

# THE PRESIDENTIAL STATUTORY STRETCH AND THE RULE OF LAW

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INTRODUCTION.....	1231
I. THE STATUTORY STRETCH.....	1235
II. IMPLICATIONS FOR THE RULE OF LAW.....	1249
A. <i>An Incoherent Question?</i> .....	1251
B. <i>The Rule of Law Case Against the Statutory         Stretch</i> .....	1253
C. <i>The Uneasy Rule of Law Case for the Statutory         Stretch</i> .....	1259
D. <i>Fashioning a Responsible Stretch</i> .....	1263
III AN ETHICAL STRETCH?.....	1268
CONCLUSION .....	1272

## INTRODUCTION

Over the past forty years, no one has written more knowledgeably or wisely than Hal Bruff about how law actually operates as a source of constraint on the presidency.<sup>1</sup> His analysis of the role and significance of executive branch

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1. For example, any “greatest hits” collection on law and the presidency scholarship during this period would have to include one of Hal’s earliest articles, Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979), which set forth what essentially became the governing framework for legal analysis supporting Exec. Order No. 12,291, 46 Fed. Reg. 13193 (1981), and its successor Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993), the pivotal executive orders creating the contemporary system of White House regulatory oversight.

lawyering in operationalizing the rule of law is especially distinctive. Professor Bruff's 2009 book, *Bad Advice*,<sup>2</sup> captures beautifully the ethical dilemmas of the President's legal advisers and the chronic difficulty of balancing an ever-present pressure to support a president's wishes with the demands of professionalism and personal conscience for a sound reading of the law.

Cynical readers may be surprised by Hal's insistence—one can use an old friend's professional title for only so long—that the demands of conscience and professionalism actually operate with real and constraining force. As it happens, however, Hal and I first worked together during the Carter Administration as colleagues in the Justice Department's Office of Legal Counsel (OLC). Shamed by its extreme politicization during the Nixon presidency,<sup>3</sup> the Justice Department was led in the immediate post-Watergate years by three Attorneys General—Edward Levi, Griffin Bell, and Benjamin Civiletti—who insisted on restoring and maintaining the Department's independent legal voice. The professional atmosphere within the Department no doubt changes in subtle ways from one Administration—and even one Attorney General—to the next. But the Justice Department we experienced was one in which claims of “right and conscience”<sup>4</sup>—to use what I take to be one of Hal's favorite Shakespearean phrases—were regarded with utmost seriousness. To put the matter most simply, we worked among lawyers and leaders unafraid to utter, “No,” to power.

Hal's articulation of the adviser's dilemma usefully frames an analysis of the attitudes towards presidential lawyering evident in the George W. Bush and Obama Administrations.<sup>5</sup> Bush lawyers were conspicuous in their allegiance to presidentialism, a theory of government “that treat[s] our Constitution as vesting in the President a fixed and expansive category of executive authority largely immune to legislative

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2. HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* (2009).

3. *See generally* CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974).

4. WILLIAM SHAKESPEARE, *KING HENRY THE FIFTH*, act 1 sc. 2, l. 96 (Jonathan Crewe ed., Penguin Books 2002) (“May I with right and conscience make this claim?”).

5. All mentions of President Bush in this article refer to President George W. Bush.

control or judicial review.”<sup>6</sup> Presidentialist philosophy helped catalyze a style of advocacy in which the Administration pushed too cavalierly through statutory limits on electronic surveillance, the interrogation of enemy combatants, and the use of military tribunals.<sup>7</sup> Reacting to these developments in 2007, then-Senator Obama called for: “No more ignoring the law when it is inconvenient.”<sup>8</sup> Many supporters of presidential candidate Obama no doubt hoped an Obama Administration would pay greater heed to checks and balances and the rule of law.<sup>9</sup>

Perhaps honoring that hope, the Obama Administration has been conspicuous in its reluctance to defend presidential initiatives under Article II authority. This has been so even with regard to the unilateral deployment of military force, a subject on which our post-World War II presidents have been unanimous in claiming some such authority.<sup>10</sup> That does not mean the Obama Administration has been less aggressive in pursuing the President’s agenda.<sup>11</sup> Its lawyers prefer, however, to rely on arguments resting on the president’s statutory powers.<sup>12</sup> In a number of national security and war powers

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6. PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 3 (2009).

7. BRUFF, *supra* note 2, ch. 7 (surveillance), ch. 11 (interrogation), and ch. 10 (military tribunals). I am using “presidentialism” to refer to “a theory of government and a pattern of government practice that treat our Constitution as vesting in the President a fixed and expansive category of executive authority largely immune to legislative control or judicial review.” SHANE, *supra* note 6, at 3.

8. Senator Barack Obama, Remarks at the Woodrow Wilson Center (Aug. 1, 2007), <http://www.cfr.org/elections/obamas-speech-woodrow-wilson-center/p13974> [<https://perma.cc/3D77-52F3>].

9. Peter M. Shane, *The Obama Administration and the Prospects for a Democratic Presidency in a Post-9/11 World*, 56 N.Y.L. SCH. L. REV. 27, 29 (2011/2012).

10. See generally STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

11. See *The Executive Unbound Revisited*, ERIC POSNER: BLOG (Oct. 22, 2015), <http://ericposner.com/the-executive-unbound-revisited/> [<https://perma.cc/DZM2-VA7F>], for a catalogue of ambitious Obama Administration initiatives.

12. Cf., KENNETH ANDERSON & BENJAMIN WITTES, *SPEAKING THE LAW: THE OBAMA ADMINISTRATION’S ADDRESSES ON NATIONAL SECURITY LAW* 188 (2015) (arguing that criticisms of the Administration’s claims to counterterrorism authority as “expressions of unaccountable executive power,” which might have had some merit during the Bush Administration, are no longer valid because the Administration has laid out a framework for its claims of authority that reflect statutes, judicial opinions, and international legal obligations). The anthology comprises what the authors take to be sixteen significant speeches by key

contexts, these statutory claims have been fairly conspicuous “stretches.”<sup>13</sup> That is, the Administration has at least implicitly acceded to congressional authority, but interpreted the relevant enactments in surprising (and in at least one case, pretty implausible) ways.

The “statutory stretch,” I will argue, is actually a distinct, although hardly unprecedented mode of lawyering. And, as the Obama record demonstrates, lawyers can use a statutory stretch to defend presidential initiatives that are no less consequential or politically controversial than initiatives purporting to rest, at bottom, on authority that the Constitution vests in presidents directly.<sup>14</sup> Yet, at least in certain circumstances, it turns out that legal arguments based on a statutory stretch are more facilitative of the rule of law than would be bolder claims of exclusive executive authority under Article II.<sup>15</sup> A President’s preference for statutory over constitutional argument can be, therefore, a nontrivial contribution to checks and balances and the rule of law.

