

Who Decides on the Emergency? Comparing Institutional Response Capacities in the US Executive and the UK Parliament Post 9/11

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Abstract

This Article is concerned with the problem of authorization to respond to emergencies and its impact on the political and institutional environment of response. The traditional insight about the problem of authorization in emergencies flows from the assumption that emergencies require a vast amount of powers, broad, flexible and arbitrary, to respond to them. The problem is then how to maintain limitations to such necessarily broad powers, limitations that are essential in a political order of limited government. This framing of the problem of authorization as the problem of “unconstrained power” within “constrained government” generates vast and complex solutions. In view of the assumed need for broad discretionary powers, complex structures of limitations are imagined, designed, practiced and contested: procedural and substantive limitations; legal, institutional and political limitations; temporal and conditional, broad and varied techniques for limiting discretionary powers. The contestations over these structures inform the legal politics of authorization as a politics of *power and constraint*.

But the drama of power and constraint tends to blur another important problem of emergency authorization. This is the problem that flows from the fact that actual response practices typically take place within complex institutional settings rather than by one powerful agent who decides what to do about the emergency. What is the connection between the constitutional distribution of powers to respond to emergencies and the actual institutional context in which those powers are exercised? The second part of this Article highlights an alternative politics of authorization, the politics of *institutional competence*. I compare functional, legal and ideological features of two institutions situated at the center of the structure of powers to respond to emergencies in two distinct systems post-9/11: the Office of Legal Counsel in the U.S. Executive and the Joint Committee on Human Rights in the U.K. Parliament. The comparison suggests that we should expect a correlation between constitutional choices in the distribution of powers to respond to emergencies and institutional environments in which response activities will actually take place. The problem of competence is therefore not strictly that of limiting unconstrained powers but of accounting for environments of power and power relations that are affected by the distribution of response competences.

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A. Introduction

Under examination in this Article are two very dissimilar institutions, very differently situated in two very unlike domestic legal systems: the Office of Legal Counsel (OLC) within the U.S. Executive and the Joint Committee of Human Rights (JCHR) within the U.K. Parliament. What brings them together here is the fact that each, in its respective domestic system, was an important legal actor in the post-9/11 response, drew significant public attention and was and still is at the center of debates about its performance in the crisis. Most importantly, from their respective domestic positions, both institutions are expected to play important legal roles in future crises.

Why is it, I ask, that these two institutions, both drawing on substantial legal expertise, are so dominant in the accounts of their systems' legal and political responses to the emergency? Why, for example, was the OLC, a professional office of legal experts, so important for understanding the Bush administration's response, even though it was claimed to be an extra-legal response? One prevalent answer is that OLC opinions were used by the administration as "get-out-of-jail cards" to legalize illegal response policies. Under this explanation, a thorough reform process might prevent this abuse in the future. But many question whether reform will be enough and claim that there are inherent problems in using internal executive mechanisms to constrain the "unlimited" power that the executive must retain in order to respond to emergencies. And why is the JCHR so dominant in the accounts of the post-9/11 (and post-7/7) U.K. government response? A prevalent explanation is that the JCHR was able to effectively scrutinize the U.K. government's decisions because of the latter's commitment to its international, and specifically European, human rights obligations as they were domesticated by the Human Rights Act 1998. Under this explanation, the JCHR was an important component in the rule-of-law framework that was able to provide some check on typical executive emergency powers excess. But many observers question the real impact of the Committee's involvement and claim that a parliamentary committee is inherently too weak to constrain the executive in front of a future emergency.

In view of this rather skeptical state of the discussions regarding the value of institutional reform for the sake of legal scrutiny in emergencies, the analysis in this Article steps back from the prevalent concerns of institutional design to describe the two institutions' involvement in the emergency by way of asking the question of competence or authorization. To understand the importance of these institutions in the post-9/11 response, this Article claims, one must ask how

they are situated in relation to the agents constitutionally authorized to respond to the emergency.

The Article consists of two parts. In the first part (Part B) the problem of authorization to respond to the emergency is presented in its traditional framing as the problem of power and constraint. Emergencies, under the traditional framework, necessitate ultimately flexible powers of response. But, since such powers have no place in a system of constrained government, they must be in some way limited. This framing of the problem generates a vast array of solutions as authorization and limitation mechanisms are imagined, designed and evaluated. But the logic of authorization operates, rather than as a mechanism for the concentration of powers in the executive, as a source of distribution of complex relations of response competences. This is the politics of powers and constraint: the formation of an ever-expanding maze of institutions that are authorized to exercise flexibility as well as constraint.

However, the drama of power and constraint cannot fully describe the legal politics of authorization. In fact it overshadows and conceals another important authorization problem that stems from the fact that even if one can construct unlimited power, one cannot expect it to be exercised by a truly unconstrained agent. Emergency powers are most often exercised in complex institutional contexts, contexts that the power/constraint trajectory cannot fully explain. The problem of authorization must be understood more broadly, not as the problem of how to constrain necessarily flexible powers but as the problem of institutional competence. This problem, I claim, has its own alternative politics and generates other kinds of consequences. What is the connection between the way that response powers are constitutionally distributed and actual institutional environments of response? To understand this aspect of the problem of authorization, the focus must move from the assumption of unconstrained powers to the study of response capacities within institutional environments.

The second part of this Article (Part C) illustrates this claim by analyzing two legal institutions, the OLC and the JCHR, as they are located within their respective competence structures. After presenting these structures—the U.S. centralized and the U.K. decentralized distribution of emergency powers in the context of the post-9/11 response—I concentrate on the two legal institutions and show how they fit their constitutionally designed environments. The OLC fits a centralized and executive centered environment because of its functional commitment to making legal sense of executive decisions, its authoritative professional status as rendering the last word on the executive's law, and its ideological stand in favor of supremacy of executive powers in emergency response. The JCHR fits a decentralized environment of response because

of its functional commitment to an interactive role within an extended and extending institutional framework; the soft, non-decisive legal status of its opinions, and its ideological stand in favor of “dialogue” and institutional reflexivity. In both cases, I conclude, the institutional environment of response is implicated by different solutions to the question: “Who decides how to respond to the emergency?” When we think about the problem of authorization for emergency response, I conclude, we must move beyond the framework of power and constraint to questions of capabilities of responders in their complex institutional settings.

B. The Problem of Authorization and the Politics of Power and Constraint

A central problem in emergency powers theory and practice is that of authorization or competence.¹ This problem is often framed in question form: Who is to decide that there is an emergency and what should be done to handle it?²

Unexpected threats, it is assumed, require unlimited competence of response and this is anathema to the idea of constrained government. “The content of competence in such a case’, Carl Schmitt famously warned, “must necessarily be unlimited,” and “the most guidance the constitution can provide is to indicate who can act in such a case.”³ Who can act with unlimited powers? Who is the authorized organ to act outside of constraints? With potential devastation associated with unexpected threats in mind, attempts are made in emergency theory and practice to design and engineer competence that would allow for such necessary “unlimited” power to be contained within the political and legal system.

¹ In this Article I use the terms “authorization,” “competence” and “legal competence” interchangeably. According to this use, a person or an institution is competent if she has the authority to make certain kinds of decisions. Competence, as authorization, is a normative concept in the sense that a person has competence by virtue of a norm and that the exercise of competence has normative implications. See TORBEN SPAAK, *THE CONCEPT OF LEGAL COMPETENCE* 11–17 (1994). I also sometimes refer in the same vein to “power,” for example when speaking of “emergency powers” as the power to respond to emergencies. British and American philosophers (Bentham, Hohfeld, Hart and others) tend to use “power” where European writers (Kelsen, Ross) prefer to speak of “competence.” Since the issue under study here is the question of authorization (to decide and act in emergencies), I move between the terms with reference to competence (or power) in the sense of authorization. For an analysis of traditional theories of legal power or competence, see LARS LINDHAL, *POSITION AND CHANGE: A STUDY IN LAW AND LOGIC* 194–211 (1977).

² Note that the question “Who decides that there is an emergency?” is different from the question “What is the emergency?”, although often this latter question is answered by pointing to an agent who decides. But this is not the only way to solve definition problems that may still be contested even if we have a clear structure of distribution of powers to decide on it. See the fascinating discussion about “the problem behind the problem” of definitions of disaster and emergency in Steve Kroll Smith & Valerie J. Gunter, *Legislators, Interpreters and Disasters: The Importance of How as Well What is a Disaster, in WHAT IS A DISASTER? PERSPECTIVES ON THE QUESTION* 160, 165 (Enrico L. Quarantelli ed., 1998).

³ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 6–11 (George Schwab trans., 2005).

And so, the traditional assumption about authorization in emergencies has a two-headed shape. The first head is that of “power”: Emergencies require an operation of a special kind of power, a power that is particularly broad, arbitrary, discretionary and mostly flexible—the power necessary to respond to unexpected threats.⁴ The other head is that of “constraint”: Since this type of power, although necessary, is anathema to a political order of constrained government, something must be available to constrain it. The solution to this problem is most often in creating mechanisms that both *authorize* and *limit* arbitrary powers. If we solve the problem of power (that is, if we find a way to allow arbitrary powers to respond to unexpected threats), we still have to solve the problem of constraint (that is we have to find a way to provide that such power will be limited).⁵

This framing of the problem, that of power and constraint in emergencies, generates large and dramatic legal politics—that is, it is a fruitful basis for contestations over the shape of the order of emergency response. Here we encounter again the limited perspective that a theory of exception allows: Emergencies cannot be described exclusively by the need for unconstrained powers, but also by the fact that they bring contestations over power and constraint to the fore. We recognize this politics when governments claim, as they often do, that they hold exceptionally broad powers due to circumstances of emergency. We recognize it in arguments about ticking time bomb torture. These are claims that should be understood within this structure: Governments assert that usually their actions are and must be constrained, but now, because of the need to respond to unexpected urgent necessities, their actions should not be restricted or checked because they should be free to act as necessary to respond to threats.⁶

⁴ To express this head Hamilton’s famous quote is often repeated: “[I]t is impossible to foresee or to define the extent and the variety of national exigency and the corresponding extent and variety of the means which may be necessary to satisfy them” THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁵ In his account of constitutional dictatorship Clinton Rossiter specifically relates to the two problems as fundamentally distinct. When he describes why limitations to Article 48 failed to work in the Weimar constitution he says, “One of the two great problems of constitutional government, that of power, had thus been solved. The problem of limitations remained.” CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES 64 (1948).

⁶ The recent torture debates in the U.S. are an example of contestations over the question of unconstrained power (rather than about constraint). Torture, some scholars claimed, is never necessary. Torture is so deeply abhorrent to legal sensitivities that it can never be authorized within a legal system; acknowledging the abhorrence of torture, others argued still sometimes it may be needed. What if torture in some limited set of scenarios is necessary? In view of the ticking time bomb scenario many argued that torture is simply not effective. But what if it is effective, asked “torture advocates,” pushing back against the “wishful thinking of liberal minded ideologues,” what if the only way to save hundreds of people is by inflicting harm on individuals? The anti-torture party would then claim that the ticking time bomb scenario is too theoretical, involves too many unknowns, and therefore cannot provide a basis for an argument in favour of authorizing torture. Most agreed but some added that although torture must stay universally prohibited in exceptional cases it can be practiced “extra-legally,” see Oren Gross, *The Prohibition on Torture and the Limits of Law*, in TORTURE: A COLLECTION 229 (Sanford Levinson ed., 2004), or that in exceptional cases it can be authorized by a warrants regime, see ALAN DERSHOWITZ, WHY TERRORISM WORKS (2003). And so, once the “power” necessary in

Note that this claim is a claim for recognition for unconstrained power but it is not an unconstrained claim. The argument is never for arbitrariness generally, but for a broad authorization justified by special conditions. The power is bounded at least by the exceptional conditions as well as by a commitment to constraint under regular conditions (and as soon as they are restored). This is the structure of all arguments from necessity: under certain conditions, when truly necessary, a power must be allowed that will be able to respond. The limitations of such power are then separately assumed, or contested.⁷

We can also recognize this politics of power and constraint in the instruments of constitutional powers distribution for emergency response. These legal frameworks tend to embody such politics in their structure. A special legal power, broad and unusual, is put in place to be activated under certain conditions of necessity; this unusual power is then folded-into and contained within a separable structure of limitations. These could include conditional limitations (specified situational conditions, such as “an extreme or immediate threat,” or legal conditions, such as a derogations), temporary limitations (as in time limits and sunset clauses), separation of powers limitations (allocation of powers to declare and/or terminate emergency by an independent agency such as parliament or to review by courts) and substantive limitations (standards for exercise such as proportionality, rationality, exclusion of certain rights and so on).⁸

The way this structure plays out within specific institutional settings can vary enormously. But the structure of the authorization problem with its distinction between power and constraint is always powerful and animating. It is a structure of containing in increasingly complex ways the necessarily broad powers within mechanisms of constraint. It is not a structure of concentrating exceptional powers in one powerful agent (although the politics of necessity and

exceptional cases is assumed, efforts are made to engineer “constraint”: political and ethical constraint in Gross’ case, judicial constraint in Dershowitz’s case.

⁷ It is important to distinguish the operational problem of authorization from the theoretical problem of constraint. What we deal with here is not the theoretical question (whether law can constrain officials in response to threats) but the operational question (how to create both power and constraint). This latter question is premised on the need to constrain all necessary power. It is already a practical problem, a product of a field, which is based on a theory of containment, a theory that focuses on solving the problem of constraint. See Karin Loevy, *An Introduction to the Theory of Crisis Containment: The Problem of Emergency and its Paradigmatic Solutions*, in STATES OF EMERGENCY – STATES OF CRISIS 3 (Winfried Fluck et al. eds., 2011). This is not to say that the problem of authorization is disconnected from the problem of constraint; they are inherently connected—at least in that the politics of authorization (and its failures and gaps) constantly bring back to mind the problem of constraint—that is the question of whether law can and whether it should constrain officials in their response to emergencies.

⁸ The structure of “power” vs. “constraint” is not only a feature of explicit constitutional frameworks but also of “extra-legal” solutions that rely on “political limitations.” These may be skeptical about positive structures of constraint and they often imagine “ethical” or “political” limitations to the unconstrained but necessary power. See, e.g., ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Mark E. Tushnet, *The Political Constitution of Emergency Powers: Some Conceptual Issues*, in EMERGENCIES AND THE LIMITS OF LEGALITY 145 (Victor V. Ramraj ed., 2008).

constraint may certainly result in such outcomes or such claims). It is at least also a structure of creating power enhanced by constraint and of creating powers to constrain. This Article suggests that the framework of exceptional powers cannot exclusively explain this politics because the distribution of emergency powers does not generate “constrained powers” nor “unconstrained powers” but complex relations of powers.⁹ The drama of power and constraint prevents us from seeing that both “power” and the power to constrain it are always situated politically and institutionally.

How does the politics of power and constraint affect the institutional environments in which actual emergency measures operate? In the next Part I will argue that we should expect some correlation between the way response powers are distributed constitutionally and the functional, legal and ideological content of specific institutions in which response activities take place. This claim adds an important layer to the legal politics of authorization: I call it the alternative politics of institutional competence; it is the politics that is generated by *relations* of powers in complex institutional settings.

C. The Problem of Authorization and the Alternative Politics of Institutional Competence

In this Part I show how the problem of authorization in emergencies extends beyond the politics of power and constraint. The outcomes of that politics, I claim, in alternative constitutional solutions of distribution of response powers, may have impact on the institutional environment in which response powers are actually exercised. However, these outcomes, although very much relevant to the question of how to authorize emergency activities, are concealed by the logic of power and constraint.

⁹ The idea that institutional frameworks and dynamics make a difference in answering “the emergency paradox” is clearly assumed in each of the different theoretical models that attempt to solve it. In the legality model it was recently expressed by Dyzenhaus’ idea that “rule of law furniture” could be crafted to resist the pull of the vicious cycle of legality’s compulsion. DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 230 (2006). John Ferejohn and Pasquale Pasquino’s questions about the mechanisms that trigger a safe passage between regular government for regular times and irregular government for irregular times, including especially the question of agency in declaring the situation, exercising the relevant powers, declaring the ending and interfering with the decisions or adjudicating legal questions, offer one example of the dictatorship model. John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210 (2004). For a more systematic account of the dictatorship model, see Issacharoff and Pildes’ institutional process model which works within the neo-Roman model but suggests a special focus on institutional design for dictatorship in democracies. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in *THE CONSTITUTION IN WARTIME, BEYOND ALARMISM AND COMPLACENCY* 161 (Mark Tushnet ed., 2005). In the extra-legal model it is the post facto mechanisms that Oren Gross describes as potentially recognizing the legitimacy of extra-legal official acts. See Gross, *supra* note 8. But, I claim the question of institutional design often stays at the level of the distinction between (unlimited) powers and (limiting) constraints. In this article I am interested in looking beyond this dichotomy to the politics of authorization as it figures in response capacities and response environments.

The drama of power and constraint influences the way we think about, design and reform the institutional environment in which powers to respond to emergencies are exercised. We tend to ask whether these environments are flexible enough and whether they allow effective control. But these questions assume the problem of authorization under the traditional framework. They unfoundedly assume that institutions are there to “constrain” or to “allow” necessary powers. It is a product of our wishful thinking about design to solve the problem of power and constraint; it is not a product of actual assessment of the institutional politics of competence. Do we know what the connection between the distribution of powers to respond to emergencies and the institutional context in which such powers are exercised is?

My claim is that we should expect such a connection to exist but that we should not expect it to correlate with our anxiety about powers and constraints. When we constitutionally situate response activities *on the institutional continuum between centralization of powers in the executive and decentralization of powers between different institutions*, we should expect to find not necessarily more or less “constraint” but thoroughly different institutional environments functionally, ideologically and professionally. The nature and character of such environments will in turn have a significant impact on the kind of actual response capacity we should expect to mobilize in emergency.

