within them has power to interpret the US Constitution in a way that binds the nation as a whole.”\(^{191}\) On the reliance questions at issue here, this concession gives up the game. Without power to bind federal authorities, whatever interpretive authority state government lawyers and other non-federal officials possess provides no basis for limiting a federal court’s later assertion of its own contrary constitutional understanding.

**B. Against State and Local Self-Authorizing**

In this context, then, the departmentalism principle that so greatly complicates federal reliance defenses simply drops out of the picture. As a structural matter, state and local officials have no self-authorizing interpretive power; federal law, and thus federal interpretation of federal law, is supreme.

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\(^{188}\) Id. at 502-05.

\(^{189}\) Id. State officials might plausibly enjoy a form of *Chevron* deference in interpreting federal statutes they administer, but such deference would turn on the scope of the statutory delegation, not any constitutional principle relevant here. For an analysis of whether *Chevron* should extend to state administration of federal law, see Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 601 (2011).

\(^{190}\) PAULSEN & PAULSEN, supra note __, at 135.

\(^{191}\) Id.
In consequence, the three-way balance of fairness, departmentalism, and anti-suspending that applies with respect to federal executive constitution reduces at the state level to a binary conflict between fairness and federal supremacy—a conflict in which supremacy, at least as a structural matter, must prevail over any unfairness in defeating reliance, lest state and local authorities acquire power to nullify federal constitutional guarantees through unprincipled self-authorizing interpretation.

In doctrinal terms, then, reliance on a prior state or local interpretation of the federal constitution, even when embodied in an internal legal opinion, should provide no particular reason to insulate state officials from liability. Accordingly, such reliance should provide no particular defense to direct federal enforcement, such as through federal prosecution of civil rights crimes. Nor should such prior constitutional interpretation provide any particular reason to bar civil liability where qualified immunity otherwise would not. Again, court-created immunity doctrines already protect state and local officials from personal liability under § 1983 unless those officials violated “clearly established” federal constitutional law. Even more clearly here than with respect to federal executive opinions, whether a particular legal position is “clearly established” should not turn on what internal advice officials received ahead of time. On the contrary, in advising their official clients, state and local lawyers’ job is simply to assess accurately what federal constitutional principles federal courts would view as clearly established under this framework. Given that such lawyers lack independent interpretive authority, their mistaken predictive judgments should not immunize conduct that would otherwise expose their clients to liability.

Arguing otherwise, one scholar has recently claimed that qualified immunity doctrine properly protects state and local officials’ reliance on internal legal guidance, so long as this reliance is “objectively reasonable.” In this account, such blanket opinion-based immunity properly “balances the policy of deterring official misconduct against that of preventing overdeterrence and unfairness to officers.”192 Yet this analysis makes precisely the same mistake that proponents of blanket immunity for OLC reliance make: it privileges fairness considerations over considerations of structure. Holding officers to account for actions their own lawyers approved may well be subjectively unfair to the officer. But given state and local lawyers’ own lack of independent authority to interpret the federal constitution, the risk of mistaken legal judgments must properly fall upon the officials who violated constitutional rights, not on the victims who suffered from those actions.

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192 Dawson, supra note __, at 529-30.
CONCLUSION

At all levels of government, government lawyers’ capacity for objective legal analysis is coming under increasing stress, as voters grow more tribal and legal judgments more partisan. One consequence may be that a question we have largely avoided answering to date—the degree to which official legal opinions may immunize those who rely on them—will now require judicial resolution. To guide any such future decisions, I have attempted in this essay to identify the set of reliance doctrines best supported by governing authorities and background constitutional considerations. With respect to the federal government, I have argued, reliance on authoritative Justice Department legal opinions should generally afford a defense to penal prosecution, reliance on informal legal directives should provide such a defense only insofar as the directive was objectively valid, and reliance should provide no particular defense in other litigation settings such as third-party prosecutions and civil damages suits. At the state and local level, meanwhile, reliance on an internal government legal opinion should provide no particular protection beyond what qualified immunity or other applicable doctrines would otherwise afford.

Elaborating these principles carries some risk of inviting bad-faith invocation of reliance. Yet my goal is the opposite. Throughout, I have aimed to highlight how reliance doctrines may help reinforce other mechanisms of legal restraint, such as formulation of principled legal guidance within the federal executive branch. Courts are the most important rule-of-law institution in our society, but they are hardly the only one, and partisanship may strain their own capacity to resolve legal questions in a manner perceived as legitimate by all. In crafting reliance doctrines—though not only in that context—courts should therefore consider not only their own best view of the law, but also whether staying their hand may sometimes better contribute to preserving an ethic of legal compliance within the executive branch, the branch of government where the rule of law most matters and yet may be most imperiled.