Part I below explains the statutory stretch and defends the claim that it is a distinct strategy for legal advocacy. Part II evaluates its status as an instrument of respect for the rule of law. Perhaps surprisingly, the rare and public use by government lawyers of a statutory stretch to defend an executive initiative that the President deems too urgent to either forego or delay serves the rule of law better than a defense of that same initiative based on the President’s Article II authorities. A statutory stretch may serve legal values less well, of course, than simply foregoing initiatives that cannot be supported with a more persuasive legal defense. Presidents, however, may find themselves faced with exigent circumstances in which values other than legalism predominate, and a variety of contextual factors may support

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Administration officials, many of whom assert the existence of statutory authority for politically controversial initiatives. *See also* Shalev Roisman, *Rejecting the Bush Comparison: A Response to Goldsmith & Waxman*, JUST SECURITY (Oct. 17, 2014, 12:38 PM), <https://www.justsecurity.org/16499/rejecting-bush-comparison-response-goldsmith-waxman/> [<https://perma.cc/7SH5-4NAH>] (“[T]he Obama Administration’s apparent view of its unilateral authority to engage in full-scale war is significantly more constrained than the Bush Administration’s—which, in fact, asserted that it had constitutional power to engage in full-scale war without congressional approval.”).

13. *See infra* notes 54–82 and accompanying text.

14. *See infra* notes 54–82 and accompanying text.

15. *See infra* Sections II.C, II.D.

the legitimacy of a “stretchy” interpretation. Part III considers how conscientious lawyers should assess their ethical obligations in connection with a statutory stretch. Based on this analysis, I conclude that, on a limited number of exigent occasions, the statutory stretch may turn out to be an ethical option for a conscientious executive branch lawyer.

## I. THE STATUTORY STRETCH

The idea of “statutory stretch” defies precise definition because how stretchy an interpretation appears will vary according to the methodological commitments of the observer. For example, government lawyers frequently use traditional non-textualist tools to derive what may be counterintuitive statutory meaning.<sup>16</sup> A committed textualist might deem any use of such tools to be dubious, while a committed purposivist may find their use entirely persuasive.<sup>17</sup> A solid instance of just such a reading appears in a 1984 Office of Legal Counsel memo to the Attorney General by then-Assistant Attorney General Theodore B. Olson,<sup>18</sup> which interprets the criminal contempt-of-Congress statute.<sup>19</sup> Mr. Olson had to consider whether that statute requires a U.S. Attorney either to prosecute or to refer to a grand jury a contempt-of-Congress citation that has been forwarded to the U.S. Attorney on behalf of a congressional committee, when the citation targets an executive branch

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16. The most celebrated recent deployment of nontextualist statutory interpretation no doubt involves the tax credit provisions, 26 U.S.C. §§ 36B(b)–(c) (2012), of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). In *King v. Burwell*, 135 S. Ct. 2480 (2015), the government successfully argued that a taxpayer enrolling in health insurance through the federal online exchange qualified for subsidies that the Act provided for purchasers on “an Exchange established by the State.” Finding an “[e]xchange established by the State” to be legally ambiguous, the Court said it was proper to “turn to the broader structure of the Act to determine the meaning of” the contested provision. *Id.* at 2492.

17. Textualism holds that “the only object of statutory interpretation is to determine the meaning of the text and that the only legitimate sources for this inquiry are text-based or -linked sources,” such as contemporary dictionaries. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 235–36 (2d ed. 2006). Purposivism holds that statutory construction should aim to advance a legislature’s general purposes or intent in enacting a statute, which might be discerned not only from a statute’s precise wording, but also from other context-revealing materials such as legislative history. *Id.* at 228–30.

18. *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101 (1984).

19. 2 U.S.C. §§ 192, 194 (1982).

official who has refused to testify because of a presidential claim of executive privilege.<sup>20</sup> For its part, the statute speaks of the “United States attorney, *whose duty it shall be* to bring the matter before the grand jury for its action.”<sup>21</sup> This language plainly reads as an absolute ministerial duty.

Mr. Olson’s memo concludes that no such duty exists, but does so based on painstaking analysis from a variety of clearly relevant non-textualist angles. First, he carefully sets out the tradition of prosecutorial discretion under the criminal law and its roots in separation of powers analysis.<sup>22</sup> Then, he points out that the criminal contempt statute states in similar mandatory terms “the duty of the . . . President of the Senate or the Speaker of the House . . . to certify” to the appropriate U.S. Attorney such reports of contempt as may be sent to them by committees of their respective Houses.<sup>23</sup> Despite what reads like a categorical command, Mr. Olson notes that the D.C. Circuit has interpreted these legislators’ certification “duty” as discretionary.<sup>24</sup> He observes that the D.C. Circuit has at least implicitly assumed in a couple of other decisions that the U.S. Attorney’s function is discretionary, as well.<sup>25</sup> He follows this explication with an account of judicial deference to prosecutorial discretion under common law<sup>26</sup> and an extensive argument, based partly in legislative history, as to why the statute ought not to be read as a congressional requirement that the executive branch prosecute an official whose refusal to testify comes in pursuit of a presidential order rooted in a constitutional claim.<sup>27</sup> Measured by any literal reading of the contempt statute, Mr. Olson’s conclusion sounds like a stretch, to be sure. But his conclusion, rooted in traditional tools of statutory analysis, stands up to any reasonable standard of responsible government lawyering. It is persuasive non-textualism.

The criminal contempt fight with Congress, however, also represents a rare, if not unique instance in which the President’s contestable construction of a statute in domestic

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20. 8 Op. O.L.C. at 101.

21. 2 U.S.C. § 194 (emphasis added).

22. 8 Op. O.L.C. at 114–15.

23. *Id.* at 120–21 (discussing 2 U.S.C. § 194).

24. *Id.* (citing *Wilson v. United States*, 369 F.2d 198 (D.C. Cir. 1966)).

25. *Id.* at 121–22.

26. *Id.* at 122–24.

27. *Id.* at 129–32.

affairs occurs in the shadow of a plausible argument as to his inherent and exclusive Article II powers.<sup>28</sup> For this reason, the statutory stretches on which I am focusing are unlikely to arise in a purely domestic affairs context. They would not include, for example, the Obama Administration's deferred action initiatives with regard to certain undocumented immigrants<sup>29</sup>—initiatives for which no authority outside Congress's immigration statutes has been or really could be suggested.<sup>30</sup> The statutory interpretations of the kind I have in mind are most common in national security and war powers contexts, where the Constitution indisputably makes some grant of independent constitutional authority to the President, but the boundaries between Article I and Article II power are unsettled and perhaps porous.