To illustrate this claim I use as examples two domestic systems (the U.S. and the U.K.) responding to the same type of emergency (the post-9/11 terrorist threat) with similar emergency measures (preventive and investigatory detentions).¹⁰ Both were equally criticized for their illegitimate power expansion in the emergency. What differentiates these systems, for our illustrative purpose, is the different ways in which the problem of authorization was solved in each of them.¹¹ While the U.S. constitutional tradition envisions the concentration of powers in the executive, the U.K. constitutional system envisions a much more diffuse system of response with active roles for Parliament and courts. Against this backdrop I attempt to look more closely at the politics of institutional competence that is generated by the different solutions. Focusing on the functional, ideological and professional features of OLC and JCHR as two legal institutions that operate in the center of the distribution of powers to respond in each system, I conclude that

¹⁰ There might be reasons to question whether the U.K. and the U.S. actually responded to “the same crisis.” The U.S. responded to an event that struck at home and the U.K. responded (at least initially) to the U.S. event and later also to its own terrorist attack of July 7, 2005. Still, as will be explained below, this important distinction may be less significant than it seems for the purpose of analyzing the institutional environments of response.

¹¹ Of course, this is not the only difference between the two systems, but this is the relevant difference for the purpose of the comparison. My question is whether the distribution of powers to respond has an impact on the institutional environment of response and therefore I am emphasizing the differentiated distribution.

the politics of institutional competence has consequences for actual environments of institutional mobilization in ways that go far beyond the framework of power and constraints.

1. Distribution of Powers to Respond in the U.S. and the U.K. Post-9/11

The U.S. government response to 9/11 rested on an explicit legal and political ideology of the unilateral executive. Historically, the U.S. system assumes executive power accretion in times of security crisis.¹² The Bush administration relied on that assumption when it claimed exclusivity of response to the terrorist threat. It was acting, as many critics and sympathizers documented, in the tradition of what Arthur Schlesinger coined in 1973 “the Imperial Presidency.”¹³ In the direct aftermath of the attacks Congress quickly passed the USA Patriot Act granting the executive branch a host of new powers.¹⁴ In executive initiation Congress also created a new cabinet-level position, the Director of Homeland Security, and radically reorganized a large number of federal agencies, including abolishing the Immigration and Naturalization Service, whose functions were transferred to new departments within Homeland Security.¹⁵

This deliberate and vast transfer of response capabilities from acting and professional agencies, departments and offices to the hands of the President and a group of officials he closely relied on is widely agreed to be a central characteristic of the U.S. response to the attacks. This comes up both in crisis management analysis¹⁶ and in legal theory.¹⁷ Specifically, the area of detention reform was in executive initiative and control, designed by a rather small group of

¹² For this historic tendency, see generally FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (Louis Henkin, Michael J. Glennon & William D. Rogers eds., 1990); HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION (1990); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004).

¹³ ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY (Mariner Books 2004) (1973) (arguing in the shadow of Watergate that presidents arrogated national security power in ways that threaten to upset the mechanisms of democratic accountability); see CHARLIE SAVAGE, TAKEOVER: RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2008).

¹⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (codified as amended in scattered sections of 8, 12, 15, 18, 20, 31, 42, 47, 49, 50 and 51 U.S.C.).

¹⁵ See generally Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. Importantly, pursuant to these reforms, FEMA has become a small, subservient part of the new department, which many argue caused the failure in responding to Katrina. See ON RISK AND DISASTER: LESSONS FROM HURRICANE KATRINA (Ronald J. Daniels et al. eds., 2005); CHRISTOPHER COOPER & ROBERT BLOCK, DISASTER: HURRICANE KATRINA AND THE FAILURE OF HOMELAND SECURITY (2006).

¹⁶ See, e.g., John R. Harrald, *Emergency Management Restructured: Intended and Unintended Outcomes of Actions Taken Since 9/11*, in EMERGENCY MANAGEMENT: THE AMERICAN EXPERIENCE 1900-2005 167 (C. B. Rubin ed., 2012); Symposium, *Shelter from the Storm: Repairing the National Emergency Management System after Hurricane Katrina*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 6 (2006).

¹⁷ See William E. Scheuerman, *Survey Article: Emergency Powers and the Rule of Law After 9/11*, 14 J. POL. PHIL. 61 (2006) (surveying the post-9/11 legal academic debate on its Schmittian concerns).

executive officials explicitly resisting any conflicting input from other branches. In a set of controversial policy decisions, the administration created an ad hoc detention system whereby both foreign nationals and U.S. citizens were detained without criminal charges for the purposes of incapacitation and interrogation.¹⁸ These largely unilateral decisions took the form of labeling alleged terrorists captured in the U.S. and in the “global” battlefields as “enemy combatants.” This meant that they could be detained under military control for the duration of the “war on terror” and that no process of rule of law proof bearing or punishment would be involved. These decisions were justified on the basis of the constitutional war powers of the U.S. President as Commander in Chief under Article II of the Constitution as well as upon the Joint Resolution passed by Congress after 9/11, which authorized the President to use all “necessary and appropriate force” against those who “planned, authorized, committed or aided” the terrorist attacks of September 11, 2001.¹⁹ Furthermore, alongside these newly constructed detention powers, the administration took the position that enemy combatants were not entitled to counsel to challenge the facts underlying that designation and that courts were not empowered to review the executive’s factual judgments that justified this designation.²⁰ Congress and the courts were clearly expected to defer.²¹

This description of a largely unilateral ideological and administrative environment in which the most controversial post-9/11 emergency measures were crafted places the U.S. response close to the centralization end of the institutional environment continuum of response. Indeed, this placement was acknowledged by many onlookers, who often referred to U.S. emergency legal policies as “Schmittian,” whether critically²² or approvingly. Whether this is

¹⁸ For an example of such a “Commander-in-Chief” order/determination, see Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833 (Nov. 16, 2001) [hereinafter Military Order of November 13, 2001]. See also Memorandum from President George W. Bush for Vice President Dick Cheney et al. (Feb. 7, 2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (determining that al-Qaeda and Taliban detainees are unlawful enemy combatants who are not entitled to the protections of the Third Geneva Convention); see generally Issacharoff & Pildes, *supra* note 8.

¹⁹ Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

²⁰ Military Order November 13, 2001, *supra* note 18, §§7(b)1–2.

²¹ One such conclusion of the famous “Bybee memo” is: “Any effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.” Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee Memo], available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> (discussing “Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A”).

²² Kent Roach, *Ordinary Laws for Emergencies and Democratic Derogations from Rights*, in EMERGENCIES AND THE LIMITS OF LEGALITY, *supra* note 8, at 229 (arguing that the U.S. legislature simply recognizes the power of the President to declare an emergency while providing power an unused power to end the emergency). On the National Emergencies Act he reflects: “In its single-minded focus on the power of the President to declare an emergency or an exception as opposed to the principles that might govern the declaration and conduct of the emergency, the Act is Schmittian.” *Id.* at 229.

good or bad policy, the scholarly consensus is that in crisis the layered work of American institutions is undermined as Congress and courts concede to the supremacy of the executive decision making process.²⁴

In contrast, post-9/11 U.K. response activities generally, and in reforming detention capabilities specifically, were significantly more decentralized. When the terror attacks provoked in the U.S. a centralizing, de-institutionalizing response, the U.K. was in the midst of a constitutional shift and a dramatic process of institution building, which was initiated in the 1998 enactment the Human Rights Act.²⁵ This was perceived as launching a great shift in U.K. constitutional history.²⁶ The Act, zenith of a political campaign to domesticate the European

²⁴ The recent and most influential scholarly work that reflects this position and its broad adherence is POSNER & VERMEULE, *supra* note 8. Still, it must be acknowledged that the placement of U.S. response and government ideology on the centralization end of the continuum is not stable. First, over time, the extreme unilateralism in which the ad hoc decisions about preventive detention were reached was rejected. In the years following the attacks a series of court decisions determined that enemy combatant decisions, relating to detainees in the U.S. and in Guantanamo may be challenged in courts. See Benjamin Wittes, Robert Chesney & Rabea Benhalim, *The Emerging Law Of Detention: The Guantanamo Cases As Lawmaking: Executive Summary*, BROOKINGS (Jan. 22, 2010), <http://www.brookings.edu/research/papers/2010/01/22-guantanamo-wittes-chesney>. In *Hamdi v. Rumsfeld* the Supreme Court held that an American citizen classified as an enemy combatant is entitled to “notice of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decision maker.” 542 U.S. 507, 533 (2004). In *Rasul v. Bush* the Court found that aliens classified as enemy combatants in Guantánamo have the right to file a habeas petition challenging that status. 542 U.S. 466, 483–84 (2004). In *Boumediene v. Bush*, it found that prisoners held in Guantánamo have a constitutionally guaranteed right to habeas. 553 U.S. 723, 771 (2008). Furthermore, the characterization of the process as highly centralized also disregards the important fact that although the Bush administration has largely worked under a unilateral ideology in crafting its emergency powers, much of its activity was motivated by the existence of various legal capabilities to make claim against such policy. As we shall later see the centralized environment in which the Bush administration crafted its powers was highly legalized especially because unilateralism was not perceived as a stable option. See JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2009) (providing a general explanation for the administration lawyers’ involvement in post-9/11 constitutional excess). Today, while the U.S. detention capabilities are still unsettled and only very partially legalized, many experts call for Congress to carefully draft the procedural requirement for such practice and for courts to remain active in review. This is reflected in the vehement discussion among legal academia commentators about the recent congressional efforts to legislate a new AUMF. See Robert Chesney, *White House Threatens Veto on the Defense Authorization Act*, LAWFARE (May 24, 2011, 5:16 PM), <http://www.lawfareblog.com/2011/05/white-house-threatens-veto-on-the-defense-authorization-act-citing-detention-and-aumf-related-provisions/>; Deborah Pearlstein, *About that New AUMF*, OPINIO JURIS (May 25, 2011, 4:01 PM), <http://opiniojuris.org/2011/05/25/about-that-new-aumf/>; Benjamin Wittes, *An Easy Fix for the AUMF Language?*, LAWFARE (May 25, 2011, 11:36 PM), <http://www.lawfareblog.com/2011/05/an-easy-fix-for-the-aumf-language/>; Robert Chesney, *Further Tightening the Proposed AUMF Language, and Responding to Additional Objections*, LAWFARE (May 26, 2011, 12:20 PM), <http://www.lawfareblog.com/2011/05/further-tightening-the-proposed-aumf-language-and-responding-to-additional-objections/>; Deborah Pearlstein, *More on the New AUMF*, OPINIO JURIS (May 26, 2011, 3:48 PM), <http://opiniojuris.org/2011/05/26/more-on-the-new-aumf/>; Robert Chesney, *Are There Detention Scenarios For Which We Need Some Form of AUMF Update?*, LAWFARE (May 27, 2011, 10:32 AM), <http://www.lawfareblog.com/2011/05/are-there-detention-scenarios-for-which-we-need-some-form-of-aumf-update/#more-2119>; Deborah Pearlstein, *U.S. Detention Needs Circa 2012*, OPINIO JURIS (May 27, 2011, 1:20 PM), <http://opiniojuris.org/2011/05/27/us-detention-needs-circa-2012/>; Deborah Pearlstein, *Catching up with the Senate on Detainee Matters*, OPINIO JURIS (June 29, 2011, 10:52 AM), <http://opiniojuris.org/2011/06/29/catching-up-with-the-senate-on-detainee-matters/>; Benjamin Wittes, *A Question for Deborah Pearlstein*, LAWFARE (July 3, 2011, 7:55 AM), <http://www.lawfareblog.com/2011/07/a-question-for-deborah-pearlstein/>; Deborah Pearlstein, *A Response to Ben Wittes*, OPINIO JURIS (July 3, 2011, 11:47 AM), <http://opiniojuris.org/2011/07/03/a-response-to-ben-wittes/>.

²⁵ Human Rights Act (HRA), 1998, c. 42 (U.K.).

²⁶ Baroness Williams of Crosby referred to it as the crossing of “our ‘constitutional Rubicon.’” Keith D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MOD. L. REV. 79 (1999) (quoting 582 PARL. DEB., H.L. (5th ser.) (1997) 1298 (U.K.)).

Convention on Human Rights (ECHR), represented an unprecedented transfer of political power from the executive and legislature to the judiciary, an incorporation of the ECHR into English domestic law and a fundamental re-structuring of the British “political constitution.”²⁷ It was driven by the Labour government (and joined in by most U.K. judges) under the title of “Bringing Rights Home.”²⁸ The idea, which was much lauded by the British public, was to enhance rights protection at the domestic level as a way to enable a more effective system of legal and political accountability to the values of the Convention, which Britain has ratified in 1951.²⁹ The problem then was in part that there were certain international consequences (that the U.K. was accountable for violations of the treaty in foreign judicial forums) that could only poorly be confronted by domestic authorities. The remedy was a large political legislative and administrative project that had a powerful effect on a multiplicity of government institutions. The Human Rights Act (receiving Royal Assent in November 1998)³⁰ gave effect to significant portions of the European Convention in domestic law.³¹ This legal fact was explicitly meant to implicate all who were exercising power on behalf of the state. It anticipated ministerial and parliamentary review of bills in term of their compatibility with rights;³² it required “public authorities” to consider the implications of their actions with regard to rights;³³ and it required judges to interpret legislation insofar as it is possible to do so in a manner that is compatible with Convention rights.³⁴ Where not possible, superior courts were empowered to make “declarations of incompatibility,” which (although not withholding direct legal effect) were expected to place substantial political pressure on public officials to reassess policy.³⁵ A fast-track procedure was included to revise legislation where declarations of incompatibility have been made.³⁶

²⁷ *Id.*

²⁸ The Labour policy on incorporation was developed by Jack Straw, who together with Paul Boateng published a document under such title. Once in government, Labour published a white paper and a bill proposing incorporation. The White Paper states, for instance, that it is “plainly unsatisfactory that someone should be the victim of a breach of the Convention standards by the State yet cannot bring any case at all in the British courts, simply because British law does not recognize the right in the same terms as one contained in the Convention.” HOME OFFICE, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL 1997, Cm. 3782, para. 1.16 (U.K.) [hereinafter THE WHITE PAPER].

²⁹ It was the post-war Labor government w ratified the treaty, see Geoffrey Marston, *The United Kingdom’s Part in the Preparation of the European Convention on Human Rights 1950*, 42 INT’L & COMP. L.Q. 796 (1993), and it was the Wilson Labor government who in 1966 accepted the right of individual petition, Lord A. Lester, *UK Acceptance of the Strasburg Jurisdiction: What Really Went on in Whitehall in 1965*, 1998 PUB. L. 237.

³⁰ It mostly came into force in October 2000.

³¹ The articles of the Convention which were given such effect are 2 through 12 and 14, as well as articles 1 through 3 of the First Protocol and articles 1 through 2 of the Sixth Protocol.

³² Human Rights Act (HRA), 1998, c. 42, § 19 (U.K.).

³³ *Id.* §§ 6–7.

³⁴ *Id.* § 3.

³⁵ *Id.* § 4.

³⁶ *Id.* § 10, sch. 2.

This new legislative project was both caused by processes of institution building (the growing consideration of compliance with the decisions of European institutions, such as the Strasbourg Court, as well as generally European integration³⁷) and was by itself a cause for further processes of institution building, this time internally (new departments, new committees, a new court,³⁸ as well as new and distinctive activities for old departments, committees and courts and a new role for civil society activities on the fringes of government and around it).³⁹ This historical institutional dynamism was the context in which response activities to the 9/11 security crisis were to take place.

The attention that the U.K. government had to pay to international legal norms and institutions was a major contextual factor at all stages of crisis management: at the preparation and anticipation stage with the pre-9/11 anti-terrorist legislative reforms (the Terrorism Act of 2000 and the move away from the Northern Irish conflict anti-terror emergency model towards a criminal model for detention⁴⁰), at the response stage when the government attempted to enlarge its detention capabilities (the Anti Terrorism, Crime and Security Act of 2001 Part 4, which created the immigration detention scheme directly and explicitly considering the *Chahal* and *Soering* decisions at the ECtHR⁴¹) and finally at the mitigation stage when the government had to reorganize its capabilities in relation to the consequences of the initial response (the House of

³⁷ The success of the incorporation of the EC treaty also had a motivational effect for the legislative initiative. Ewing, *supra* note 26, at 84.

³⁸ The court was established by the Constitutional Reform Act of 2005, c. 4 (U.K.), and started work on October 1, 2009.

³⁹ Besides the establishment of the Joint Committee, which will be discussed below, *see infra* notes 142–50, there were other initiatives within British public services before and after the coming into effect of the HRA. These included the establishment of a specialized unit within the Home Office (subsequently, the Lord Chancellor’s Department) to oversee the implementation of the Act and to help Departments and other public bodies to comply. It led to extensive training of judges. The Human Rights Act also included (in section 19, as will be discussed below, *see infra* note 156, a mechanism whereby Ministers would be required to identify whether proposed legislation was in compliance with the Act when measures were presented to Parliament.

⁴⁰ Terrorism Act, 2000, c. 11, §§ 54–64 (U.K.) (increasing in variety and jurisdictional range of criminal offenses related to terrorism). A statutory power to detain terrorist suspects for seven days without charge was abolished and replaced by a system which involved judicial oversight from the fourth day of detention. *Id.* §§ 40–41 (reacting to *Brogan v. UK*, 11 Eur. Ct. H.R. 117 (1988)).