In the national security and war powers contexts where statutory stretches thrive, an Administration's lawyers are likely always to at least take notice of the possibility of Article

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28. In so asserting, I am disregarding a variety of novel and untested claims of this sort uttered in Bush 43 signing statements, e.g., claims that statutory requirements of executive branch reports to Congress impinge on the President's legislative recommendation power in Article II, Section 3 of the Constitution. Neil Kinkopf & Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001–2009* (Moritz Coll. of Law, Pub. Law, & Legal Theory Working Paper Series, Paper No. 118, 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1485715](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485715) [<https://perma.cc/7XZ4-9FA5>]. I regard many of these claims as fanciful, and none apparently led to an actual real-world test of either President Bush's constitutional theories or the counterintuitive statutory readings his theories supposedly supported.

29. See Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/X8ML-6ST5>]; Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/D26V-MXZ4>].

30. I have argued elsewhere that the controversial program of “deferred action” for undocumented aliens who are the parents of U.S. citizens or young people otherwise legally present in the United States may be surprising because of its scope, but well within authority vested by statute in the Department of Homeland Security. Peter M. Shane, *Judge Hanen's Misconceptions and the Legality of Deferred Action*, HUFFINGTON POST (Mar. 18, 2015, 10:48 AM), [http://www.huffingtonpost.com/peter-m-shane/judge-hanens-misconception\\_b\\_6880376.html](http://www.huffingtonpost.com/peter-m-shane/judge-hanens-misconception_b_6880376.html) [<https://perma.cc/9B9B-8GTC>].

II authority. But there is an important distinction, albeit a subtle one, between the phenomenon I am describing and conspicuous statutory contortions accompanied by a full-throated insistence that the President is acting pursuant to exclusive Article II powers that Congress could not limit in any event. Such is the lawyering strategy embodied in a roster of OLC opinions repudiated in a “Memorandum for the Files,” authored by OLC’s Principal Deputy Assistant Attorney General in the very last days of the Bush Administration.<sup>31</sup> These include what are often called the “Torture Memos,” which both gave an implausibly crabbed reading to the criminal ban against torture and asserted—based entirely on OLC’s unsupported declaration—that “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.”<sup>32</sup> The aggressiveness of the Article II interpretation in such cases belies any imputation that the Administration genuinely regards the terms of the statute as a constraint to which it is accountable.

The statutory stretch, as I am focusing on it, is the reading of a statute, whether textualist or not, that fits the following three conditions:

- It reaches what the enacting Congress would almost certainly consider a surprising reading;

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31. Memorandum for the Files from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009), 2009 WL 1267352 (O.L.C.) [hereinafter Bradbury Memo to Files].

32. Memorandum from Jay S. Bybee, Assistant Attorney Gen., for Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A at 35, 39 (Aug. 1, 2002), <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf> [https://perma.cc/P6FG-HM2D] (“Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”); *see also* Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., for William J. Haynes II, Gen. Counsel of Dep’t of Def., Military Interrogation of Alien Unlawful Enemy Combatants Held Outside the United States 13, 19 (Mar. 14, 2003), <http://nsarchive.gwu.edu/torturingdemocracy/documents/20030314.pdf> [https://perma.cc/TL62-C5PS]. Technically, the Bradbury memo only reaffirmed the earlier withdrawal of these particular memoranda. *See* Memorandum from Daniel Levin, Acting Assistant Attorney Gen., for James B. Comey, Deputy Attorney Gen., Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A, at 2 (Dec. 30, 2004), <https://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc96.pdf> [https://perma.cc/3S6A-JVVT].



2016]

PRESIDENTIAL STATUTORY STRETCH

1239

- It is offered in an area where presidents have at least a colorable argument of inherent Article II authority that might or might not overlap with powers of Congress;<sup>33</sup> and
- The interpretation at issue is rhetorically positioned as a sincere effort at statutory compliance, eschewing any reliance on the constitutional avoidance canon in combination with Article II to buttress the “surprising reading.”

An example of such a stretch from the Clinton Administration is the 2000 memorandum from OLC head Randolph Moss concluding that an emergency supplemental appropriation for military operations in Kosovo constituted authorization for continuing hostilities after the expiration at sixty days under section 5(b) of the War Powers Resolution (WPR).<sup>34</sup> The conclusion is surprising because, assuming an armed attack has not disabled Congress from meeting, the WPR acknowledges only three other grounds for continuing a military operation beyond sixty days: (1) by a declaration of war; (2) the enactment of a “specific authorization for such use

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33. However, I am not including within my discussion instances of statutory interpretation where the supposed background Article II argument would be based only on what Professors Jack Goldsmith and John F. Manning have hypothesized is a constitutionally based presidential “completion power,” conveying “authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme.” Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2282 (2006). Although the existence of such a power might well justify a variety of executive branch actions usually defended under disparate lines of either statutory or constitutional authority, I think disaggregated analyses are likely to be sounder. But more to the point for present purposes, it is hard to imagine a statutory interpretation that would say, “X is what the statute authorizes, and, if X is not what the statute authorizes, the statute violates the President’s completion power.” Because the President’s completion power rests on the inference of a statutory assignment to be “completed,” such a position would be self-contradictory. Finally, the Goldsmith-Manning position appears to rest on an assumption, with which I disagree, that grants of statutory authority to the executive branch are always to be understood as grants of authority to the President. SHANE, *supra* note 6, at 32–42; *cf.*, Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005).

34. Memorandum from Randolph D. Moss, Assistant Attorney Gen., for the Attorney General, Authorization for Continuing Hostilities in Kosovo (Dec. 19, 2000), 2000 WL 33716980 (O.L.C.).

of United States Armed forces”; or (3) the extension “by law” [of the] sixty-day period.”<sup>35</sup> Congress had plainly not provided either (1) or (3). As for “specific authorization,” the WPR also states:

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter . . . .<sup>36</sup>

In other words, under § 1547(a)(1), no statute counts as “specific authorization” for the use of force unless it actually says it is.

Section 1547(a)(1) would thus seem to bar reliance on the emergency supplemental appropriation,<sup>37</sup> which certainly did not include any explicit indication of any intent, with regard to Kosovo, to provide the kind of specific statutory authorization that the WPR requires. The Moss memo reasoned, however, that the Congress that enacted the emergency supplemental appropriation could not constitutionally be bound by the terms of the earlier statute.<sup>38</sup> Mr. Moss then went on to argue that the legislative history of the emergency supplemental

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35. 50 U.S.C. § 1544(b) (2012).

36. *Id.* § 1547(a)(1) (2012).

37. An Act Making Emergency Supplemental Appropriations for the Fiscal Year Ending September 30, 1999, and for Other Purposes, Pub. L. No. 106-31, 113 Stat. 57.