⁴¹ Anti Terrorism, Crime and Security Act (ATCSA), 2001, c. 24, §§ 21–24 (U.K.). The Act granted the Home Secretary the power to “certify” foreign nationals who were terrorist suspects. *Id.* § 21(1). Once an individual had been certified, that individual could be repatriated. If, however, the individual’s home country conditions were such that upon repatriation the individual might face torture or other forms of ill treatment, that individual could be detained until such conditions changed (potentially indefinitely) or until another country indicated that it was willing to receive the suspected individual. *Id.* § 23. The text of section 23(1) reads: “A suspected international terrorist may be detained under a provision specified in subsection (2) [relevant provisions of the Immigration Act 1971] despite the fact that his removal or departure from the United Kingdom is prevented (*whether temporarily or indefinitely*) by—(a) *a point of law which wholly or partly relates to an international agreement*, or (b) *a practical consideration*”. *Id.* § 23(1) (emphasis added). This provision of the ATCSA allowing for indefinite detention of foreign nationals was intended to address the United Kingdom’s responsibilities under Article 3 of the ECHR, which has been interpreted by the Strasbourg Court to prohibit the extradition of individuals to countries in which they would face a real risk of torture, the death penalty, or any other inhuman or degrading treatment or punishment. *See Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413, para. 80 (1997); *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989).

Lords proclamation of incompatibility, leading to the repeal of Part 4, the replacement of its preventive detention scheme with a control order scheme and allowing for a limited period of pre-trial detention in the Prevention of Terrorism Act of 2005 (PTA) and the Terrorism Act of 2006 (TA).⁴²

This technical description of legislative history is I believe quite enough for the limited purpose of placing the U.K.'s response to the 9/11 security crisis closer to the decentralized end of the continuum. Even though the U.K. government was as keen as the U.S. government to be seen responding aggressively to the “new global threats,” and even as both were clearly attempting to craft an ability to detain suspects of the war on terror for an unlimited period of time with as few restrictions as possible, the U.K.'s attempts were directly and explicitly interlaced within the fabric of multilayered responders. The U.K. acknowledged an irresistible, almost structurally required sensitivity to the opinions and decisions of various institutions, foreign and domestic, and even an antipathy towards the centralizing ideology of the American response. The Bush administration's adherence to the unitary executive and its exclusivity in crisis was explicitly rejected as an unworthy ideology of response;⁴³ for British onlookers this theory was foreign and unfathomable.

⁴² The government responded to the Lords' ruling in the *Belmarsh* case by repealing Part 4 of the ATCSA and introducing the Prevention of Terrorism Act of 2005, providing for “control orders” to be used to proscribe the movements of “undeportable” terror suspects. Paragraph 13 of the Explanatory Notes to the PTA states that control orders may be imposed on individuals of any national origin who are suspected of being involved with terrorism and are considered to be a threat to public safety. Two types of control orders were envisaged by the Act: first, derogating control orders—control orders requiring a derogation from Article 5 of the ECHR, which were to be used only for those individuals considered to pose a high risk to public safety and security and in those instances where such risk is associated with a public emergency; and second, non-derogating control orders—control orders that the Home Secretary could request, requiring a preliminary hearing (potentially *ex parte*) in the High Court, at which a judge of that court would ascertain whether there “is a prima facie case for the order to be made” by the Home Secretary. If a prima facie case were found for this second type, the High Court would authorize the order and order a full inter parties hearing, at which the court would either revoke the order or confirm its continuance for a period of up to six months. Thereafter, the Home Secretary would be required to renew the application for the control order, otherwise it would lapse. See Sangeeta Shah, *The UK's Anti Terror Legislation and the House of Lords: The First Skirmishes*, 5 HUM. RTS. L. REV. 403, 418 (2005). Against this legislative backdrop, and in the aftermath of the July 7, 2005 bombings, the Terrorism Act of 2006, referred to hereinafter as TA 2006, was enacted. This Act provides that U.K. authorities may detain without charge persons suspected of involvement in terrorist or terrorism-related activities for an initial period of forty-eight hours, and, with judicial authorization, may detain those persons for an additional period of up to, but not exceeding, twenty-eight days. Terrorism Act, 2006, c. 11, § 23(7), sch. 8 (Eng.). In 2008 Prime Minister Gordon Brown attempted to raise the period of pre-charge detention from twenty-eight to forty-two days. The bill passed in the House of Commons by a slight margin, but was defeated in the House of Lords. Nicholae Watt, *Brown Abandons 42-Day Detention After Lords Defeat*, GUARDIAN, Oct. 14, 2008, at 1.

⁴³ See, e.g., Conor Gearty, *11 September 2001, Counterterrorism and the Human Rights Act*, 32 J. L. & Soc'y 18, 25 (2005) (stating that calling the U.K. detention a mini-Guantanamo is a reckless misuse of language); see also R v. Sec'y of State for Foreign and Commonwealth Affairs, [2002] EWCA (Civ) 1598, [64] (appeal taken from Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html> (using harsh words in referring to Guantanamo as the “legal black-hole”); Philippe Sands, *Addison Harris Lecture: Poodles and Bulldogs: The United States, Britain, and the International Rule of Law*, 84 IND. L.J. 1357 (2009).

This is not to say that the U.K. was necessarily more constrained in its policies, although it might be argued that it was.⁴⁴ My claim is instead that the different solutions to the problem of authorization generate differences in the politics of institutional competence that go beyond the problem of power and constraint. Emergency powers are exercised within complex institutional frameworks that imply huge consequences on actual response capacity even if they only indirectly effect the question of “constraint.”

To show this I focus on two distinct institutional actors located close to the centers of authorization structures: the Office of Legal Council (OLC) in the U.S. “centralized” response system and the Joint Committee on Human Rights (JCHR) in the U.K. decentralized response system. Both were particularly active in the process of response and both were (and still are) fittingly set in the institutional framework of their respective jurisdictions. Given their situated difference I ask: what were the distinct features and capabilities that made them fit to play an important role in their respective systems? The analysis of functional, professional and ideological features of these institutions suggests that there is a correlation between the structure of emergency competence in distinct systems and the actual institutional environments of response.

The question is whether the different solutions that the U.K. and U.S. domestic systems presented to the problem of authorization have any implication on actual responses. If one sticks to the traditional framing of the authorization problem as that of constraining the necessary broad powers in emergencies, the comparison would stay quite moot. The U.S. solution seems to imply that constraint should be minimal and the U.K. solution seems to imply significant constraint. Neither is true. The British government acted as if it were “constrained” but many criticized its use of human rights compliance as a veneer to conceal and legitimize the encroachment of their normative value.⁴⁵ The U.S. government claimed it was “unconstrained” but was obsessed with law and protocol. The trajectory of power and constraint obscures the fact that all powers exercised in response to 9/11 were institutionally located and cannot be fully understood outside

⁴⁴ See, e.g., Stella Burch Elias, *Rethinking “Preventive Detention” from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects*, 41 COLUM. HUM. RTS. L. REV. 99 (2009); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed-Conflict Divide*, 33 YALE J. INT’L L. 369 (2008); John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 773 (2007).

⁴⁵ Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?*, 65 MOD. L. REV. 724 (2002). When judging whether the HRA implicated post-9/11 anti-terror powers, Conor Gearty claimed that the new powers were unambiguously the consequence of human rights law and the commitment to compliance. Gearty, *supra* note 43, at 25.

their location. I therefore leave behind the question of who was more “constrained” and try to look closer at the texture of the environments in which response powers were exercised.

2. A Closer Look: The OLC and the JCHR

a. Why the OLC and the JCHR? Roles and Capabilities of Institutional Actors in Different Authorization Structures

Why take such different institutions as the OLC in the U.S. executive setting and the JCHR in the U.K. parliamentary, “pluralistic” setting as the subject of comparison? There are, after all, extreme differences between these two institutions. While the OLC is an elite office of professional legal advisors to the President, and more generally to the executive branch,⁴⁶ that deals with a range of legal issues, the JCHR is a select committee of parliamentarians, whose remit is to scrutinize government bills and policies implicating human rights issues for compliance with U.K. and European Court decisions regarding human rights violations.⁴⁷ While the OLC was a relatively old and developed institution at the time of its involvement in the post-9/11 management activities, the JCHR was in its first days; while the OLC is an executive department, the JCHR works in Parliament; while the main officials in the OLC are nominated by the administration, the members of the JCHR are nominated by the two houses; while the subject matter of OLC opinions are broad and general legal issues, the JCHR is restricted to human rights issues as they are framed in domestic and international instruments. These two bodies seem to resist comparison.

Still, they are brought together in this analysis for their demonstrative value in thinking about the correlation between the constitutional distribution of competences to respond to emergencies and the actual institutional environment of response. Both the OLC and the JCHR are state institutions that played a significant role in mobilizing the legal aspect of the crisis and are expected to play significant roles in future crises.⁴⁸ Both were and still are at the center of important debates (mostly in the field of political science) about their performance in the crisis

⁴⁶ John H. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 422 (1993).

⁴⁷ Janet L. Hiebert, *Parliament and the Human Rights Act: Can the JCHR facilitate a culture of rights?*, 4 INT’L J. CONST. L. 1, 18 (2006).

⁴⁸ See, e.g., Clive Walker, *Clamping Down on Terrorism in the United Kingdom*, 4 J. INT’L CRIM. JUST. 1137, 1144 (2006) (depicting the JCHR’s independent review as a part of the solution to “panic legislation” in future events). The assumption that the OLC will be involved in future crises is the backdrop for the Ackerman-Morrison debate, as well as for the debate regarding the use of force in Libya. See *infra* note 57.

and the lessons we should learn from them.⁴⁹ Most of all, both are perfectly located at the heart of the structure of authorization to respond to emergencies in their relevant jurisdictions. The OLC is located at the centre focus of executive, centralized response. In fact, its major contribution to the management of the crisis was to legitimize and make legal sense of the executive claim of exclusive powers in the crisis. The JCHR is located as mediator, almost a translator between some of the different institutions involved in the process of response - mostly the courts (international, regional and domestic courts), the government and both houses of parliament. I propose to inspect this 'situatedness' in the two institutions in order to assess their respective contribution to the response efforts within their institutional context. What, I ask, made each institution fit to its environment? What made them the right (or wrong) type of response agents that they were? What made and continues to make them the focus of much debate about future involvement in future emergencies?

A note is required regarding these debates. The activity of both the OLC and the JCHR is today at the focus of academic disputes and research agendas in their respective jurisdictions. These debates are informed by assessments of their role in crafting counter-terrorism policy in the 9/11 crisis. In both jurisdictions they are strongly motivated by an after-the-fact urge to learn from past mistakes in order to prepare for better responses in the next crisis. These reform agendas are structured in the framework of power and constraint. What particular reforms, they ask, should be implemented in order to improve the institution's ability to facilitate effective constraint in future emergencies?

In the U.S. context the debate about the OLC's performance in the response to 9/11 directly focuses on the issue of culpability and reform. OLC's role in the Bush administration's crisis management apparatus is widely acknowledged, was highly problematic (especially in the first eighteen months after the attacks), and is in part responsible for the evolution of a legitimacy crisis or controversy, especially around detention powers and interrogation methods. The opinions expressed move between *a condemnation of specific lawyers* who were engaged in drafting legal opinions that authorized excessive detention and interrogation practices by the Executive (these Bush administration lawyers⁵⁰ are criticized as incompetent,⁵¹ unethical⁵² or

⁴⁹ See *infra* notes 50–59.

⁵⁰ Sometimes this group is referred to as “torture lawyers.” See, e.g., Editorial, *The Torture Lawyers*, N.Y. TIMES, Feb. 24, 2010, at A32, available at <http://www.nytimes.com/2010/02/25/opinion/25thurl.html> (mostly referring to John Yoo and Jay Bybee); see also PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008); DAVID LUBAN, *The Torture Lawyers of Washington*, in LEGAL ETHICS AND HUMAN DIGNITY 162 (2007).

⁵¹ See W. Bradley Wendel, *The Torture Memos and the Demands of Legality*, 12 LEGAL ETHICS 107 (2009); see also HAROLD H. BRUFF, BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR (2009).

outright criminal⁵³) and a call for reform of OLC practices in general (critical calls for a radical reform⁵⁴ and even the abolishment of the institution⁵⁵ are answered by calls for a moderate reform and the strengthening of the OLC's long-established norms⁵⁶). The analysis below will not take sides in these discussions⁵⁷ but hopes to shed some light on them by going beyond power and constraint to account for the unique roles and capabilities that made the OLC a significant player in a centralized environment. I will argue that the OLC's (1) strong functional commitment to the executive, (2) its professional capacity to make "hard law" for the executive and (3) its ideological commitment to the supremacy of executive powers in national security, were among

⁵² See Lawyers' Statement on Bush Administration Torture Memos, available at <http://www.aclu.org/files/FilesPDFs/ACF1DBD.pdf> ("The lawyers who prepared and approved these memoranda have failed to meet their professional obligations."); see also Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455 (2005); Stephen Gillers, *Legal Ethics: A Debate*, in THE TORTURE DEBATE IN AMERICA 236 (Karen J. Greenberg ed., 2006); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008).

⁵³ See SANDS, *supra* note 50, at 205; see also JORDAN PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR ON TERROR" (2007); Claire Finkelstein, *When Government Lawyers Break the Law: The Case for Prosecution*, 158 U. PA. L. REV. 196 (2010); Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 349 (2007); David Cole, *The Man Behind the Torture*, N.Y. REV. BOOKS, Dec. 6, 2007, at 39 (reviewing GOLDSMITH, *supra* note 24).

⁵⁴ See BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010) (calling for establishment of a "Supreme Executive Tribunal"); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (proposing a quasi-adjudicative body as a replacement for the OLC); Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409 (2011) (suggesting that Congress restrict the President's power to fire the OLC supervisor). *But see* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 896-909 (2007) (criticizing Katyal's model as utopian and suggesting pragmatic substitutes, such as bipartisan appointments).

⁵⁵ Bruce Ackerman, *Abolish the White House Counsel: And the Office of Legal Counsel, Too, While We're at It*, SLATE (Apr. 22, 2009), <http://www.slate.com/id/2216710>.

⁵⁶ Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007) [hereinafter Johnsen, *Faithfully Executing*]; Dawn E. Johnsen, *What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395 (2008); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579 (2009). Reform commentators are very often scholars with inside experience (having previously worked in or around the OLC or WHC). *Cf.* Memorandum from Walter E. Dellinger, Assistant Att'y Gen., Office of Legal Counsel, et al., Principles to Guide the Office of Legal Counsel (Dec. 21, 2004) [hereinafter OLC Guidelines], available at https://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf (stressing and expressing the institutional norms of the Office from the perspective of a group of former OLC lawyers). Finally, OLC in recent years has issued two memoranda laying out best practices for the office. Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Att'ys of the Office, Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) [hereinafter 2010 OLC Best Practices], available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Att'ys of the Office, Best Practices for OLC Opinions (May 16, 2005) [hereinafter 2005 OLC Best Practices], available at <https://www.fas.org/irp/agency/doj/olc/best-practices.pdf>.

⁵⁷ One of the most interesting exchanges on this issue is between the "outside" OLC critic of Bruce Ackerman and the "inside" critic of Trevor W. Morrison, who harshly reviewed Ackerman's *The Decline and the Fall of the American Republic*. See Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) [hereinafter Morrison, *Constitutional Alarmism*] (reviewing BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010)). For Ackerman's reply, see Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13 (2011). For Morrison's response, see Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62 (2011) [hereinafter Morrison, *Libya, "Hostilities"*].

the characteristics that made this institution of special importance in a system of centralized response.

In contrast to the debates about the OLC in the U.S., the debates around the involvement of the JCHR in the U.K. 9/11 response do not focus on accountability but on effectiveness. The question here is whether the Committee, a parliamentary institution focused on human rights had any impact on policy at all. While some celebrate the JCHR's influence on counter-terrorism policy, and even see it as a useful alternative model for rights protection in crisis situations,⁵⁸ many are more skeptical about the actual influence of the JCHR or about the ability to assess such impact.⁵⁹ Here too, the analysis below will not take sides or provide evidence in favor of any of the arguments. Instead it will describe the situated role that the JCHR played in the response apparatus, focusing on the JCHR's (1) functional position as an intermediary between the different institutional actors involved in the decentralized environment of response, (2) its "soft" authority on issues of legality and (3) its ideology of "harmony" and inclusiveness in decision-making. These features made it a vital norm mobilizer in a decentralized response system.

What is important in the inquiry is that it will enable us to see why framing the problem of authorization as that of "power" vs. "constraint" is too limited. Emergency powers are always

⁵⁸ Hiebert, *supra* note 47, at 38. For laudatory remarks on the JCHR's influence, see, for example, Robert Hazell, *Who Is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?*, 2004 PUB. L. 495, ("[T]he systematic and careful approach to scrutiny by the JCHR has helped focus the minds of ministers and officials on human rights issues."); Robert Hazel, *The Continuing Dynamism of Constitutional Reform*, 60 PARLIAMENTARY AFF. 3, 22 (2007) (referring to the JCHR's work as very impressive in the quantity and quality of its output). For popular press accounts referring to the JCHR as "powerful" and "influential", see Ned Temko & Jamie Doward, *Race Hate Laws Split the Cabinet*, OBSERVER, Nov. 12, 2006, at 6, available at <http://www.theguardian.com/politics/2006/nov/12/uk.race>; metrowebukmetro, *MPs criticise human rights chief*, METRO (Mar. 15, 2010, 7:33 AM), <http://www.metro.co.uk/news/817423-mps-criticise-human-rights-chief>.

⁵⁹ Stephen Tierney, *Determining the State of Exception: What Role for Parliament and the Courts?*, 68 MOD. L. REV. 668 (2005); Michael C. Tolley, *Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights*, 44 AUSTL. J. POLIT. SCI. 41 (2009); David Monk, *A Framework for Evaluating the Performance of Committees in Westminster Parliaments*, 16 J. LEGIS. STUD. 1 (2010); Danny Nicol, *The Human Rights Act and the Politicians*, 24 LEGAL STUD. 451 (2004); see also FRANCESCA KLUG, JOINT COMM. ON HUMAN RIGHTS, REPORT ON THE WORKING PRACTICES OF THE JCHR, TWENTY-THIRD REPORT, at para. 9.8 (2006), available at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/239/23907.htm> (reporting on how to enhance the committee's effectiveness assessing impact on legislation and concluding that "[i]t is very difficult to assess the extent to which JCHR reports have been directly responsible for amendments to Bills. Even where there is a clear connection between what is proposed and an amendment, it is not always possible to assess how crucial the Committee's proposals have been or whether there were other more significant sources or reasons for the amendment. . . . [But o]ut of more than 500 Bills of all kinds considered by the JCHR since its inception, to the best of our knowledge 16 Government Bills and two Private Bills were amended as a consequence of JCHR reports, plus two draft Bills and one remedial order.").

A research project on JCHR impact is currently going on in Oxford, funded by AHRC and headed by Murray Hunt, JCHR Legal advisor. The aim is to evaluate the effectiveness of legislative human rights review, by both the JCHR and Parliament generally during the 2005–2010 Parliament, and the judicial response to such review. See MURRAY HUNT, HAYLEY HOOPER & PAUL YOWELL, PARLIAMENTS AND HUMAN RIGHTS: REDRESSING THE DEMOCRATIC DEFICIT (2012), available at <http://www.ahrc.ac.uk/News-and-Events/Publications/Documents/Parliaments-and-Human-Rights.pdf>.

situated, institutional powers whether they are “constrained” or “unconstrained.” The complexity of this situated-ness has its own politics, which is overshadowed by the worry of unconstrained powers while effectively and powerfully transcending it. When we put in place and design institutions to enable the exercise of flexible powers or to create effective constraint we should bare in mind that their mobilization in the emergency will be a function of their placement within a complex institutional system of emergency response.

b. The OLC in the Centralized Environment of Response

Located within the Department of Justice, the OLC is a small and prestigious bureau that “functions as a kind of general counsel to the numerous other top lawyers in the executive branch.”⁶⁰ This tiny legal agency⁶¹ of extremely skilled and respected law professionals (including in its rich history distinguished judges, respected lawyers and law professors), exercises the Attorney General’s authority under the Judicial Act of 1789 by delegation to advise the President and executive agencies on questions of law.⁶²

Its primary function according to a 2006 “best practices” memo is “to provide formal advice through written opinions signed by the assistant Attorney general” These opinions are controlling on questions of law within the Executive.⁶³ OLC opinions’ clients are mainly the President, the Attorney General and to a lesser degree executive branch departments and agencies.⁶⁴ The opinions historically involve such varied subject matter as: “domestic problems,

⁶⁰ Johnsen, *Faithfully Executing*, *supra* note 56, at 1577.

⁶¹ It consists of about two dozen lawyers. In addition to the Assistant Attorney General who heads the office, there are also several politically appointed (but not Senate confirmed) Deputy Assistant Attorneys General, along with one Deputy who is not politically appointed. The rest of the lawyers in the office are “career” civil service lawyers. Most serve in the office for only a few years. Pillard, *supra* note 56, at 713.

⁶² Since 1789 the Attorney General has had the statutory responsibility for providing such advice. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (providing that the Attorney General shall “give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments”). Today, the relevant statutory provisions are found in Title 28. *See* 28 U.S.C. § 511 (2006) (“The Attorney General shall give his advice and opinion on questions of law when required by the President.”); *id.* § 512 (“The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department.”); *id.* § 513 (“When a question of law arises in the administration of [one of the military departments], the cognizance of which is not given by statute to some other officer . . . , the Secretary of the military department shall send it to the Attorney General for disposition.”). Attorneys General themselves regularly issued legal opinions under their own names for over 150 years; the separate office that is now OLC was not created until 1950. Reorganization Plan No. 2 of 1950, § 4, 64 Stat. 1261, 1261.

⁶³ 2005 OLC Best Practices, *supra* note 56, at 1. More recently, this was rephrased as: “to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government.” 2010 OLC Best Practices, *supra* note 56, at 1.

⁶⁴ OLC is authorized to provide legal advice only to the executive branch and “do[es] not advise Congress, the Judiciary, foreign governments, private parties, or any other person or entity outside the Executive Branch.” 2005 OLC Best Practices, *supra* note 56, at 1. OLC traditionally requires that requests for advice come from the head or general

international issues, pet plans of bureaucrats, the application of the Constitution and the laws to administrative policies and procedures, the powers and jurisdictions of departments and agencies, the advisability of contemplated actions, [and various mundane and] momentous matters.”⁶⁵ In addition to its opinion function, OLC performs a constitutional review function called the Bill Comments Practice, whereby OLC lawyers review bills introduced in Congress for constitutional problems.⁶⁶ OLC also resolves interagency legal disputes. When disagreements on points of law affecting more than one agency arise, OLC will, upon request from the agencies involved, resolve the dispute. Its resolutions are then binding on the agencies involved.⁶⁷

Most OLC advice is never made public. When OLC writes an opinion, it sends it in confidence to the requestor, and includes it in OLC’s own internal and confidential database. After a period of time, OLC lawyers review completed opinions, decide which might be worthy of publication, and seek permission from the requestors for release.⁶⁸ Many OLC decisions are not formalized, these may take the form of oral discussions and email exchanges.⁶⁹

As for the agency’s institutional practices: First, there is no formal requirement that anyone in the executive branch will take any particular problem to the OLC. Its involvement is a function of client choice.⁷⁰ Generally, OLC demands from its clients (except for the Attorney General himself and the President’s Counsel⁷¹) to submit their request in writing and provide their own view of the matter.⁷² Also, and these points will be elaborated further below, legal advice is to be rendered by the OLC on the basis of “an accurate and honest appraisal of applicable law

counsel of the requesting agency, that advice-seekers submit their own view of the question to OLC, and that independent agencies agree in advance to abide by the advice—even oral advice—that OLC delivers. *See* Pillard, *supra* note 56, at 711.

⁶⁵ LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* 34 (1967).

⁶⁶ Pillard, *supra* note 56, at 714.

⁶⁷ *Id.* at 711.

⁶⁸ *Id.* at 112. Selected opinions are then made public online. *See Opinions*, U.S. DEPARTMENT JUST. (July 28, 2014), <http://www.justice.gov/olc/opinions.htm>. For the most part OLC opinions are not available to the public or even to others within the executive branch, and there is a substantial delay before any opinions go online. Harold H. Koh, *Protecting the Office of Legal Counsel from Itself*, 15 *CARDOZO L. REV.* 513 (1993). A large mass of bill comments remains unpublished, as does the substantial body of oral and emailed advice. Much of the advice rendered, including much White House Council telephone and email consultation is not recorded or systematically added to a database. *See* Pillard, *supra* note 56, at 713. Bruce Ackerman refers to the “telephone chatter” in his response to Morrison. Ackerman, *supra* note 57, at 18.

⁶⁹ According to 2010 OLC Best Practices, “the Office frequently conveys its controlling legal advice in less formal ways, including through oral presentations and by email” 2010 OLC Best Practices, *supra* note 56, at 2.

⁷⁰ Morrison, *supra* note 56, at 1461.

⁷¹ These individuals are afforded greater informality in communicating with OLC when considering their requests. Morrison, following Ackerman, gives as an example of “lengthy phone calls” exchanged between Elena Kagan, then in the White House Counsel’s office, and Walter Dellinger, OLC head. Kagan “tried to convince Dellinger, the head of the OLC, to change his mind about legal issues” Morrison, *Stare Decisis*, *supra* note 56, at 1468 n.77 (citing ACKERMAN, *supra* note 54, at 231 n.43).

⁷² Pillard, *supra* note 56, at 711.

even if that advice will constrain the administration's pursuit of desired policies."⁷³ This advice carries great authority within the executive branch and although it can be overruled by the President or the Attorney General, this rarely happens.⁷⁴ If doubts arise as to whether the advice will be followed, OLC will not provide it;⁷⁵ however, it will often work with the client to try to find a lawful way to pursue his desired ends.⁷⁶

OLC in the Post-9/11 Response

With these capabilities and an authoritative ability to execute them, the OLC has been closely engaged with the starkest questions that have arisen as the President and other executive branch agencies have contemplated their legal powers in the post-9/11 "war on terror." The story of this involvement is widely known. Almost immediately after September 11, 2001 the White House engaged "some of the best trained lawyers in the country"⁷⁷ working in the White House⁷⁸ and the Department of Justice to come up with legal justifications for a vast expansion of government's powers in waging a "war on terror." In a series of legal opinions the OLC authorized not only physical and psychological torture of terror suspects detained by the U.S.,⁷⁹ but also other previously illegal practices, including the secret capture and indefinite detention of designated "enemy combatants" captured anywhere in the world.⁸⁰ Once in U.S. custody, the

⁷³ OLC Guidelines, *supra* note 56, at 1; *see also* Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1324 (2000) (noting that OLC's advice "does not come from the individual lawyer, but from the office that he or she holds," and must reflect "the office's best view of the law"). Also *see infra* notes 102-111 and 124-128 and accompanying text.

⁷⁴ *See* OLC Guidelines, *supra* note 56, at 1 ("OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President."); *see also infra* Part C.2.b (offering a more detailed discussion).

⁷⁵ *See* 2010 OLC Best Practices, *supra* note 56, at 3 ("[O]ur practice is to issue our opinion only if we have received in writing from that agency an agreement that it will conform its conduct to our conclusion."); *see also* Peter L. Strauss, *Overseer, or "the Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 742-43 (2007).

⁷⁶ *See* OLC Guidelines, *supra* note 56, at 5 ("[W]hen OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives.").

⁷⁷ JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 7 (2008).

⁷⁸ The Office of Counsel to the President is otherwise known as the White House Counsel's Office and will be referred to hereinafter as "WHC."

⁷⁹ Bybee Memo, *supra* note 21.

⁸⁰ The first memo in this episode is Yoo's memo from September 25 focusing on broad constitutional arguments about the President's Article II powers as Commander-in-Chief and Chief Executive. Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to Timothy E. Flanigan, Deputy Counsel to the President, The President's Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), *available at* http://dspace.wrlc.org/doc/bitstream/2041/70942/00110_010925display.pdf; *see also* Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., and Robert J. Delahunty, Special Counsel, to Alberto R. Gonzales, Counsel to the President, Authority for the Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001), *available at* <http://ccrjustice.org/files/memomilitaryforcecombatus10232001.pdf>; Memorandum from John Yoo, Deputy Assistant Att'y Gen., and Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Dep't of Def., Application of Treaties and Laws to al Qaida and Taliban Detainees (Jan. 9, 2002) [hereinafter Application of Treaties and Laws to Detainees Memo], *available at* http://upload.wikimedia.org/wikipedia/commons/9/91/20020109_Yoo_Delahunty_Geneva_Convention_memo.pdf

OLC opined, these suspects could be held incommunicado for the duration of the war against terrorism.⁸¹ At the President's will, he could establish commissions to try suspects with reduced procedural requirements and no civil court access.⁸² Any congressional attempts to restrict such powers would be deemed unconstitutional.⁸³ As the story goes, these memos were crucial in the environment of fear and panic in which the administration attempted to construct its response capabilities.

The OLC was especially important in such unstable crisis and urgency-filled conditions because it was the right agent to provide some certainty as to the powers held by the Executive to respond to the new threats. In a PBS interview Jack Goldsmith explained the importance of the OLC opinions under such pressure:

The President and his staff found itself, after 9/11, on 9/12, wanting to do all sorts of things to protect the country and to take the aggressive steps needed to find and thwart the terrorists and to prevent another attack. They found themselves, however, confronting everywhere they turned a whole variety of restrictions—many of them criminal restrictions—that Congress over the last couple of decades had put into place, . . . thinking about all sorts of other problems that had occurred in the past. In the military and the intelligence bureaucracies especially—the agencies that the President and the White House were asking to do the aggressive things needed to thwart the terrorists—they were understandably hesitant about acting aggressively in the teeth of these laws for many reasons. One, they didn't want to violate the law. Two, they worried that what seemed like it was lawful today may seem unlawful tomorrow or down the road two, five, seven years from now. The Office of Legal Counsel was able to help alleviate this problem. . . . When the Office of Legal Counsel says that a course of action is lawful, . . . and therefore that the action can go forward, . . . it gives the imprimatur to the Department of Justice to those actions. It basically says, "You can do these actions lawfully, and you don't have to worry about legal repercussions later."⁸⁴

(discussing detainee status); Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (Feb. 7, 2002), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020207.pdf>.

⁸¹ Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, *supra* note 80; see also Application of Treaties and Laws to Detainees Memo, *supra* note 80 (providing the analytical basis for a blanket rejection of the applicability of Third Geneva Convention to members of Taliban and al Qaeda).

⁸² See Memorandum from Patrick F. Philbin, Deputy Assistant Att'y Gen., to Alberto Gonzales, Counsel to the President, Legality of the Use of Military Commissions To Try Terrorists (Nov. 6, 2001), available at <http://www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20011106.pdf>.

⁸³ For example, the Bybee memo argues that "[a]ny effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President," Bybee Memo, *supra* note 21, at 39, and also that, "[e]ven if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign," *id.* at 31.

⁸⁴ Interview with Jack Goldsmith, FRONTLINE (Oct. 16, 2007), <http://www.pbs.org/wgbh/pages/frontline///cheney/interviews/goldsmith.html>.

Note that this explanation is structured in the framework of powers vs. constraint. In the emergency, Goldsmith implies, there was a will and a need to do many things that are regularly illegal. The OLC served to alleviate this problem by giving assurances of legality.⁸⁵ The OLC's central role in crafting post-9/11 response powers is widely agreed to be damaging.⁸⁶ Only months later, in the first months of 2004, a more settled and professional atmosphere returned to the Office of Legal Council. Jack Goldsmith, in the short period he spent as the head of the OLC, uncovered legal mistakes, withdrew some of memos⁸⁷ and challenged the notion of unchecked power that so many of them advanced.⁸⁸ Still, it was argued, these reservations and the internal reassessment of the unconstrained powers were quite stylistic in nature and almost never touched the essence or substance of the measures.⁸⁹ The outlines of powers, as well as the specific measures taken by the Bush administration in accordance with the legal opinions of the OLC, were never fully rebuked and are still today at the basis of counter-terrorism policy.⁹⁰

As indicated above, I will not attempt here to take sides in the OLC reform debates, which are ongoing.⁹¹ I will also not attempt to challenge the widespread agreement regarding the centrality of the OLC in crafting response capabilities in the post-9/11 administration, or the also prevalent opinion that this involvement was harmful. Instead, I will describe below some features of the OLC which could explain its centrality within the specific system of centralized crisis

⁸⁵ The contestations of this account are also framed in the language of power vs. constraint. The problem was that OLC did not provide the right kind of constraint. *See, e.g., Cole, supra* note 53, at 38 (“Goldsmith writes convincingly that the pressures on an administration fearful of another terrorist attack are so strong that the executive feels obligated to do everything it can to stop the next attack. He contends that ‘this is why the question ‘What should we do?’ so often collapsed into the question ‘What can we lawfully do?’” But if his account of this pressure is accurate, it only underscores the need for legal restraints. Indeed, it is because of the abuse of executive power in times of crisis that we now have laws regulating torture, the treatment of enemy detainees, and wiretapping for foreign intelligence.”).

⁸⁶ *See Wendel, supra* note 51 (surveying major works that describe the involvement of OLC lawyers in licensing post-9/11 response measures).

⁸⁷ In June 2004 he withdrew the torture memo. *See Interview with Jack Goldsmith, supra* note 84; *see also Cole, supra* note 53. *But see* Memorandum from Daniel Levin, Acting Assistant Att’y Gen., for James B. Comey, Deputy Att’y Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, at 2 n.8 (Dec. 30, 2004), *available at* <https://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc96.pdf> (“While we have identified various disagreements with the August 2002 memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.”).

⁸⁸ In late 2003, just weeks after his confirmation, he confronted David Addington, the all-powerful advisor to the Vice President, arguing that the Geneva Conventions protected terrorist suspects in Iraq. Early in 2004 he concluded along with FBI Director Robert Mueller and Deputy Attorney General James Comey, backed by Attorney General Ashcroft, that the NSA spying program violated FISA. *See GOLDSMITH, supra* note 24, at 181–82.

⁸⁹ *See LUBAN, supra* note 50, at 59.

⁹⁰ On preventive detention policies, *see BENJAMIN WITTES, DETENTION AND DENIAL* (2011). There are also many indications to the fact that although the fact the torture memos were withdrawn many specific CIA methods approved in the summer of 2002 are still in effect. For a critical evaluation of Obama’s national security policies, *see Christian A.I. Schlaerth, Aaron Puhmann, Katelyn Rozenbroek & Hillary Cook, Being Progressive on National Security: The Rolling Back of Bush Administration Policies and Keeping America Safe, in GRADING THE 44TH PRESIDENT: A REPORT CARD ON BARACK OBAMA’S FIRST TERM AS A PROGRESSIVE LEADER* 221 (Luigi Esposito & Laura L. Finley eds., 2012).

⁹¹ *See supra* notes 50–59.

response of which it was part. Specifically I will point to three factors (functional, professional and ideological), which were constructive to that involvement: the “functional commitment” of the OLC to the executive, the “hard law” effects of its opinions and its executive-minded constitutional ideology.