38. Memorandum Opinion from Randolph D. Moss, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, for the Attorney Gen., Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 341 (Dec. 19, 2000), <http://www.justice.gov/sites/default/files/olc/opinions/2000/12/31/op-olc-v024-p0327.pdf> [<https://perma.cc/2E7J-43D7>] (“To the extent, however, that this interpretation [of the War Powers Resolution] would take from Congress a constitutionally permissible method of authorizing war, it runs afoul of the axiom that one Congress cannot bind a later Congress.”).

appropriation sustained the inference that Congress meant, in appropriating the funds President Clinton had requested, to provide the legal authority for the operation he explicitly intended to pursue, even though they failed to say so explicitly.<sup>39</sup> In reaching this conclusion, he expresses not a word of doubt about the constitutionality of the WPR and does not rely on presidential war powers under the Constitution to justify his statutory reading. His memo thus fits the three criteria I have offered for the “statutory stretch.”

An equally glaring example from the Bush 43 Administration—structured much the same way as the Moss Kosovo memo—was the Bush fallback justification for conducting electronic surveillance for foreign intelligence information outside the terms of the Foreign Intelligence Surveillance Act (FISA),<sup>40</sup> which was rooted in the 2001 Authorization to Use Military Force (AUMF) against al Qaeda.<sup>41</sup> The original Bush defense<sup>42</sup>—in a memo subsequently repudiated<sup>43</sup>—apparently took the position that the President needed no statutory authority to violate FISA, which, to the extent it purported to limit the President’s foreign intelligence surveillance powers, would itself be unconstitutional.<sup>44</sup> Although reference was likely made to the 2001 AUMF, it also seems probable, given the interpretive approach evident in the torture memos authored by the same official, that any seeming reliance on statutory authority would have been merely a gestural gloss on OLC’s underlying and vigorous reliance on Article II.<sup>45</sup>

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39. *Id.* at 346–65.

40. Letter from William E. Moschella, Assistant Attorney Gen., Office of Legislative Affairs, U.S. Dep’t of Justice, to Honorable Pat Roberts, Chairman, Senate Select Comm. on Intelligence, et al. (Dec. 22, 2005), [https://epic.org/privacy/nsa/olc\\_release1.pdf](https://epic.org/privacy/nsa/olc_release1.pdf) [<https://perma.cc/9A9T-9C6L>] [hereinafter Moschella Letter].

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

42. Bradbury Memo to Files, *supra* note 31, at 6–7 (citing Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, for William J. Haynes II, Gen. Counsel, Dep’t of Def., from John C. Yoo, [Classified Matter] (Feb. 8, 2002)). The contents of the Yoo FISA Memo must be inferred from the Bradbury memo repudiating it; the underlying memo has never been made public.

43. *Id.* at 6–8.

44. *Id.* at 6–7.

45. *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/index-bush-era-olc-memoranda-relating-interrogation-detention-rendition-andor->

After the Administration withdrew the 2002 FISA memo, it advanced a fallback position relying chiefly on the idea that the 2001 AUMF should be properly read as “supplement[ing]” the President’s constitutional powers.<sup>46</sup> This is clearly a stretch, much like the Moss opinion on Kosovo. FISA in its original form explicitly states that no statute other than FISA or Title III of the Omnibus Crime Control and Safe Streets Act of 1968<sup>47</sup>—the law that applies to ordinary federal criminal prosecutions—provides authority for electronic surveillance by the federal government.<sup>48</sup> The 2001 AUMF could thus supersede FISA only by implicitly repealing it. Yet courts rarely infer in any context that Congress has repealed prior law, unless Congress makes the repeal explicit,<sup>49</sup> and clearly this was not the case for the AUMF, which nowhere mentions electronic surveillance.<sup>50</sup>

Moreover, any compelling argument for implicit repeal of FISA’s exclusivity provision would presumably have to be based on the proposition that the 2001 AUMF, as the more recent piece of legislation,<sup>51</sup> deals with an extraordinary circumstance that the earlier Congress did not envision, and should therefore not be regarded as having dealt with. But no such argument could withstand scrutiny. FISA not only anticipated that foreign intelligence surveillance needs may differ during wartime, but it expressly provided for how that difference is to be taken account of. Specifically, FISA provides

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surveillance [<https://perma.cc/3GHN-CQQM>].

46. Moschella Letter, *supra* note 40, at 2.

47. Pub. L. No. 90-351, 82 Stat. 197 (codified at 42 U.S.C. § 3711).

48. 18 U.S.C. § 2511(2)(f) (2012).

49. *Laperriere v. Vesta Ins. Grp., Inc.*, 526 F.3d 715, 719 (11th Cir. 2008) (“[r]ecognizing that implicit repeals of statutory provisions are disfavored”). The Administration proffers an alternative version of this argument, under which FISA need not be implicitly repealed because FISA supposedly acknowledges that some statute other than either FISA or Title III might authorize electronic surveillance. Specifically, as originally enacted, FISA made it unlawful to conduct electronic surveillance except as “authorized by statute.” Pub. L. No. 95-511, § 109, 92 Stat. 1783, 1796 (1978) (codified as amended at 50 U.S.C. § 1809(a) (2012)). Read in the context of FISA as a whole, however, it is patent that Congress meant to include in the phrase “by statute” only FISA itself and Title III. *Id.* Unless that were so, the statement in 18 U.S.C. § 2511(2)(f) that FISA and Title III are the “exclusive means” by which electronic surveillance may be conducted would make no sense.

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

51. The Foreign Intelligence Surveillance Act was enacted in 1978. Pub. L. No. 95-511, 92 Stat. 1783 (1978).

2016]

PRESIDENTIAL STATUTORY STRETCH

1243

that, upon a declaration of war, the President shall have fifteen days to conduct foreign intelligence surveillance without recourse to the judicial process otherwise applicable.<sup>52</sup> This provision makes the FISA stretch even more obvious than the Kosovo memo. Whether or not the Kosovo statutory argument is persuasive, there is no doubt that President Clinton made his intentions regarding the Kosovo campaign known to Congress when it enacted the contested emergency supplemental appropriation.<sup>53</sup> No such claim could be made that, when Congress enacted the 2001 AUMF, it had been warned of the Administration's intention to ignore FISA in pursuit of foreign terrorists.

Subsequent amendments to FISA made it unnecessary for the Obama Administration to embrace the Bush 43 FISA stretch,<sup>54</sup> but it did embrace another—namely, reliance on section 215 of the USA PATRIOT Act<sup>55</sup> to acquire telephone company records of the metadata concerning millions and millions of phone calls.<sup>56</sup> Prior to its amendment in 2015, section 215 authorized the FBI Director or a designee to seek

an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.<sup>57</sup>

The problem is that section 215 also required the applicant to provide the relevant court with “a statement of facts showing that there are reasonable grounds to believe that the tangible

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52. 50 U.S.C. § 1811 (2012).