A methodological note: I learn about these traits mostly from accounts of internal actors who express these as distinct and valuable features of OLC competency. I rely somewhat extensively on two insider accounts: Jack Goldsmith’s explanation of his perspective as the “hero” of the post-torture memos OLC⁹² and Trevor Morrison’s accounts of the OLC in his criticism of Ackerman’s “constitutional alarmism.”⁹³ These are two distinguished OLC insiders who are also professors of law at leading universities and esteemed academics. Their narrative is helpful for the purpose of this analysis because of their insider perspectives of moderate reform, which prompts them to attempt to articulate the essential value of the OLC. As such I treat them as credible sources for expressing the organization’s self-understanding.

i. A Functional Position of Commitment to the Executive

At the bottom of the OLC’s self-understanding, in the heart of all descriptions of its function, is the idea of responsibility and loyalty towards the President and its administration. The OLC’s task as the top advisor to the executive branch, it is commonly argued by “insiders,” is to make possible (to legally enable) the policy that the Executive wishes to carry through. The very notion of “legality” (and often “constitutionality”) that this body upholds is not that of a universal rule of law but that of an executive rule of law, an executive branch perspective over legal powers and constraints. The OLC exists to satisfy the legal needs of the President. By that, the insiders never mean personal legal needs, but always the needs of the office, the requirement that a democratically elected “political branch” will be able to execute its policies within legal limits.⁹⁴

⁹² GOLDSMITH, *supra* note 24. Jack Goldsmith, Professor of Law at Harvard University, served as the OLC head between October 2003 and June 2004. *See* Wendel, *supra* note 51, at 109 (“Jack Goldsmith . . . has emerged as something of a heroic defender of the rule of law, one of the few lawyers within the administration with the courage to stand up to the bullying of David Addington and the relentless fear-mongering of Dick Cheney.”).

⁹³ Morrison, *see* sources cited *supra* notes 56–57, Professor of Law and Dean of N.Y.U. School of Law, served in the OLC from 2000 to 2001 and later at the White House Counsel’s Office in 2009.

⁹⁴ As explained in the 2010 Best Practices memorandum, the OLC is responsible to facilitate the work of the executive branch and the objectives of the president. *See* 2010 OLC Best Practices, *supra* note 56, at 2. Where possible the OLC will work with the administration and recommend lawful alternatives to unlawful executive proposals. *Cf.* OLC Guidelines, *supra* note 56, at 3 (“OLC . . . serves both the institution of the presidency and a particular incumbent,

This position is quite powerfully demonstrated in the tension often expressed by OLC analyzers (again, mostly insiders) between the two models of OLC's role: "the lawyer-client model" and the "neutral expounder of the law" model.⁹⁵ According to this distinction, the OLC must steer its performance between two conflicting ideal types. One is that of a lawyer serving his client⁹⁶ and the second is that of a lawyer with an obligation of fidelity to the law.⁹⁷ While the first model celebrates the lawyer's ability to effectuate the will of the people who voted for this client to execute certain ideological agendas, the second celebrates those lawyers as independent of the President's or administration's immediate preferences, "almost as if they were constitutional judges within the executive branch."⁹⁸ In effect, none of the OLC analysers, neither the official presentation commit to any one of the models. Instead, they often describe the models in order to express the double commitment of the OLC to both valuable positions and an "uncomfortable"⁹⁹ balancing act, which is always required from them. In effect that means a position of loyalty to *the law of the executive*.¹⁰⁰ The OLC holds the promise and the dangers, its insider explicators suggest, of both models.¹⁰¹ Its lawyers answer to the Executive (as his officials) and they answer to "the law: (as they are the most professional, most skilled and respected lawyers in the administration).

But the best expression of this institutional position of the OLC as the "Executive's legal expounder" is found in Jack Goldsmith's account of his experience as the head of the OLC and the "hero" of the after-the-fact correction of post-9/11 OLC perversions. There are many other institutions, reflects Goldsmith, beside courts, which check the President's opportunistic interpretation of the law. "But the OLC is, and views itself as, the frontline institution responsible for ensuring that the executive branch charged with executing the law, is itself bound by law."¹⁰² Still, Goldsmith recognizes the danger of this frontline institution living "inside the very political executive branch might itself be unaccountable to law." To protect against that danger, Goldsmith explains, "the office has developed powerful cultural norms about the importance of providing

democratically elected President in whom the Constitution vests the executive power."). Its work reflects "the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office." *Id.*

⁹⁵ McGinnis, *supra* note 46; Moss, *supra* note 73; Pillard, *supra* note 56.

⁹⁶ This is loosely analogous to the private legal representation of institutional clients, both in the context of litigation and counseling.

⁹⁷ This reflects a "constitutional conscience" to which the president is constitutionally bound.

⁹⁸ Pillard, *supra* note 56, at 682.

⁹⁹ GOLDSMITH, *supra* note 24, at 35.

¹⁰⁰ Or often, to "its law." See Morrison, *Constitutional Alarmism*, *supra* note 57, at 1714 & n.98 ("OLC's commitment is to *its* best view of the law — not *the* best view of the law in any decontextualized sense. . . . I am tracking OLC's own description of its role here, which consistently speaks in term of *its* best view, not *the* best view.").

¹⁰¹ See *id.* at 1715, 1720–21.

¹⁰² GOLDSMITH, *supra* note 24, at 33.

the President with detached, apolitical legal advice, as if the OLC were an independent court inside the executive branch.”¹⁰³ This culture, or tradition, requires independence from but not neutrality toward the President’s agenda. It required of Goldsmith that he “work hard to find a way for the President to achieve his ends.”¹⁰⁴ This is the essential commitment that Goldsmith reads into his new job. A responsibility to make the President’s wishes come true in a legal sense—to make legal sense of the President’s policy decisions. Furthermore, Goldsmith believes (quoting Robert Jackson, Franklin D. Roosevelt’s Attorney General) that the OLC must not only make policy decisions legal, but also give the President “the benefit of a reasonable doubt as to the law.”¹⁰⁵ The OLC shouldn’t censor the President’s will according to a neutral concept of legality but work hard to make that will legal, even if that may prove to be a very difficult task.¹⁰⁶ When, despite great effort, it is not possible to confer legality on the President’s agenda, then it is the duty of the OLC, so understands Goldsmith, to present that failure to the President who should then decide for himself whether to act “extralegally,” according to his prerogative.¹⁰⁷ “My job was to make sure the President could act right up to the chalk line of legality. But even blurry chalk lines delineate areas that are clearly out of bounds.” When Goldsmith couldn’t find “any plausible argument that he could disregard” legal restrictions, then he had to admit to the President that he was clearly beyond boundaries.¹⁰⁸

Put practically, an OLC lawyer is assigned the difficult task of making legal sense of executive decisions. When confronted with a hard case, he must try as best as he can to construe good arguments that would satisfy the President’s wish to act legally. When he fails that task, the President has to decide whether he should exercise his prerogative power and disregard the law. Goldsmith argued that one problem of the post-9/11 OLC within the administration was that “the idea of extralegal presidential actions simply wasn’t feasible in 2004” because “the post-Watergate hyper-legalization of warfare and the . . . proliferation of criminal investigators” threatened the very idea of extra-legality even in times of crisis: “The president had to do what he

¹⁰³ *Id.*; see also *id.* at 34 (recounting that he said before the Senate Judiciary Committee in July 2003 that his “main goal, if confirmed as head of the Office of Legal Council, would be to continue the extraordinary traditions of the office in providing objective legal advice, independent of any political consideration”); Morrison, *Constitutional Alarmism*, *supra* note 57, at 1693, 1714, 1723 (pointing out Goldsmith’s references to “cultural norms” and using the phrase “deeply ingrained norms” himself).

¹⁰⁴ GOLDSMITH, *supra* note 24, at 35.

¹⁰⁵ *Id.*

¹⁰⁶ This, Goldsmith explains, is especially true on national security issues “where the president’s superior information and quite different responsibilities foster a unique perspective.” In such areas the regular “court focused” legality of constraint moves aside in favor of a robust executive perspective. *Id.*

¹⁰⁷ *Id.* at 80 (referring to Jefferson’s “laws of necessity” as within the Lockean tradition).

¹⁰⁸ *Id.* at 78. Clearly, what invigorates this position is the problem of power and constraint. The OLC is depicted as structuring executive limitations as broadly as possible in order to allow effective response.

had to do to protect the country. And the lawyers had to find some way to make what he did legal.”¹⁰⁹

It is beyond the point here to assess whether Goldsmith was right that too much law and too many lawyers were responsible for the post-9/11 failures.¹¹⁰ What is emphasized here is Goldsmith’s identification of the functional role of the OLC as the legal expert who marshals his profound professional skills for one purpose, to make the Executive’s decisions legal. This very high technical capability translates into a most valuable asset for the Executive who is constitutionally committed to exercise his powers legally. The OLC is of great service for such an Executive only as long as it maintains the reputation of scrupulously honoring norms of detachment and professional integrity in its work.¹¹¹ The point is that as long as the OLC maintains its commitment to a legally dignified executive, it is valuable to that executive whenever he wishes to legally trespass the law.

ii. Making “Hard Law” for the Executive

“Jack . . . we need you to decide whether the Fourth Geneva Convention protects terrorists in Iraq. We need the answer as soon as possible, no later than the end of the week”¹¹² This phone call from White House Council, so Goldsmith recounts, marked the beginning of his short career as the head of the OLC. With most important legal issues of the executive branch never reaching courts, Goldsmith explains, the executive determines for itself what the law requires and whether its actions are legal. This executive duty to determine whether its policy is legal was delegated to the Attorney General and, since the middle of the twentieth century, the Attorney General delegated it to the OLC.¹¹³

While other lawyers in the administration’s many departments and offices routinely resolve their own legal issues, the OLC has no precise mandate and nobody is required to seek a legal opinion from it.¹¹⁴ But while OLC lacks mandatory jurisdiction it is said to have the last

¹⁰⁹ *Id.* at 81.

¹¹⁰ The main lesson his book promises to teach is that human rights laws and their threatening international institutions are responsible for “strangling” U.S. response capabilities. *Id.* at 69.

¹¹¹ See Morrison, *Constitutional Alarmism*, *supra* note 57, at 1722 (explaining that OLC is valuable only to the extent that its work continue to be viewed as serious, carrying such norms and integrity). The insiders repeatedly go back to announcing a tradition or a culture of norms—“deeply ingrained norms,” as Morrison puts it, *id.* at 1723—motivating and attracting both highly professional lawyers and ever-abiding clientele.

¹¹² GOLDSMITH, *supra* note 24, at 32.

¹¹³ See *supra* note 62.

¹¹⁴ Frank M. Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A. J. 33, 37 (1971).

word in every matter on which it is asked to opine. Its opinions are considered to carry superior weight and authority and are rarely rejected or sidelined by its clients.¹¹⁵ The reason for this de facto hard power, the high level of authority and high levels of compliance with its decisions, lies first and foremost in the OLC's professional culture and reputation.¹¹⁶ Jack Goldsmith recalls FBI director Bob Mueller explaining why he must follow OLC opinions even if the President disagrees with them: "Your office is expert on the law and the President is not."¹¹⁷ The fact that the OLC has such superior technical knowledge of the law makes it capable despite its relative weakness to influence and even control policy making because in other officials' opinion it is a better, more authoritative source on the legality of policy than any other official in the administration, including the President. The President may have his more or less informed opinions about the legality of his policy, but OLC's opinion *is his law*.¹¹⁸

An example for this can again be found in Goldsmith's narrative about his confrontation with the President's close advisors. When he suggested that the President is free to disregard "the law" (or, in other words, OLC consideration of the law), "Gonzales and Addington looked at [him] as if [he] w[ere] crazy"¹¹⁹ They did not need to hear from their superior legal advisor about the option of extra-legality; they expected "the law," the authoritative ability to distinguish between what is legal and what is illegal: "When I said 'no' my superiors could not ignore me."¹²⁰ The kind of certainty that they needed in order to conduct the very uncertain war on terror was legal certainty. The whole point of having a professional desk whose unique capability is to determine what's legal and what isn't is that it can provide that authoritative

¹¹⁵ Exceptions are rare but recently such an exception carried with it public debate and criticism when in respect to its authority to use force in Libya the Obama administration was related to as sidelining OLC opinion. For criticism, see *Obama Libya War Powers Debate: Obama's Lawyers Are Worse than Bush's*, HUFFINGTON POST (June, 19, 2011, 11:58 AM), http://www.huffingtonpost.com/2011/06/19/obama-libya-lawyers-war-powers_n_879951.html; Glenn Greenwald, *Obama rejects top lawyers' legal views on Libya*, SALON (June 18, 2011, 6:19 AM), http://www.salon.com/2011/06/18/libya_10/; Bruce Ackerman, Op-Ed., *Legal Acrobatics, Illegal War*, N.Y. TIMES, June, 21, 2011, at A.27, available at http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html?_r=1; see also Morrison, *Libya, "Hostilities," supra* note 57. But see Eric Posner & Adrian Vermeule, *Libyan Legal Limbo*, SLATE (July 5, 2011, 6:17 PM), <http://www.slate.com/id/2297793/> (arguing in favour of Obama ignoring legal advice under his constitutional prerogative).

¹¹⁶ On this reputation see, for example, Morrison, *Constitutional Alarmism, supra* note 57, at 1725, 1730, and GOLDSMITH, *supra* note 24, at 37.

¹¹⁷ GOLDSMITH, *supra* note 24, at 79.

¹¹⁸ Randolph Moss, head of OLC at the end of the Clinton Administration, explained why OLC opinions are binding on the hardly challenged reality of executive practice: "[W]e have been able to go for over two hundred years without conclusively determining whether the law demands adherence to Attorney General Opinions because agencies have in practice treated these opinions as binding." Moss, *supra* note 73, at 1320.

¹¹⁹ GOLDSMITH, *supra* note 24, at 80.

¹²⁰ *Id.* at 79. Goldsmith blames this over-reliance on lawyers on a "superlegalistic" culture in which criminal laws threaten executive conduct. I am not convinced that this explanation is very useful in analyzing the Bush Administration's response to the 9/11 crisis especially because it undermines Goldsmith's own part in negating these laws. See *infra* notes 139–41 and accompanying text. For the current discussion it suffices to point to the extent that OLC opinions were considered by officials to be the executive law.

certainty.¹²¹ An OLC head that resists that capability, who argues that his opinions do not carry the last word of authority, is simply not doing his job.¹²²

A different matter is the question how the OLC achieves this superior status as the last word on the Executive's law. It is one thing that officials badly need a trusted insider who can say what the law is because they cannot act authoritatively without acting legally.¹²³ But it is something else altogether to succeed in designing an institution with such capability of making hard authoritative opinions about the legality of policy. The ability of the OLC to render such authoritative decisions relies on its professionalism, technicality and adherence to judicial forms and techniques. The language of OLC opinions is extremely legalistic and technical. The office traditionally strongly relies on Supreme Court doctrine. It exercises interpretive methods that are very similar to courts' methods, especially in their textual, linguistic and highly technical methodology.¹²⁴ It strongly adheres to an internal mechanism of *stare decisis*.¹²⁵ Like a court,

¹²¹ Goldsmith refers to the history of OLC decisions backing presidential powers as “executive branch precedents [that] are ‘law’ for the executive branch.” *Id.* at 36. The OLC is guided by a body of executive precedents. *See* 2010 OLC Best Practices, *supra* note 56, at 2 (“OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question.”); *see also* Morrison, *Stare Decisis*, *supra* note 56 at 1453.

¹²² The authoritative “hard law” position of the OLC can be detected also from the formal shape of its opinions. The opinions are drafted not only as a professional legal presentation but also as an order, a strong request from the President to comply—certainly not a suggestion or a limited judgment for the President to consider. In many decisions the lawyer discusses his concerns, makes his argument and then *requires* that the conclusion will be followed. For example when the OLC provided the President an opinion on executive confidentiality with respect to congressional oversight it discusses the legal issues, determines that the documents should not be disclosed and then concludes with no less than an order not to disclose them: “I am greatly concerned about the chilling effect that compliance with the Committee’s subpoena would have on future White House deliberations and White House cooperation with future Justice Department investigations. For the reasons set forth above, *I believe that it is legally permissible for you to assert executive privilege with respect to the subpoenaed documents. I respectfully request that you do so.*” Letter from Michael B. Mkasey, Att’y Gen., to the President of the U.S., *Assertions of Executive Privilege Concerning the Special Counsel’s interviews of the Vice President and Senior White House Staff* (July 15 2008), *available at* <http://fas.org/sgp/bush/ag071508.pdf>.

¹²³ Not only because they may face criminal charges—as Goldsmith continuously stresses (he repeatedly refers to OLC opinions as ‘get out of jail cards’ and ‘golden shields’)—but also because as officials (in their official capacity), they can only act according to the law. If they don’t, they are simply not doing their job—they will normally not do what is required from them if they come to believe that it is blatantly illegal (as may happen if the OLC so determines) and surely may not be expected to do so.