53. An Act Making Emergency Supplemental Appropriations for the Fiscal Year Ending September 30, 1999, and for Other Purposes, Pub. L. No. 106-31, 113 Stat. 57.

54. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

55. Pub. L. No. 107-56, § 215, 115 Stat. 272, 287–88 (2001) (codified at 50 U.S.C. § 1861 (2012)).

56. Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, *GUARDIAN* (June 6, 2013), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [<https://perma.cc/S6PZ-55ZH>].

57. 50 U.S.C. § 1861(a).

things sought are relevant to an authorized investigation.”<sup>58</sup> No one believes that each intercepted telephone call could possibly meet the relevance standard.<sup>59</sup>

The Bush and Obama Administrations urged, however, what has become to be known as the “needle-in-the-haystack theory”—namely, that the likely existence of some modicum of specifically relevant data in the bulk collection makes all the metadata records relevant because, at the moment of collection, it is impossible to be any more specific about what that modicum may be.<sup>60</sup> The obvious problem with this argument, which the Foreign Intelligence Surveillance Court nonetheless accepted, is that this would seem to eliminate entirely the distinction between relevant and irrelevant records.<sup>61</sup>

More recent Obama Administration statutory stretches pertain to the President’s deployment of military force to aid in the campaign against the so-called Islamic State—variously called ISIS, ISIL or Daesh<sup>62</sup>—in both Iraq and Syria. These

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58. *Id.* § 1861(b)(2)(A).

59. *See, e.g.*, Jennifer Stisa Granick & Christopher Jon Sprigman, *The Criminal N.S.A.*, N.Y. TIMES (June 27, 2013), [http://www.nytimes.com/2013/06/28/opinion/the-criminal-nsa.html?\\_r=0](http://www.nytimes.com/2013/06/28/opinion/the-criminal-nsa.html?_r=0) [<https://perma.cc/4CP3-J5LD>].

60. Eric Schmitt et al., *Administration Says Mining of Data Is Crucial to Fight Terror*, N.Y. TIMES (June 7, 2013), <http://www.nytimes.com/2013/06/08/us/mining-of-data-is-called-crucial-to-fight-terror.html> [<https://perma.cc/6UGG-4XFK>] (quoting Jeremy Bash, chief of staff to Leon E. Panetta, former C.I.A. director and defense secretary, as saying: “[i]f you’re looking for a needle in the haystack, you need a haystack”).

61. Just a few weeks before Congress amended section 215 to prohibit bulk collection, the Second Circuit held that the bulk collection program violated section 215 and rejected the needle-in-a-haystack theory. *ACLU v. Clapper*, No. 14-42-cv (2d Cir. May 7, 2015), <http://justsecurity.org/wp-content/uploads/2015/05/14-42.majority.pdf> [<https://perma.cc/A7V5-C4SH>]. For a detailed critical analysis of the Government’s section 215 argument, see Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL’Y 757, 836–62 (2014). For a comprehensive review of the interpretive issues raised under section 215, see David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. NAT’L SECURITY L. & POL’Y 209 (2014). The Obama Administration’s official defense of its position appears in ADMINISTRATION WHITE PAPER: BULK COLLECTION OF TELEPHONY METADATA UNDER SECTION 215 OF THE USA PATRIOT ACT 2–3 (2013), <http://big.assets.huffingtonpost.com/Section215.pdf> [<https://perma.cc/3H4K-QQHW>].

62. The Islamic State “began in 2004 as al Qaeda in Iraq, before rebranding as ISIS two years later. It was an ally of—and had similarities with—Osama bin Laden’s al Qaeda.” Nick Thompson et al., *ISIS: Everything You Need to Know About the Rise of the Militant Group*, CNN (Feb. 10, 2015, 11:59 AM), <http://www.cnn.com/2015/01/14/world/isis-everything-you-need-to-know/> [<https://perma.cc/L8F6-RSXM>]. It is variously referred to as ISIS, which stands for either the “Islamic State in Iraq and Syria” or the “Islamic State in Iraq and al-Sham,”

stretches actually do no violence to the wording of the relevant statutes, as long as one accepts the factual premises on which the arguments are advanced—especially with regard to Syria. The Administration justifies its actions in Syria and Iraq based on the 2001 Authorization to Use Military Force against al Qaeda<sup>63</sup> and the 2002 Authorization to Use Military Force in Iraq.<sup>64</sup>

The 2002 AUMF authorizes the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq.”<sup>65</sup> As Jack Goldsmith has pointed out, the “threat posed by Iraq” has been universally understood to mean more than the threat posed by the government of Saddam Hussein.<sup>66</sup> The executive branch is authorized to respond to the threat to national security posed by the instability in Iraq that resulted from Hussein’s ouster.<sup>67</sup> ISIS is one of those threats.

The argument from the 2001 AUMF is trickier. That statute allows the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States by such nations,

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ISIL, which stands for the “Islamic State in Iraq and the Levant,” and Daesh, which is the Anglicization of its Arabic acronym. Faisal Irshaid, *Isis, Isil, IS, or Daesh? One Group, Many Names*, BBC NEWS (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east-27994277> [<https://perma.cc/5HH3-RR9F>]. This paper will use ISIS to refer to the Islamic State.

63. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). On the Obama Administration’s reliance on the 2001 AUMF, see Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES (Sept. 12, 2014), <http://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html> [<https://perma.cc/AU93-8K2M>].

64. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498. On the Obama Administration’s reliance on the 2002 AUMF, see Savage, *supra* note 63.

65. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501.

66. Jack Goldsmith, *The 2002 Iraq AUMF Almost Certainly Authorizes the President to Use Force Today in Iraq (and Might Authorize the Use of Force in Syria) [UPDATED]*, LAWFARE (June 13, 2014, 11:29 AM), <http://www.lawfareblog.com/2002-iraq-aumf-almost-certainly-authorizes-president-use-force-today-iraq-and-might-authorize-use> [<https://perma.cc/SV3M-NYB2>].