¹²⁴ For example, see the decision regarding the military commissions’ internal decision making rules interpreting Military Commission Order, which relies extensively on dictionaries and grammatical guides:

The text of section 4(c)(2) might be considered awkward in referring to “the military commission” (singular) as the “triers” (plural). This construction, however, likely just reflects that the term “military commission” is a collective noun. It therefore can take either singular or plural verbs and subsequent pronouns. COLUMBIA GUIDE TO STANDARD AMERICAN ENGLISH 100 (1993). Here, given the plural “triers,” section 4(c)(2) appears to use the term “military commission” to mean the “military commission members,” as individuals, rather than the military commission as an entity. *See* OXFORD DICTIONARY OF ENGLISH GRAMMAR 69 (1994) (“The choice of singular or plural verb—and corresponding pronouns and determiners—depends on whether the group is considered as a single unit or a collection of individuals.”); MORTON S. FREEMAN, THE GRAMMATICAL LAWYER 305 (1979) (“Nouns known as collective nouns may be either singular or plural, depending upon whether the group is considered as a whole—in which case singulars are used—or as individual members—in which case plurals are used[.]”). Under this reading of “military commission,” it is

reserved, detached and independent, the OLC waits for its clients to bring forth their controversies and then sets out on a technical journey to decide them.¹²⁶ In the words of Cornelia Pillard, the OLC “loosely and imperfectly” mimics the courts, “specializing in legal interpretation, remaining somewhat institutionally insulated from its clients, passively waiting for matters to come to them and generating and relying on a body of precedent.”¹²⁷ Imitating courts’ authority, living up to the requirement of independence and legal technicality, makes the OLC with its very general and airy responsibilities capable of being the center of hard legal influence in the Executive. In the words of John McGinnis, a professor of constitutional law at Northwestern Law School and Deputy Assistant Attorney General at OLC from 1987 to 1991, “The formality of the process and the product . . . allows the Office to appear to be more than simply another legal office within government, but rather the oracle of executive branch legal interpretation.”¹²⁸ This legal oracle is invaluable for an executive who must, for itself, and disregarding outsiders’ opinions and authorities, determine whether his policies are practicable, meaning, in this crisis as in many others, legal.

iii. An Ideology of Executive Supremacy

The third component of the OLC’s characteristics that made it fit its significant role in the U.S. centralized response environment is its ideology of centralization. The OLC’s institutional tradition was always invested in carrying out the political aim of strengthening the Executive generally and empowering the President in times of crisis specifically. A philosophy that stresses “executive powers,” often through the perspective of “the unitary executive,” was a property of historical iterations of the OLC in all administrations, disregarding political party bias. Of course, an underlying commitment to expanding presidential power was especially strong

true that one might conclude that the word “both” in section 4(c)(2) indicates that each member of the military commission must decide all questions of fact and law. But the language is not unequivocal on this point, and one also could conclude that section 4(c)(2), in requiring that the military commission members be “triers of both fact and law,” merely indicates that some from among the military commission members must resolve all legal or factual questions’.

Memorandum from C. Kevin Marshall, Deputy Assistant Att’y Gen., OLC, to Gen. Counsel, Dep’t of Defense, Proposed Amendments to Military Commission Order No. 1 (Aug. 12, 2005), *available at* http://www.pegc.us/archive/DOJ/OLC_mil_commissions_20050812.pdf.

¹²⁵ Morrison, *supra* note 56.

¹²⁶ *Id.* at 1461.

¹²⁷ Pillard, *supra* note 56, at 685.

¹²⁸ McGinnis, *supra* note 46, at 428.

under the Bush administration,¹²⁹ but historical accounts of the OLC in previous administrations and under both parties recall a consistent tendency to strongly support broad presidential authority in the context of national security and beyond.¹³⁰ The Clinton-era OLC is often cited as an example for this ideology that crosses political lines.¹³¹ While on some matters the Clinton-era OLC lawyers attempted to narrow Republican-era broad precedents on presidential powers, on matters of war and national security they took the lead in expanding such powers and arguing against congressional restrictions. Opinions by Clinton OLC lawyers argued that the President could disregard congressional statutes that impinge on the Commander-in-Chief or related presidential powers.¹³² Others approved the CIA's extraordinary rendition programs.¹³³ And others famously approved unilateral uses of presidential military force in Bosnia, Haiti, and Kosovo.¹³⁴ This tendency to provide for, lead the way to and stand for broad presidential powers is thus a long tradition of OLC lawyers. As Goldsmith puts it, all OLC lawyers "over many decades were driven by the outlook and exigencies of the presidency to assert more robust presidential powers, especially during war or crisis, than have been officially approved by the Supreme Court or than is generally accepted in legal academy or by Congress."¹³⁵ For Goldsmith, this tendency, "the office's pro-President disposition" and the unusual pressures of executive branch demands for licensing provide reasons to encourage "cultural norms" of professional integrity that, just like the Office's presidentialism, transcend administrations and parties.¹³⁶

¹²⁹ See GOLDSMITH, *supra* note 24, at 89. See generally BRUFF, *supra* note 51.

¹³⁰ See Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993). There is also vast support for this ideology in academic writing, which considers the broad presidential capabilities suitable for conduct in wartime and crisis and his constitutional perspectives superior on these issues. See David J. Barron, *Constitutionalism in the Shadow of Doctrine: the President Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS., no. 1-2, 2000, at 61; Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990).

¹³¹ See, e.g., GOLDSMITH, *supra* note 24, at 36; see also David Gray Adler, *Bill Clinton, the Constitution, and the War Power*, in THE CLINTON PRESIDENCY AND THE CONSTITUTIONAL SYSTEM 107 (James P. Pfiffner ed., 2012).

¹³² See Memorandum from Walter Dellinger, Assistant Att'y Gen., to Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994); Memorandum from Walter Dellinger, Assistant Att'y Gen., to Alan J. Kreczko, Special Assistant to the President and Legal Advisor to the NSC, Placing of United States Armed Forces under United Nations Operational or Tactical Control (May 8, 1996).

¹³³ Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106 (introducing evidence of a legal practice during the 1990s).

¹³⁴ The bombings continued in the face of the House of Representatives' refusal to authorize them. Adler, *supra* note 131, at 19. OLC concluded that Congress authorized the bombings through its appropriations for the bombings. See Memorandum from Randolph D. Moss, Assistant Att'y Gen., OLC, to the Att'y Gen., Authorization for Continuing Hostilities in Kosovo (Dec. 19, 2000), available at <http://www.justice.gov/sites/default/files/olc/opinions/2000/12/31/op-olc-v024-p0327.pdf> (contradicting the 1973 War Powers Resolution, which insists that "authorization for war 'shall not be inferred . . . from any provision contained in an appropriations act'").

¹³⁵ GOLDSMITH, *supra* note 24, at 37.

¹³⁶ *Id.* Goldsmith himself is open about his adherence to this tradition of supporting strong presidential powers in crisis. *Id.* at 28. His criticism of Cheney, Addington and Yoo's commitment to expand presidential powers is essentially a point on the extent of expenditure requirement: "necessary exercise" of powers for "vital ends" is for Goldsmith the preferred historical formulation. *Id.* at 89.

But these two characteristics of the OLC’s “institutional culture” are not mutually opposed. In fact, they complement each other in that they are both equally important for the OLC to play such an influential role in crisis management in a centralized environment. Standing firmly behind an ideal of expansive presidential powers in crisis together with a distinct ability to make this ideal into a legal reality (to make hard law for the executive) is an especially useful capability for a system which confirms to the centralization theory of crisis management.

An OLC with a consistent ideology supporting a strong executive in crises also enables an authoritative exclusion of other branches’ input into crisis management. The OLC was (especially so in the post-9/11 era) strongly invested in—and indeed instrumental to—restricting outsiders’ ability to have a say, to influence, to review or to account for crisis management decisions and policy. This was true not only in the heyday of post-9/11 panic but well into the time when Jack Goldsmith withdrew the torture memos. This exclusionary line—the idea that any attempt by “others,” domestic institutions and international actors alike, to influence the decisions of the executive about the proper response to the crisis should be resisted—is not exclusive to Bush administration OLC opinions. It can be found in many “separation of powers” doctrines that the OLC helped to promote, from Dellinger’s non-execution power to Yoo’s conclusion that “any effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution’s sole vesting of the Commander in Chief authority in the President.”¹³⁷ Here too Goldsmith believes the significance of the Bush period is in its extremity. The Bush administration was remarkable, Goldsmith argues, in that it didn’t just argue that the President could ignore statutes that in concrete instances conflict with his commander-in-chief powers, but went further to argue that any such laws are unconstitutional.¹³⁸ Of course this is true. The Yoo and Bybee memos take the unitary ideology to its extremes. Yet it was not the remarkable extremity, but in effect the traditional OLC line of marginalizing other voices in times of crisis and stressing unitary capabilities, that made the OLC central to that particular environment of response.

It was Goldsmith himself who, while still in the Department of Defense, provided the most remarkable legal opinion, which expresses fear and resentment towards other potential sources of legal influence over U.S. government response capabilities. In this opinion he provides the legal basis for no less than an all-fronts American war against “a web” of laws and institutions inside the U.S. and beyond, which threaten to restrict the U.S. executive’s free hand in the war on

¹³⁷ Bybee Memo, *supra* note 21.

¹³⁸ GOLDSMITH, *supra* note 24, at 149.

terror.¹³⁹ This forceful memo, written in April 2003, was possibly in front of decision makers who later that year presented Goldsmith with the desirable position of OLC head.¹⁴⁰

In this memo Goldsmith refers to a very wide web of dangerous, outsiders, mainly legal actors threatening US government interests.

In the past quarter century, various nations, NGOs, academics, international organizations, and others in the “international community” have been busily weaving a web of international laws and judicial institutions that today threatens USG interests. . . . The USG has seriously underestimated this threat, and has mistakenly assumed that confronting the threat will worsen it. . . . Unless we tackle the problem head-on, it will continue to grow. The issue is especially urgent because of the unusual challenges we face in the war on terrorism.¹⁴¹

Goldsmith goes on to outline the contours of the fight against international law for which he advocates. He names the institutions—the ICC, the ICJ, foreign and domestic courts, as well as human rights laws and universal jurisdiction laws in the U.S. and in foreign domestic settings—and the special and urgent measures that must be taken against each. The measures suggested to resist the web’s dangers are “extraordinary” and “urgent” and amount to a direct attack against threatening laws and institutions with the aim to hold back and resist this dangerous net. Aggressive campaigns are suggested against the ICC and the ICJ by withdrawing from proceedings and treaties; foreign courts are confronted by framing a strong immunity wall; and local courts, also understood as a part of the web, should be resisted by firm non-jurisdiction stands, immunity and non-justiciability claims.

The point is that these views, advocated by Goldsmith a short period before he came to the OLC, reflect hostile and unproductive relations with outside organizations. His advice is to control, limit and substantially obstruct the capabilities of any legal actor outside the small group of U.S. executive crisis managers to be involved in the decisions over how to respond to the crisis. Similar to the Yoo-type OLC opinions committed to exclude federal courts’ say on detention policies, here too the aim is to exclude outsiders, de-legitimize, weaken and resist them in every possible way. This advocacy against “outsiders” made Goldsmith a proper OLC head for

¹³⁹ Memorandum from General Counsel, Dep’t of Def., Potential Responses to the Judicialization of International Politics (Apr. 1, 2003), available at <http://library.rumsfeld.com/doclib/sp/221/2003-04-09%20to%20Vice%20President%20et%20al%20re%20Judicialization%20of%20International%20Politics.pdf>.

¹⁴⁰ I couldn’t find proof for the assertion that this memo was instrumental to Goldsmith’s promotion in the administration but the date of issuance and the involvement of the memo’s addressee (James Haynes) in the promotion story may indicate that this strong legal opinion was on the table when discussing the offer. For information on the process of Goldsmith’s appointment, see GOLDSMITH, *supra* note 24, at 21–31, and in particular on Haynes’ part in it, see *id.* at 25.

¹⁴¹ *Id.* at 1.

the U.S. centralizing and de-institutionalizing response to the crisis. In national security crisis, he maintains along with his predecessors in the OLC, authority runs to the center and any peripheral intrusion is in itself a threat.

c. The JCHR in the Decentralized Environment of Response

As opposed to the OLC, whose traditions and ideologies are rooted in its long-standing history, the JCHR is a newly made creature, conceived of the constitutional transition of the Human Rights Act. From its inception the JCHR was expected to play an important role in the project of incorporating European Convention rights domestically.¹⁴² The Labour Government's white paper, "Rights Brought Home," indicated that "Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy."¹⁴³ In this spirit, setting the "British Model" of rights protection,¹⁴⁴ Jack Straw, then Home Secretary, and one of the leading proponents of the bill, had stressed during parliamentary debate that the ministerial obligation in section 19 of the bill to report to Parliament on the compatibility of bills with Convention rights would have an important influence on parliamentary reviews.¹⁴⁵ "The best course would be," the white paper suggested, "to establish a new Parliamentary Committee with functions relating to human rights."¹⁴⁶ The constitutional question to which the Committee was supposed to give an answer was what would be Parliament's role in protecting the newly domesticated rights: "Having decided that we should incorporate the Convention," Jack Straw recalled, "the most fundamental question that we faced was how to do that in a manner that strengthened, and did not undermine, the sovereignty of parliament."¹⁴⁷ His answer was in finding a specific role for Parliament in the "operation and development of the rights in the Bill."¹⁴⁸ The white paper was not specific about the structure or the mandate of the new committee but it

¹⁴² This project aims in the HRA's words "to give further effect to rights and freedoms guaranteed under the ECHR." Human Rights Act (HRA), 1998, c. 42, pmb1. (U.K.).

¹⁴³ THE WHITE PAPER, *supra* note 28, para. 3.6.

¹⁴⁴ For the terms of the "British model," see Janet Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963 (2004).

¹⁴⁵ 306 PARL. DEB., H.C. (6th ser.) (1998) 779 (U.K.).

¹⁴⁶ THE WHITE PAPER, *supra* note 28.

¹⁴⁷ 306 PARL. DEB., H.C. (6th ser.) (1998) 771 (U.K.).

¹⁴⁸ 314 PARL. DEB., H.C. (6th ser.) (1998) 1141 (U.K.). The context of the question was the different models of constitutional protection to which the HRA was reacting—that of the American tradition of judicial review and that of the common law tradition of parliamentary protection. While the former was strongly rejected as giving too much power to unaccountable, non-democratic courts, the latter was seen as a weak form of protection, especially for minorities. The HRA was introduced in Parliament and public debate as a "brilliant" document, an "ingenious compromise" between the different models. See Ewing, *supra* note 26, at 79 (quoting House of Lords debates).

suggested that such committee “might conduct enquiries on a range of human rights issues relating to the Convention” and that it would produce reports “so as to assist the Government and Parliament in deciding what action to take.” Also, the document envisioned that the committee might “examine issues relating to the other international obligations of the UK.”¹⁴⁹ Subsequent to these recommendations the government announced in December 1998 that it would create the Joint Committee of Human Rights.¹⁵⁰

The JCHR was actually established two years later and held its first meeting on January 2001.¹⁵¹ The Committee’s first sessions were largely dedicated to debates about the interpretation the JCHR should give to its broad mandate and whether to prioritize Bill scrutiny. In its first report the Committee interpreted its terms of reference to include “a power to examine the impact of legislation and draft legislation on human rights in the UK.”¹⁵² The ongoing process of developing and testing the terms of its role and work procedures is continuously documented by the Committee itself in its working reports.¹⁵³

According to its broad mandate the JCHR’s role is to consider matters relating to human rights in the United Kingdom.¹⁵⁴ Early on the JCHR decided to construe its responsibilities, or terms of reference, broadly and since then it has considered not only rights that arise from the ECHR but also from the nation’s other international human rights obligations, including the International Covenant on Civil and Political Rights and other U.N. instruments.¹⁵⁵ But the JCHR indicated from its first sessions that its central focus would be on scrutinizing bills for their compatibility with rights and examining ministerial statements of compatibility under section 19

¹⁴⁹ THE WHITE PAPER, *supra* note 28, paras. 3.6–3.7.

¹⁵⁰ Margaret Beckett, then Leader of the House of Commons, indicated on December 14, 1998 that both houses would be asked to appoint a Joint Committee on Human Rights. 332 PARL. DEB., H.C. (6th ser.) (1998) 604 (U.K.).

¹⁵¹ The first committee met between January 31 and April 30, 2001.

¹⁵² JCHR, CRIMINAL JUSTICE AND POLICE BILL, FIRST REPORT OF SESSION 2000-01 (U.K.).

¹⁵³ For an example of such self-documentation, see JCHR, THE WORK OF THE COMMITTEE IN THE 2001-2005 PARLIAMENT: NINETEENTH REPORT OF SESSION 2004-05 (U.K.), *available at* <http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/112/112.pdf>. For a summary, see Paul Evans, *The Human Rights Act and Westminster’s Legislative Process*, in PARLIAMENT, POLITICS AND LAW MAKING 84 (Alex Brazier ed., 2004).

¹⁵⁴ In the words of its announcer before parliament, House of Commons Leader, Margaret Beckett: “We envisage that the Joint Committee’s terms of reference will include the conduct of inquiries into general human rights issues in the UK, the scrutiny of remedial orders, the examination of draft legislation where there is doubt about compatibility with the ECHR, and the issue of whether there is a need for a human rights commission to monitor the operation of the HRA.” 322 PARL. DEB., H.C. (6th ser.) 604 (U.K.).