67. *Id.*

organizations or persons.”<sup>68</sup> The Administration relies on the 2001 AUMF to deploy military assets against ISIS in Syria based on the factual assertion that ISIS is, in reality, al Qaeda<sup>69</sup>—an assertion that, while not utterly implausible, is plainly counterintuitive given the passage of time and the rejection of ISIS by al Qaeda’s current leadership.<sup>70</sup>

My point, however, is not to assess the Administration’s case, but to note its motivation. Without a statute in place like the AUMF, the Administration’s ISIS campaign would run into the WPR’s sixty-day limit on presidential deployments of military force without statutory authorization or a declaration of war.<sup>71</sup> The Obama Administration cannot use Congress’ approval of funding for the campaign against ISIS as a Kosovo-like way around the sixty-day limit. Although Congress gave President Obama the funds he requested to pursue ISIS, the appropriations act states that none of its provisions “shall be construed to constitute a specific statutory authorization for the introduction of United States Armed Forces into hostilities or into situations wherein hostilities are clearly indicated by the circumstances.”<sup>72</sup> Relying on the AUMF, however, solves the Administration’s authority problem. It also obviates any challenge to the WPR as to either its applicability or constitutionality.

The most notorious of the Administration’s statutory stretches, however, concerns the deployment of military force in Libya. After both the Justice and Defense Departments indicated that U.S. involvement beyond sixty days was precluded by the WPR,<sup>73</sup> the Administration took the

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68. § 2, 115 Stat. 224, 224 (2001).

69. Marty Lederman, *The Legal Theory Behind the President’s New Military Initiative Against ISIL*, JUST SECURITY (Sep. 10, 2014, 9:12 PM), <http://justsecurity.org/14799/legal-theory-presidents-military-initiative-isil/> [https://perma.cc/2CU6-3MWW].

70. Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL Is a Successor to Al Qaeda—Part 1 (Organizational Structure)*, JUST SECURITY (Oct. 1, 2014, 9:04 AM), <http://justsecurity.org/15801/assessing-isil-successor-al-qaeda-2001-aumf-part-1-organizational-structure/> [https://perma.cc/UK22-AWY5]; Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL Is a Successor to Al Qaeda—Part 2 (Organizational Goals)*, JUST SECURITY (Oct. 6, 2014, 9:01 AM), <https://www.justsecurity.org/16003/assessing-claim-isil-successor-al-qaeda-part-2-organizational-goals/> [https://perma.cc/3GEP-JAXK].

71. 50 U.S.C. § 1544(b) (2012).

72. Joint Resolution Making Continuing Appropriations for Fiscal Act 2015, and for Other Purposes, Pub. L. 113-164, § 149(i), 128 Stat. 1867, 1876 (2014).

73. Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*,



2016]

PRESIDENTIAL STATUTORY STRETCH

1247

position—defended only in an unsigned white paper<sup>74</sup> and in congressional testimony by then-State Department Legal Advisor Harold Koh—that the sixty-day limit was irrelevant because the U.S., at the time in question, was no longer involved in “hostilities,” within the meaning of the WPR.<sup>75</sup>

Via its thirty-two page unsigned, undated white paper forwarded to the Speaker of the House on June 15, 2011, the Administration explained its position as follows:

U.S. military operations are distinct from the kind of “hostilities” contemplated by the Resolution’s 60[-]day termination provision. U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.<sup>76</sup>

The Administration’s implicit multi-factor test for what constitutes “hostilities” has no apparent grounding in the text of the WPR. Compared to earlier instances in which Presidents urged what might be called a “sub-hostilities theory” to avoid triggering the WPR’s sixty-day clock, the current campaign was

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N.Y. TIMES (June 17, 2011), [http://www.nytimes.com/2011/06/18/world/africa/18powers.html?hp&\\_r=0](http://www.nytimes.com/2011/06/18/world/africa/18powers.html?hp&_r=0) [<https://perma.cc/6QWY-FJMY>].

74. U.S. DEP’T OF STATE & U.S. DEP’T OF DEF., UNITED STATES ACTIVITIES IN LIBYA 25 (2011), *reprinted in* Letter from Joseph E. Macmanus, Acting Assistant Sec’y, Legislative Affairs, Dep’t of State, & Elizabeth L. King, Assistant Sec’y, Legislative Affairs, Dep’t of Def., to Congressman John A. Boehner, Speaker of the House of Representatives, (June 15, 2011), <http://fas.org/man/eprint/wh-libya.pdf> [<https://perma.cc/BR7S-JAH7>] [hereinafter LIBYA WHITE PAPER].

75. *Presidential Powers—Hostilities and War Powers: Hearing on Libya and War Powers Before the Sen. Foreign Relations Comm.*, 112th Cong. 8–9 (2011) (statement of Harold Hongju Koh, Legal Advisor, Department of State), *reprinted in* 1 PUB. L. MISC. 292 (2011), [http://fas.org/irp/congress/2011\\_hr/libya.pdf](http://fas.org/irp/congress/2011_hr/libya.pdf) [<https://perma.cc/MH2K-XQSA>].

76. LIBYA WHITE PAPER, *supra* note 74, at 25.

offensive (unlike Lebanon),<sup>77</sup> sustained (as compared to Grenada),<sup>78</sup> and relatively continuous (unlike the 1996 U.S. military presence in Liberia).<sup>79</sup> The supporting military role described in the June 15 White Paper certainly describes what would count under international law as acts of war: “The United States provides nearly 70 percent of the coalition’s intelligence capabilities and a majority of its refueling assets, enabling coalition aircraft to stay in the air longer and undertake more strikes.”<sup>80</sup> Moreover, our role was not exclusively one of support. The report stated: “The overwhelming majority of strike sorties are now being flown by our European allies while American strikes are limited to the suppression of enemy air defense and occasional strikes by unmanned Predator UAVs against a specific set of targets. . . .”<sup>81</sup> That such activities are not “hostilities” is counterintuitive, at best, and the rationale is obviously a strained attempt to avoid challenging the constitutionality of the WPR insofar as it might otherwise limit the President’s prerogatives. Yet the report’s only mention of the President’s commander in chief power is the passing statement that he was constitutionally authorized to launch U.S. involvement in Libya;<sup>82</sup> there is no suggestion Congress is powerless to limit the duration of that involvement.

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77. Statement on Signing the Multinational Force in Lebanon Resolution, 19 WEEKLY COMP. PRES. DOC. 1422, 1422–23 (Oct. 12, 1983), <http://www.presidency.ucsb.edu/ws/?pid=40624> [<https://perma.cc/9LD5-5LKQ>] (“I would note that the initiation of isolated or infrequent acts of violence against United States Armed Forces does not necessarily constitute actual or imminent involvement in hostilities, even if casualties to those forces result. I think it reasonable to recognize the inherent risk and imprudence of setting any precise formula for making such determinations.”).

78. “On October 25, 1983, United States military forces invaded the island nation of Grenada. . . . On November 2, after one week of fighting, armed conflict ceased. All combat troops were withdrawn by December 15, 1983.” *Conyers v. Reagan*, 765 F.2d 1124, 1125–26 (D.C. Cir. 1985) (dismissing as moot a challenge by eleven members of Congress to President Reagan’s invasion of Grenada).

79. Letter from President William J. Clinton to Congress on Military Forces in Liberia (May 20, 1996), 1996 WL 264953, at \*2 (“The Marine commander reported that during these attacks, U.S. forces opened fire only upon persons who fired upon the Embassy complex. In the judgment of U.S. military commanders, these attacks are sporadic incidents and do not represent an intent to mount a concerted or deliberate attack against the American Embassy or the Marines. We do not intend that U.S. Armed Forces deployed to Liberia become involved in hostilities.”).

80. LIBYA WHITE PAPER, *supra* note 74, at 9.

81. *Id.*

82. *Id.* at 25.

## II. IMPLICATIONS FOR THE RULE OF LAW

The question posed directly by these statutory stretch examples is: what do they accomplish? No President wants to appear to be above the law, and the arguments I have recounted purport to function as public declarations of legal compliance with constitutionally enacted constraints on presidential power. But, in each case, it would have been open to the Administration in question to advance a theory of Article II that would authorize the controversial presidential initiative and then assert the fact of legal compliance by insisting that the President was operating within the limits set by Article II. In other words, the decision to advance a statutory rather than constitutional argument—a form of argument rhetorically more restrained than an Article II argument—must be seen as purposeful.

The most obvious purpose associated with the strategy I have identified is to go beyond merely asserting legal compliance on an individual matter and to align an Administration with what I would call “rule of law” values more generally. I have elsewhere advanced a conception of the rule of law in the administrative state that comprises five central premises surrounding the exercise of government power: the insistence on politically legitimate authorization, the observance of human rights, accountability to legal constraint, the expectation of legal justification, and the availability of remedies for government-imposed injury.<sup>83</sup> A President conspicuously eschewing Article II claims in favor of statutory claims shows respect for the accountability principle by implicitly acknowledging Congress’s entitlement to set constraints on executive action and the President’s willingness to be bound by them.

Different administrations may well find such a strategy politically appealing for different reasons. The Bush 43 Administration was repeatedly rebuffed by the Supreme Court for its claims of plenary authority with regard to the war in Afghanistan<sup>84</sup> and embarrassed by leaks of material suggesting

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83. Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 *FORDHAM L. REV.* 679, 681 (2014).

84. *Rasul v. Bush*, 542 U.S. 466 (2004) (holding habeas applicable to enemy combatants interned at Guantanamo); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (requiring procedural due process in the determination of a U.S. citizen’s “enemy

what might be seen as a cavalier legal attitude towards issues as provocative as torture<sup>85</sup> and electronic surveillance.<sup>86</sup> Falling back on statutory arguments in defense of the National Security Agency's (NSA) surveillance efforts may have been appealing precisely to undo any hint of legal arrogance. For the Obama Administration, however, the roots of the strategy might be thought to go even deeper. Candidate Obama ran in 2008 very much as the anti-Bush. Declarations of fealty to the rule of law both then and as President are no doubt intended to draw a contrast between the lawyering of his Administration and that of his predecessor. This is not to say the Administration's use of the statutory stretch is "merely" political. I take rule of law values to be central to the Administration's sincere public philosophy. The statutory stretch, when employed, is intended as an exercise of that philosophy.

The strategy, however, cannot completely escape an obvious tension. Willful reliance on attenuated statutory interpretation seems to threaten, not advance, the value of accountability to legal constraint. President George W. Bush was notable, as I discuss further below, in the volume of his objections to the possible unconstitutionality of statutory provisions he was signing into law.<sup>87</sup> He pledged in many of his signing statements protesting such provisions that he would "construe" a disputed statute "consistent with the constitutional authorities of the President";<sup>88</sup> in other words,

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combatant" status); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding the Geneva Conventions applicable to Guantanamo internees and imposing substantive and procedural limitations on the availability of military tribunals to try Guantanamo internees for alleged offenses).

85. See, e.g., Neil A. Lewis & Eric Schmitt, *The Reach of War: Legal Opinions; Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES (June 8, 2004), <http://www.nytimes.com/2004/06/08/world/the-reach-of-war-legal-opinions-lawyers-decided-bans-on-torture-didn-t-bind-bush.html> [https://perma.cc/XD7B-UC9U].

86. See, e.g., James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html> [https://perma.cc/7GNK-GF2P].

87. See generally Peter M. Shane, *Presidential Signing Statements and the Rule of Law as an "Unstructured Institution,"* 16 WM. & MARY BILL RTS. J. 231 (2007); Kinkopf & Shane, *supra* note 28.

88. Statement on Signing the Homeland Security Act of 2002, 38 WEEKLY COMP. PRES. DOC. 2092, 2092-93 (Nov. 25, 2002), <https://www.gpo.gov/fdsys/pkg/WCPD-2002-12-02/pdf/WCPD-2002-12-02-Pg2092.pdf> [https://perma.cc/M2LY-QJNV].

he would not ignore the statute, but rather construe it—presumably under the constitutional avoidance canon<sup>89</sup>—so that it did not prohibit the president from doing something the Constitution permits him to do.<sup>90</sup> It was frequently doubtful, however, that any reasonable such “construction” would be available, and critics sometimes scoffed at Bush’s statements as manifesting an Administration indifference to statutory constraint.<sup>91</sup> In response—and as an implicit pledge of respect for the rule of law—President Obama seemingly committed himself to avoiding contortions in statutory interpretation. His May 2009 memorandum on the use of signing statements promises: “I will announce in signing statements that I will construe a statutory provision in a manner that avoids a constitutional problem only if that construction is a legitimate one.”<sup>92</sup> That is plainly the preferable baseline stance. It remains to be considered, however, whether the rule of law is nonetheless advanced when a President in exceptional cases employs a statutory stretch in lieu of a constitutional argument in order to defend an urgent initiative.

#### A. *An Incoherent Question?*

For the sake of analytic completeness, it is perhaps best to begin by acknowledging that some separation of powers scholars might find the question incoherent. Eric Posner and

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89. “The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

90. *E.g.*, Statement on Signing the Homeland Security Act of 2002, *supra* note 88, at 2092–93 (“The executive branch . . . shall construe [the provision governing federal employee disclosure of critical infrastructure information to Congress] . . . in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.”).

91. *See, e.g.*, Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, 16 WM. & MARY BILL RTS. J. 307, 314 (2007) (“The most significant [criticism] from the standpoint of statutory interpretation is that [the signing statements] are frequently so tendentious that they cannot be taken to express a true attempt at interpretation. Rather, . . . [they] represent an attempt to alter the meaning of those statutes or to exempt the President and the executive branch from their coverage.”).