¹⁵⁵ JCHR, FIRST REPORT OF SESSION 2000–01, H.L. 69, H.C. 427, annex 1. In a subsequent report, the committee indicated in a letter sent to the secretary of state for the Home Department: “[O]ur starting point is of course the statement made under s. 19(1)(a) of the Human Rights Act 1998; but . . . the committee’s remit extends to human rights in a broad sense, not just the Convention rights under the Act.” JCHR, SCRUTINY OF BILLS: PROGRESS REPORT: THIRD REPORT OF SESSION 2003–04, H.L. 23, H.C. 252, app. 1 at 23.

of the HRA.¹⁵⁶ In one report the JCHR indicated that it “considers itself to be responsible to Parliament” for assessing whether section 19 statements “have been properly made” and, accordingly, will “make scrutiny of primary legislation for its compatibility with Convention rights its first priority.”¹⁵⁷

The process of scrutiny in the JCHR was also created by the Committee in its first and second sessions.¹⁵⁸ As soon as a bill is published, the Committee’s full-time legal adviser and his staff reviews it and provides a note to the Committee on those bills that engage rights. The note forms the basis for Committee deliberations with the Committee identifying aspects of the bill it finds problematic, as well as questions and issues that should be included in correspondence with the relevant ministers and departments. A letter is then sent to the relevant minister, on behalf of the Committee, identifying the legislative provisions that raise controversy with rights, specifying the rights engaged and spelling out the questions to be addressed. This letter is expected to be answered by the department within two weeks and within ten weeks the Committee reports to Parliament before the report stage of the first house.¹⁵⁹ Although most of the JCHR’s involvement takes place after the bill was produced to Parliament, occasionally the Committee becomes involved even before, when the government is still contemplating the proposal. Since 2007, practice is that the government publishes a draft legislative program for the session and the Committee’s staff may get involved in department work during the drafting stage. Along the way the Committee deals directly with the minister who signs the section 19 compatibility declaration and all its correspondence with him is formal and publishable. The department is not obliged to

¹⁵⁶ The role of parliament in the scheme of the HRA (all reference to Parliament in the HRA and in this article are made in the context of the British parliamentary system where most legislation is initiated by Government) is reflected in the following provisions of the Act: first, section 19, which requires Ministers to make a “Statement of compatibility” before introducing a Bill, or, where this is not possible, indicate that the government nevertheless wishes the House to proceed with the Bill; second, sections 3 and 4, which require the courts to interpret legislation compatibly with Convention rights, but allow Parliament to decide how to proceed when they are unable to do so. Human Rights Act (HRA), 1998, c. 42, §§ 3–4, 19 (U.K.).

¹⁵⁷ JCHR, FOURTEENTH REPORT OF SESSION 2001–02, H.L. 93, H.C. 674, para. 1 (U.K.).

¹⁵⁸ See JCHR, *supra* note 153. The second important responsibility was construed by the committee under sections 3 and 4. Practically, following a “declaration of incompatibility” by the courts under section 4, it is left to Parliament to decide whether, and if so how, to proceed. It is open to the Government, acting through Parliament, to proceed through a “Remedial Order” where “there are compelling reasons” to do so. Human Rights Act (HRA), 1998, c. 42, § 10 (U.K.). It is also open to the Parliament to disagree with the courts that a provision is incompatible with the rights in the HRA and to decide that the legislation in question should remain in force or be amended in a way which is different to that suggested by the domestic courts, leaving it to the Strasbourg court to determine otherwise.

¹⁵⁹ Interview by Justice Sales, Judge of the High Court, Chancery Div., with Murray Hunt, JCHR Legal Advisor, The Role of the Joint Committee on Human Rights in the Legislative Process (Mar. 4, 2011) [hereinafter Interview with Hunt], available at <http://www.youtube.com/watch?v=GFGENRwO3iI>.

respond but there is a strong convention that it will and within the time framework established by committee and parliamentary stages.¹⁶⁰

The JCHR has an overwhelming reputation of “rising beyond party divisions,” of principled reporting, efficiency in keeping legislative timeframes and independence.¹⁶¹ This reputation is encouraged by different factors concerning design, process and substance: that it is jointly constituted¹⁶² (which prevents government domination); that deliberations and reports are based on consensus with relatively few votes required;¹⁶³ that it bases its scrutiny on the legal framework of human rights protection, a formal and objective set of criteria of legal determination¹⁶⁴ and that it is guided by prominent legal advisors with a strong reputation in legal scholarship and human rights advocacy.¹⁶⁵

JCHR in the Post-9/11 Response

The involvement of the JCHR in the crafting of the detention schemes post 9/11 was mainly centered on its scrutiny of the set of controversial government bills regarding counterterrorism detention powers.¹⁶⁶ In that process the JCHR referred to its role as that of a “parliamentary guardian,” the keeper of “core values which must not lightly be compromised or cast away”¹⁶⁷ and indeed this involvement assisted in building its reputation.

As noted above, the ATCSA of December 2001 authorized indefinite detention without trial of foreign terrorist suspects who could not be deported because of human rights concerns and

¹⁶⁰ “There isn’t a strict requirement for response to the report but in practice the government finds it useful to put out a formal response in form of a report.” *Id.*

¹⁶¹ Hiebert, *supra* note 47, at 15–16 (presenting conditions for the achievement of such reputation).

¹⁶² The JCHR consists of twelve members, six from each house. “[G]overning party members are unlikely ever to dominate the committee numerically.” *Id.* at 16.

¹⁶³ Lord Lester, one of the JCHR’s most prominent members, commented in an interview with Janet Hiebert that in his view consensus is important because resulting reports will have more authority. *Id.* at 17.

¹⁶⁴ “Human rights,” argues David Feldman, the committee’s first legal advisor, in his 2006 Lecture in the University of Melbourne on the roles of parliaments, “can be a useful lever because (unlike most political values which are party specific and subject to negotiation between the parties) human rights (at least in one sense) are objective standards existing independently of any party and carrying considerable moral value.” David Feldman, Miegunyah Public Lecture at University of Melbourne Law School Centre for Comparative Constitutional Studies: *The Roles of Parliaments in Protecting Human Rights: A View from the UK* 4 (July 20, 2006), available at <http://www.law.cam.ac.uk/faculty-resources/summary/the-roles-of-parliaments-in-protecting-human-rights--a-view-from-the-uk/3391>.

¹⁶⁵ David Feldman, a Cambridge Law Professor and an expert on human rights was the first legal advisor and Murray Hunt, a well-known barrister, was the second. Hiebert based his assessment that the prestige of the legal advisors has implicated the reputation of the JCHR impartial conduct on interviews with leading academics, justices, members of the JCHR and staff conducted in 2004. See Hiebert, *supra* note 47, at 18 n.50.

¹⁶⁶ See Walker, *supra* note 48, at 1144 (crediting the JCHR for improving the quality of bill scrutiny as a part of the solution for panic legislation—and a structurally deficient judiciary—in emergency).

¹⁶⁷ JCHR, SECOND REPORT OF SESSION 2001-02, para. 5 (U.K.).

in accordance with ECHR court decisions. In a set of reports the Committee questioned the compatibility of many aspects of the bill, asked the Home Secretary to explain and justify why it was necessary to derogate from the ECHR and reported to Parliament on the bill, its human rights implications, the questions asked of the minister and his replies.¹⁶⁸ The Committee was time efficient in its reporting, knowing Government's intention to pass the legislation quickly. It questioned the Home Secretary two days after the bill was introduced and published its initial report two days later.¹⁶⁹

In the report the Committee flagged a number of issues. Generally it stressed that the new powers should only confront new threats, not “change the agenda.”¹⁷⁰ After hearing from the Home Secretary, the JCHR reported that it was not convinced the derogation order was warranted. It characterized the U.K.'s armor of antiterrorism measures as “the most rigorous in Europe” and reminded Parliament that “no other Member State of the Council of Europe has so far felt it to be necessary to derogate from Article 5 in order to maintain their security against terrorist threats.”¹⁷¹ The Committee emphasized the seriousness of the deprivation; it recommended that Parliament give serious thought as to whether the threat to the United Kingdom justified this order and, even if it did, whether safeguards should be introduced into the bill in light of the seriousness of the deprivation of liberty to those who are detained indefinitely.¹⁷² It also expressed concerns regarding the overly broad definition of “terrorist,” especially in light of the indefinite detention measure. Most significantly (and in a most detailed manner), the committee was concerned with the lack of due process regarding appeal against the certification of an individual as a terrorist and the lack of requirement for reasonable suspicion in the certification process.¹⁷³

Although the report was referred to extensively in both houses at deliberation, the bill was rushed through all stages in the Commons, which in sixteen hours dealt with, and passed, all its 126 clauses and eight schedules.¹⁷⁴ Two weeks after its initial report the Committee revisited the bill and published a further report.¹⁷⁵ Following a much richer discussion in the House of

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* para. 5.

¹⁷⁰ “[A]ny novel powers which are proposed” should be clearly directed toward “combating a novel threat, and should not be used to introduce powers for more wide-ranging purposes which would not have received parliamentary support but for current concerns about terrorism and fear of attack.” *Id.*

¹⁷¹ *Id.* para. 30.

¹⁷² *Id.*

¹⁷³ *Id.* paras. 17–68.

¹⁷⁴ *See supra* note 41.

¹⁷⁵ JCHR, FIFTH REPORT OF SESSION 2001–02, H.L. 51, H.C. 420, paras. 2–3 (U.K.) (in this report, the JCHR expressed criticism that it was given insufficient time to scrutinize such important legislation and issued a second report to draw

Lords, the government was compelled to make some amendments that reflected JCHR concerns.¹⁷⁶ The JCHR subsequently conducted a further inquiry into the antiterrorism legislation and reported its concerns that the “long term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights.” It urged public and parliamentary debate about the responses to terrorism to “take place within a human rights framework.”¹⁷⁷

Ultimately, it was not parliamentary debate or the commission’s scrutiny but new judicial review powers that influenced the repeal of the ATCSA preventive detention scheme. On December 16, 2004, the British Law Lords characterized it as draconian and ruled that it was incompatible with the ECHR because it “discriminated on the ground of nationality or immigration status, allowing detention for foreign suspects but not British suspects.”¹⁷⁸ The government responded to this ruling by introducing the PTA and the control order regime repealing the ATCSA’s detention scheme in February 2005. The JCHR raised serious doubts about whether the new scheme (which proposed a wide range of restrictions on the movements, associations and expression of terrorist suspects) was compatible.¹⁷⁹ The JCHR conducted two reviews of the bill, proposed amendments and raised questions about the justification for home arrest.¹⁸⁰ It expressed serious concerns that these restrictions on liberty would be authorized by officials rather than judges.¹⁸¹ The bill was passed (after heated debate in both houses) when Government agreed to allow judges to authorize the control orders.¹⁸²

As indicated above,¹⁸³ the discussions in the U.K. about JCHR involvement with crafting response policies do not center on reform but on impact. The question is whether and how the JCHR was influential on policy issues and whether and how one can determine such influence. I do not intend to participate in such debates, which must be viewed in the broader context of estimating (and encouraging) democratic parliamentary involvement in rights protection. Instead I will describe below some qualities of the JCHR which could explain its role within a system of

attention to those concerns it had raised earlier as well as others not previously commented on but which, on further reflection, caused great concern).

¹⁷⁶ It introduced a legal requirement for reasonableness relating to a decision to certify a person as a suspected international terrorist, modified the definition of terrorist and introduced a sunset clause. It did not, however, alter or withdraw its derogation order.

¹⁷⁷ JCHR, REVIEW OF COUNTER-TERRORISM POWERS: EIGHTEENTH REPORT OF SESSION 2003–04, H.L. 158, H.C. 713, at 3 (U.K.).

¹⁷⁸ See *A v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56, [2005] 2 A.C. 68.

¹⁷⁹ In doing so, the Committee scrutinized Charles Clarke, the Secretary of State for the Home Department’s statement of compatibility with the ECHR.

¹⁸⁰ These questions were made particularly in light of the decision not to derogate from Article 5 of the ECHR.

¹⁸¹ JCHR, PREVENTION OF TERRORISM BILL: PRELIMINARY REPORT: NINTH REPORT OF SESSION 2004–05, H.L. 61, H.C. 389 (U.K.); JCHR, PREVENTION OF TERRORISM BILL: TENTH REPORT OF SESSION 2004–05, H.L. 68, H.C. 334 (U.K.).

¹⁸² K.D. Ewing & Joo-Cheong Tham, *The Continuing Futility of the Human Rights Act*, 2008 PUB. L. 668, 673.

¹⁸³ See *supra* notes 58–59.

decentralized crisis response of which it was part. I will point to three qualities which are constructive to that position: (1) functionally, the JCHR plays a willingly meditative role between the different actors¹⁸⁴ that are expected to participate in a pluralistic system of crisis management; (2) legally, the JCHR is committed to a soft power approach and soft power tools; and (3) ideologically, the Committee is dedicated to a vision of “harmony” and “dialogue” between the different parts of the government and beyond in the pursuit of human rights protection.

Again, a methodological note is required. In describing the qualities that make the JCHR well suited to operate in a pluralistic environment of response, I rely mostly on “insiders,” the Committee’s description of its work and function and certain individuals who reflect, just like in the case of the OLC, on their work and experience in the Committee. Among them are the two influential legal advisors David Feldman and Murray Hunt and a prominent member who regularly bears the Committee’s institutional image in public, Lord Lester of Herne Hill. As in the OLC case I assume the credibility of these insiders’ descriptions since they are engaged in a self-exposition, explaining and often flagging the expressed value of the organization. Still, this credibility may be contested within the context of the individuals’ roles.

i. A Functional Mediating Position

Jack Straw, Home Secretary, in piloting the Human Rights Bill stated that “Parliament and the judiciary must engage in a serious dialogue about the operation and development of the rights in the Bill. . . . This dialogue is the only way in which we can ensure the legislation is a living development that assists our citizens.”¹⁸⁵ This commitment to “dialogue” was also at the basis of the idea to strengthen parliamentary scrutiny capabilities by way of establishing the JCHR: a way to ensure that Parliament retains a central role in rights promotion.

From its very first days, the JCHR has taken a functional commitment to “dialogue” between the different actors expected to be involved in carrying forward the protection of Convention rights. To help the Committee understand how the HRA was affecting political behavior, it sought in its very first session information from a range of actors on a range of issues, such as how the government had prepared departments for the introduction of the HRA, how the HRA had affected departments’ approaches to human rights issues, what its consequences were

¹⁸⁴ These actors are mainly government parliament and the courts in the UK and Europe but also civil society organizations, academia and private litigators.

¹⁸⁵ 314 PARL. DEB., H.C. (6th ser.) (1998) 1141 (U.K.).

for the development of policy and delivery of services, how departments approached the section 19 reporting obligations, and the government's own approach to reporting where issues of rights arise. It also sought information from ministers, law officers, and senior judges on how they were interpreting and responding to the Act, as well as from nongovernmental organizations on their perspectives on the development of a human rights culture in the U.K., the HRA's impact on policy, and their advice on how the JCHR should interpret its mandate.¹⁸⁶

This information gathering process is indicative of the broader self-understanding of the function of the Committee's scrutiny. As pronounced by one of its more prominent actors, David Feldman, a human rights lawyer who served as the Committee's first legal advisor, the function of the JCHR is highly mediatory. The primary role, Feldman maintained in 2002,¹⁸⁷ is to alert Parliament about the implications of bills for rights. The aim is to "enable both houses to deal" with these aspects of the measures brought before them "in a well informed and systematic way."¹⁸⁸ This basic parliamentary focus is intensified by much more wide-ranging targets. The JCHR sees itself as facilitating "a political culture of rights" (second role)—its systematic scrutiny of bills is aimed at providing incentives for ministers, department officials and drafters to ensure that they are attentive to the consequences of legislative bills with relation to rights.¹⁸⁹

This broadens the sphere of deliberate interaction from Parliament to the many public officials and government decision makers who are expected to be involved in policy making and bill drafting. The third function widens the outlook of the JCHR from government officials to courts through the assessment of government responses to judicial declarations of incompatibility. Section 10 of the HRA establishes a process in which the government can pass "remedial orders" when the judiciary declares that legislation is incompatible with Convention rights.¹⁹⁰ According to this "fast track procedure," if a minister "considers that there are compelling reasons" to respond to a judicial declaration of incompatibility, he or she "may by order make such amendments to the legislation as he considers necessary to remove the incompatibility."¹⁹¹

The JCHR is required to be informed by the relevant ministers of any judgment of the ECHR in cases brought against the U.K. or of a declaration of incompatibility from a U.K. court within fourteen days of the court's decision. With it there must be included a statement indicating

¹⁸⁶ See JCHR, SECOND SPECIAL REPORT OF SESSION 2000-1, H.L. 66-i, H.C. 332-I (U.K.); see also Hiebert, *supra* note 47, at 17.

¹⁸⁷ David Feldman, *Parliamentary Scrutiny of Legislation and Human Rights*, 2002 PUB. L. 323, 333.

¹⁸⁸ *Id.* at 336.

¹⁸⁹ *Id.*; see also Feldman, *supra* note 187, at 164.

¹⁹⁰ See *supra* note 158.

¹⁹¹ Human Rights Act (HRA), 1998, c. 42, § 10(2) (U.K.).

whether an appeal will be made against the court's decision and what the minister's view of the appropriate way to proceed is.¹⁹² The JCHR is also engaged in reading and echoing judicial decisions as a part of its functional, day-to-day reporting practices. The JCHR is intimately familiar and up to date on human rights jurisprudence in the U.K., the ECHR court and international and domestic courts globally. It also explicitly welcomes the use of its reports by courts and U.K. and E.U. courts often cite them.¹⁹³

An interactive connection also exists between the JCHR and civil society organizations, private actors (such as practicing human rights lawyers) and academic scholars. JCHR explicitly called for nongovernmental bodies, academics and individuals with known interest to submit their views and take part in the Committee's inquiries.¹⁹⁴ This is seen as "an important part of the Committee's efforts to involve civil society more fully in the process of scrutiny."¹⁹⁵ Finally, many refer to the JCHR as a center for evidence gathering from other institutions,¹⁹⁶ and civil liberties organizations often cite JCHR reports when they provide their own critical assessment of bills.¹⁹⁷

The image of the JCHR as a center for messaging on human rights, a site of communication and relation between the different actors involved in human rights issues, is seen as a distinguishing characteristic of the Committee. Furthermore, it is seen as tied directly to the HRA's model of "dialogue" and "tension" between different actors "joined" by human rights concerns and obligations. As Janet Hiebert puts it, "The JCHR assumes a central role in this dialectic relationship, since one of its core functions is to facilitate broader parliamentary scrutiny and debate"¹⁹⁸ In operating on a high interactive level with other actors the JCHR facilitates

¹⁹² See JCHR, SIXTH REPORT OF SESSION 2001–02, H.L. 57, H.C. 472 (U.K.).

¹⁹³ In the "impact" debate, Michael Tolley contends, based on Klug's and his own research, that while all U.K. courts have cited the JCHR and are familiar with its work, it is difficult to conclude that it has impact on judicial decisions. Only in fourteen percent of the judgments citing or mentioning the JCHR have courts agreed with the committee's recommendation. Tolley, *supra* note 59, at 51. The question of "agreement" is for our purposes beyond the point. It is the fact that JCHR reports are cited by courts in the U.K. and Europe that provides evidence for an interactive capability at work.

¹⁹⁴ See, e.g., JCHR, *supra* note 153, at 19.

¹⁹⁵ Feldman, *supra* note 187, at 333.

¹⁹⁶ Ewing and Tham provide an impressive example of scholars' use of JCHR publications as a source to broaden the perspective to cover the life experience of controlled persons and their families. See Ewing & Tham, *supra* note 182 ("The evidence was provided (to the JCHR) by solicitors who represent controlled persons (Birnberg Pierce and Tyndallwoods) and by organizations that provide support (Peace and Justice in East London, Campaign Against Criminalizing Communities, and Scotland Against Criminalizing Communities). With notable restraint the Joint Committee found this evidence to be 'disturbing'").

¹⁹⁷ See, e.g., MENTAL HEALTH ACT COMM'N, PLACED AMONGST STRANGERS: TENTH BIENNIAL REPORT 2001-2003, at 84 (2003), available at <http://www.mentalhealthalliance.org.uk/pre2007/documents/placedamongststrangers.pdf> (citing with approval a JCHR recommendation that the government publish the risk factors and their reliability in assessing dangerousness and referred to the JCHR's report on the creation of a human rights commission).

¹⁹⁸ Hiebert, *supra* note 47, at 27.

the needs of a pluralistic system of response in which not one but many actors are expected to operate.

ii. The Soft Power Approach

In stark contrast to the OLC's hard power and, in effect, authority over executive law, the JCHR, in carrying out its legislative scrutiny function, does not have an authority to say definitely whether an interference with a right is justified. The Committee explains its mode of decision making:

Unlike the courts, we are not an adjudicative body, nor would we claim to be infallible arbiters of such matters. We see our role as to alert both Houses of Parliament on occasions when we consider that they may be a risk of proceeding to legislate in a manner which will later be held by a court to be incompatible with ECHR.¹⁹⁹

The point is to “enable”²⁰⁰ both Parliament and Government to see the relevant human rights implications, and to “make,” as Lord Lester puts it, “government think harder” on these implications, as well as on the ways of making itself accountable to Parliament rather than only to courts.²⁰¹

These “enabling,” “soft” functions of the Committee, “facilitating a political culture of rights” and “alerting and informing” officials in a systematic way about rights problems are complemented by “soft methods” and working practices. The Committee extensively engages in “note taking,” “letter writing,” “question asking,” and “reporting” practices, none of which are supposed to carry any determinative consequences.²⁰² These “monitoring” activities are of course quite legalistic in nature, extensively referring to and formulating doctrinal and court decisions and often resembling litigatory argumentation.²⁰³ The Committee scrutinizes legislation for

¹⁹⁹ JCHR, *supra* note 153, at 20.

²⁰⁰ This soft language of “enabling” and “facilitating” is all over the place in the committee’s self pronouncements. Also see the contention that the committee’s mandate is an “opportunity” (“Marvellous opportunity”) for parliament to assert authority on a notorious field difficult to police, Feldman, *supra* note 164, at 9.

²⁰¹ JOINT COMMITTEE ON STATUTORY INSTRUMENTS, MINUTES OF EVIDENCE, 2001, H.L. 66-I, H.C. 332-I., at question 28 (U.K.), available at <http://www.publications.parliament.uk/pa/jt200001/jtselect/jtrights/66/1031409.htm> (Lord Lester).

²⁰² The volume of this activity is striking. The committee publishes numerous full-length reports yearly, considers all published bills (though the number is falling as a result of the decision by the committee to limit itself to the ones which has human rights implications) and conducts many specific inquiries. See Tolley, *supra* note 59, at 44.

²⁰³ “Early research suggests that . . . legal compliance . . . best characterizes the general way legislative initiatives are being evaluated under the HRA. This assessment is based on interviews with legal and policy advisors about the criteria and processes for assessing bills and the guidelines ministers are instructed to follow when determining whether to report that a bill is compatible with Convention rights.” Janet L. Hiebert, Paper Presented at the Conference on

compatibility in a way similar to the approach adopted by courts in assessing claims of human rights violations. It considers whether the legislation interferes potentially with any of the Convention rights and, if so, it considers next the reasons advanced by the responsible minister to justify the interference, directly informed by legal principle, frequently utilizing balancing techniques, such as (overwhelmingly) proportionality tests.²⁰⁴ Still, Committee actors often understand this legalistic tone as a way to provide more effective (more formal and objective) moral influence on the government and the public.²⁰⁵ It is the “hollowness” and “substancelessness” of human rights legal standards that makes the scrutiny politically valid.²⁰⁶ It is the moral weight of human rights principles that is stressed by using their formal legal structures, not the other way around.²⁰⁷

Finally, the Committee sees a wide range of possibilities for expressing scrutiny, not only revealing non-compliance, disproportionality or the lack of precise legal basis for interference with rights, but also taking care to congratulate the government for introducing a human rights enhancing measure or to specifying opportunities that haven’t been taken to implement a human rights obligation.²⁰⁸

All in all the JCHR makes no law, it makes “risk assessments” based on its understanding of human rights laws and principles, whether the proposed legislation presents a significant risk, a risk, or no appreciable risk of incompatibility with the HRA.²⁰⁹ Legal knowledge is used for moral/political purposes but is never operationally decisive.²¹⁰ Again, this ability to use legal

Parliamentary Protection of Human Rights, University of Melbourne: Governing Under a Bill of Rights: What Does a Compliance Culture Entail? (July 20–22, 2006).

²⁰⁴ See Anthony Lester, *Parliamentary Scrutiny of Legislation under the Human Rights Act 1998*, 33 VICTORIA U. WELLINGTON L. REV., no. 1, 2002, at 1, 8 (“The Joint Committee scrutinizes legislation for compatibility in a way similar to the approach adopted by the courts in assessing claims of human rights violations. The Joint committee considers first whether the legislation interferes potentially with any of the Convention rights. If a potential interference is apparent, the Joint Committee considers next the reasons advanced by the responsible Minister to justify the interference, applying the principles of legal certainty and proportionality.”).

²⁰⁵ As Feldman expresses this, “Law, unlike political theory, is capable of providing minimum standards for objective assessments of the rightness and wrongness of political actions. Constitutional rights can affect the rule-making process in Parliament by influencing legislators and the executive, as well as judges, with specific ideas of right and wrong.” David Feldman, *Injecting Law into Politics and Politics into Law: Legislative and Judicial Perspectives on Constitutional Human Rights*, 34 COMMON L. WORLD REV. 103 (2005).

²⁰⁶ See Feldman, *supra* note 164, at 5 (comparing the human rights framework to that of common law tort doctrines).

²⁰⁷ Feldman, *supra* note 205. See also Hunt’s stress of the committee’s “legalism”: “[I]t is always guided by legal advice, but the committee takes its own view of compatibility It reaches its own view on compatibility with the benefit of legal advice on the compatibility question. It seeks to try to make human rights less of a legalistic concept, so that parliamentarians don’t get put off by debating the compatibility of particular issue.” Interview with Hunt, *supra* note 159.

²⁰⁸ Interview with Hunt, *supra* note 159.

²⁰⁹ See Tolley, *supra* note 59, at 45; see also JCHR, *supra* note 153, para. 44, at 20; KLUG, *supra* note 59, para. 6.6(g).

²¹⁰ Mark Tushnet refers to this form of rights protection as a “weak” model under “a bureaucracy of rights.” Under such model the existence of “statements of concern” about a policy’s consistency with the relevant constraints, together with a “weak” form of judicial review (by way of the HRA) “may increase the likelihood that the reviewing institution will

principles as tools for moral/political persuasion without determination is facilitative for a system in which many actors may authoritatively impact the decision making process. The Committee's activities and formal opinions encourage certain actors to reply and respond while all may equally use the Committee's opinions as reference points without having to commit to a centralized decisive authority.

iii. An Ideology of “Dialogue” and “Harmony”

As was mentioned above, many commentators have referred to the HRA as a “dialogue model,” engaging the courts, government and Parliament in human rights protection.²¹¹ This is an ideological feature of the U.K.'s model of political and constitutional transition—a project of “bringing rights home” by “opening up” both internationally (to outside influence in the field of human rights protection norms and institutions in Europe and beyond) and domestically (to institutional engagement between the branches and with civil society).

The JCHR explicitly sees itself working within this ideology, carrying through the political aim of “opening up” to the Convention, stressing and expressing the value of “the outside” to “us.” This ideological commitment is stressed time and again by Committee members and outside onlookers, often referring in one breath to the HRA system of rights protection and to JCHR as working under a “holistic approach.” Expressive of this ideological coining, stressing “holism” and often “harmony,” is Lord Lester's often repeated stimulating remarks when explaining the JCHR and articulating the institutional image of the organization. As early as 1997, when the Bill was first presented and three years before the Joint Committee was established, he revealed before the House of Lords that the Government proposed to strengthen Parliament's role by initiating the creation of a new parliamentary committee on human rights: “That proposal,” he explained, “is part of a much-needed *holistic approach*, which does not leave the task exclusively to the courts but which requires Parliament and the Executive, as well

add its voice to the prior critics. Anticipating that outcome and its political costs, the executive government may end up modifying its policies to steer clear of criticism by these institutions.” See Mark Tushnet, *The Political Constitution of Emergency Powers: Parliamentary and Separation of Powers Regulation*, 3 INT'L J.L. CONTEXT 275, 282–83 (2007).

²¹¹ See Richard Clayton, *Judicial Deference and “Democratic Dialogue”: The Legitimacy of Judicial Intervention under the Human Rights Act 1998*, 2004 PUB. L. 33; Francesca Klug, *The Human Rights Act: a “Third Way” or “Third Wave” Bill of Rights*, 2001 EUR. HUM. RTS. L. REV. 361; Francesca Klug & Keir Starmer, *Standing Back from the Human Rights Act: how effective is it five years on?*, 2005 PUB. L. 716, 722; Nicol, *supra* note 59; see also Hiebert, *supra* note 47.

as the judiciary, to take human rights equally seriously.”²¹² Almost a decade and a half later, in March 2011 and as a Committee member, he introduced the Committee to Jeremy Waldron, who was invited to testify before it, with very similar terminology:

*Our system is what you might call holistic, as you know, in that all three branches of government, judicial as well as the political, are bound to give effect to human rights. This Committee acts as a kind of buckler of the system in scrutinizing compliance, questioning Ministers and reporting to Parliament, so our system is not judge-based in the sense that the United States system is judge-based.*²¹³

The image of harmony is more sophisticatedly described by other JCHR insiders. David Feldman, for example stresses the *non-harmony* in this field as the motivating force for JCHR activity as a forum for debate and interaction: “Like democracy, human rights offer not harmony, but a practical framework in which a society, if it is sufficiently durable and flexible, can maintain an equilibrium between conflicting interests.” What the JCHR promotes is a “healthy dialogue,” “tolerating” and even “celebrating” the friction between the different branches. “The particular role of the Committee may turn out to be the offering of a forum in which the ideas of different bodies can meet in an atmosphere which consciously avoids party politics and political, racial religious and social faction.”²¹⁴ These bodies are not only governmental but also NGOs: “No one body can establish a human rights culture. It demands the interaction of systems and institutions to achieve and maintain the delicate and unstable equilibrium between interests and values on which respect for human rights depends, making them part of decision-making process in their different spheres and functions.”²¹⁵

The vision of positive interactivity and the JCHR as a place for promoting it is emphasized also in the JCHR’s self reporting. For example, in its 2001-2005 Parliament “work report,” the Committee devotes a special section to the description of its relation to other bodies of government: particularly to Parliament and other committees,²¹⁶ to government²¹⁷, to courts²¹⁸,

²¹² 582 PARL. DEB., H.L. (5th ser.) (1997) 1240 (U.K.) (emphasis added).

²¹³ JCHR, MINUTES OF EVIDENCE, 2011, H.C. 873-i., at question 49 (U.K.) (emphasis added), *available at* <http://www.parliament.uk/documents/joint-committees/human-rights/HumanRightsJudgments/Transcript150311.pdf>.

²¹⁴ David Feldman, *The Impact of Human Rights on the UK legislative Process*, 25 STATUTE L. REV. 91, 115 (2004).

²¹⁵ *Id.* at 114–15. Also see Murray Hunt’s interview in which he notes congratulating government for human rights protection achievements and alerting it to lost opportunities as possible content of scrutiny reports. The idea is to involve, include and enable government participation in the holistic process of rights protection. *See* Interview with Hunt, *supra* note 159.

²¹⁶ JCHR, *supra* note 153, paras. 33–35 (stressing that human rights consideration is always open to other committees and the need to prevent overlap).

²¹⁷ *Id.* para. 36 (“We are in regular touch with the Government across all Departments, principally in exploring with them, through correspondence, the human rights compatibility of legislation which they introduce.”).

²¹⁸ *Id.* para. 37 (“We welcome use being made of our reports in legal proceedings, to assist courts in appreciating the human rights compatibility issues . . .”).

and “outside organizations and the wider public.”²¹⁹ Finally, even when strongly criticizing the ATCSA, the Committee is careful to stress its vision of dialogue and debate²²⁰ and to ascribe to the Government a serious respectful attempt to comply and protect rights in difficult times:

We recognize that the Government *is doing its best* to respond to a sensitive security position in a way that respects its obligations under domestic and international human rights law. *We acknowledge the seriousness with which the Government has engaged in a dialogue with those (including this Committee) who seek to uphold the core values of democratic society in difficult times.* We welcome the improvements to the Bill which have been made or promised in order to improve the safeguards for human rights. At the same time, there are a number of aspects of the Bill which we are concerned may continue to compromise the protection of human rights in ways which have not so far been fully justified²²¹

In relating to Government, as it relates to actors outside government as partners, allies, co-workers in the project of rights protection, the Committee resists any image of a relation based on competition and division—it holds onto a notion of a political-moral mission with many participants. Whether or not this vision is instrumental for the actual promotion of rights protection in times of crisis, it surely makes the JCHR particularly fit to a system in which it is anticipated that the next security crisis will be managed by more than one public “decider.”

D. Conclusion

How is the politics of authorization seen in the two institutions’ functional, professional, ideological features?

The OLC in the U.S. system is an executive-centered tool; it exists to legally serve the executive, and by that purpose it represents in a functional, institutional way the distribution of powers to respond in the U.S. constitutional solution to the problem of authorization. This generates executive-centered politics of institutional competence that goes beyond the problem of power and constraint: If the executive is the center of emergency response capabilities, he needs

²¹⁹ *Id.* paras. 38–39 (stressing media coverage, public attention, and welcoming outside submissions from organizations, both formal and informal, as being of great value).

²²⁰ *See* JCHR, FIFTH REPORT OF SESSION 2001-02, para. 2 (U.K.) (“We welcome the Government’s (and particularly the Home Secretary’s) willingness to listen to the concerns expressed in our Second Report and elsewhere, and to engage in constructive dialogue in order to seek ways of minimizing the risks to human rights we and others have identified in the Bill”).

²²¹ *Id.* para. 32 (emphasis added).

to have available the tools to do the job alone. The OLC is such a tool; the office is structured in such way that it can give the President the legal green light (or the legal red light) to act as he sees fit. That is also why it must have the professional ability and the authoritative position to produce hard determinative law for the Executive, rather than mere recommendations or opinions. If the President is to act as he sees necessary to respond to threats, he must be able to act legally, or at least know what the law that he decides to set aside is. That is why he needs an authoritative body that can determinatively decide for his benefit what is legal (or not) right away, without waiting for opinions and contestations. Finally, if the President is to decide, his advisors should believe in the premise that centralized response is indeed the most effective way to manage emergencies and crises.

The JCHR in the U.K. system is a mediator, a translator and expounder of commitments between the different agencies, at home and abroad, who speak the language of human rights in responding to the emergency. This generates a “dialogic” politics of institutional competence that also goes beyond the problem of power and constraint: If different agencies are mobilized by the Human Rights Act to decisively intervene and contest emergency-time decisions, they need a point of reference that can authoritatively interpret their exchange. If this authority were to be conclusive, it would contradict the constitutional structure of multiple powers to respond, which is the U.K.’s solution to the problem of authorization. A soft power of policy recommendation is facilitative to the end of “dialogue” where no one agency is expected to have the last and definitive word. An ideology of harmony and dialogue is useful in leveling up gaps in the use of human rights language and in corresponding to the operation of a system whose decision structures are diffuse.

This is how we see the politics of authorization manifested in mobilized response environments—a constitutional assumption about the way that response powers should be distributed creates not necessarily more or less constraint of necessary power, but an institutional structure that corresponds to the premise, that works to achieve it, that is invested in its ideology.

The purpose of the comparison between the two incomparable institutions, the OLC and the JCHR, was not to emphasize the differences between the two “environments of response.” Surely, the “environments” in which decisions were taken in the post-9/11 context in both jurisdictions were much more complex than any description of one institution could illustrate. The aim instead was to suggest and illustrate the connection between decisions made regarding distribution of powers to respond to emergencies and actual institutional environments of

response. The traditional assumption that emergencies require the creation of flexible and broad powers that can (or cannot) be constrained by institutional mechanisms obscures this connection. It generates a politics of powers and constraints that dramatically informs intuitions about institutional design with no regard to the politics of institutional competence, which proves to be rather distinct from questions of control.