92. Memorandum on Presidential Signing Statements, 74 Fed. Reg. 10669 (2009).

Adrien Vermeule, for example, have argued that it is implausible to speak of executive action in conventional rule of law terms—and perhaps most so in the case of war powers which are hashed out between the elected branches against a background nearly devoid of judicial guidance.<sup>93</sup> Even scholars who do not embrace Posner and Vermeule’s “Schmittian” view of executive power<sup>94</sup> have argued that lawyers ought to worry less about whether our constitutional arrangements induce legal compliance in the war powers arena than with whether they generate a sound deliberative process about going to war.<sup>95</sup>

As I have argued elsewhere, the Posner-Vermeule attack on the plausibility of the rule of law in the administrative state is fundamentally wrong on both descriptive and normative grounds.<sup>96</sup> What would count as “law” in this attack are solely rules that are both sharply discretion-constraining and enforced through courts.<sup>97</sup> And, yes, if that is all that counts as law, the administrative state—awash as it is in discretion—does not appear rule-bound.<sup>98</sup> But the key ingredients of the rule of law are not to be found in the abstract properties of legal rules, but in the institutional arrangements that promote the values associated with the rule of law. Most government officials and their lawyers would surely agree that, under the complex system of institutional checks and balances that the Constitution erects, legal enactments—even if broadly phrased—do function as significant constraints. Congress and

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93. See generally ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010).

94. *Id.* at 32–34 (embracing an analytic framework rooted in the work of Weimar and Nazi jurist Carl Schmitt).

95. E.g., MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* (2013); GRIFFIN, *supra* note 10.

96. Peter M. Shane, *Madisonianism Misunderstood: A Reply to Posner and Vermeule*, AM. CONST. SOC’Y: BLOG (Apr. 8, 2011), <http://www.acslaw.org/acsblog/madisonianism-misunderstood-a-reply-to-posner-and-vermeule> [https://perma.cc/R2QF-HTAK].

97. For example, the Supreme Court has held that presidents may not impose domestic treaty-based legal obligations on state authorities unless the relevant treaty is self-executing or Congress has enacted legislation to make the treaty operational in domestic law. *Medellin v. Texas*, 552 U.S. 491, 504–06 (2008).

98. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (“Our administrative law contains, built right into its structure, a series of legal “black holes” and “grey holes”—domains in which statutes, judicial decisions and institutional practice either explicitly or implicitly exempt the executive from legal constraints.”).

the executive are routinely involved in the production, review, and application of law, even when their interpretations are not likely to be reviewed in court. Actors within the political branches consequently do and should think of themselves as obligated to frame their deliberations over the exercise of government power within a principled legal framework, and this legal framing is critical to understanding the institutional dynamics and substantive outcomes that attend such deliberations.<sup>99</sup> To quote myself again, under a rule of law system, “the written documents of law have to be buttressed by a set of norms, conventional expectations, and routine behaviors that lead officials to behave as if they are accountable to the public interest and to legitimate sources of legal and political authority.”<sup>100</sup> The plausibility of a rule of law account of our government cannot be dismissed without investigating those norms, expectations, and behaviors.

*B. The Rule of Law Case Against the Statutory Stretch*

Taking it then as coherent to speak of a rule of law as a real thing that the statutory stretch strategy either challenges or advances, the case against the strategy seems straightforward: it can appear as a too-clever-by-half attempt to evade the constraint that the relevant law imposes. To import the *Marbury v. Madison*<sup>101</sup> view of the written Constitution into a statutory context, the Congress that enacts written law intends it to be binding, and the rule of law dictates that government acts going beyond the written law are void.

On this ground, of course, not all surprising statutory readings may be equally problematic. Of the examples offered earlier, the use of the 2002 AUMF to justify engaging ISIS in Iraq would seem to fall quite comfortably within its language.<sup>102</sup> No one challenged the AUMF as inapplicable once

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99. This argument has been made by Professors David Barron and Martin Lederman with specific regard to war making. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 721–25 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1106–11 (2008).

100. SHANE, *supra* note 6, at 116.

101. 5 U.S. 137 (1803).

102. Authorization for Use of Military Force Against Iraq Resolution of 2002,

Saddam Hussein was overthrown and U.S. forces remained to help stabilize Iraq's newly elected government. What is surprising is the Administration returned to the AUMF as authority after the President announced that the Iraq combat mission, for the United States, was over.<sup>103</sup> But, it could surely be argued that the President's mistake as to fact did not repeal the AUMF. The argument is surprising, but perhaps not contrived.

At the other extreme is the Administration's case for not deeming our protracted participation in Libya as engagement in "hostilities." As a matter of statutory interpretation, the Administration's argument seems like a souped-up version of purposive interpretation with Congress' imputed purpose being the prevention of a unilateral presidential commitment to the kind of military quagmire that would widely be perceived as "another Vietnam." The factors identified as taking Libya outside the realm of "hostilities" seem to be conspicuously intended to distinguish the Libya campaign from the Vietnam debacle:

- The U.S. role is "constrained and supporting";
- The United States was acting as part of a "multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution";
- "U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces";
- The U.S. role does not "involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof"; and
- There is no "significant chance of escalation into a conflict characterized by" U.S. casualties or a

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Pub. L. No. 107-243, 116 Stat 1498.

103. See President Barack Obama, Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010), <https://www.whitehouse.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq> [<https://perma.cc/R85T-347S>].



serious threat thereof.<sup>104</sup>

One might also characterize the argument as a kind of “dynamic statutory interpretation,”<sup>105</sup> in which subsequent events counsel an interpretation of a statute’s reach that is narrower, not broader, than what might originally have been anticipated. Unfortunately, none of this belies the fact of U.S. engagement in acts of war against the Gaddafi regime, which would certainly fit any common understanding of “hostilities.” Presumably, that is why both Justice and Defense Department lawyers refused to sign on to the theory.<sup>106</sup>

As a strategy of legal justification, statutory stretches as conspicuous as the Libya example can be harmful in at least six ways. First, they may appear to signal flat out disrespect for law. That is, to the extent a statutory argument is glaringly unpersuasive under usual principles of legal reasoning, it implies an Administration’s insincerity. The failure to make a full-throated defense of a far-fetched statutory reading suggests that an Administration does not really believe its own argument, which further implies a willingness to prioritize the President’s agenda over conscientious legal compliance. And, of course, if the Government communicates its own disrespect for the law, such disrespect can hardly be helpful in inducing voluntary legal compliance by the public at large.

Second, the statutory stretch undermines the credibility of other nontextualist statutory readings that might be both important and persuasive. When the Bush Administration relied on the conclusions of the Reagan-era Olson contempt of Congress opinion not to prosecute its own White House advisors who declined congressional subpoenas on the basis of executive privilege,<sup>107</sup> the apparent flouting of the criminal contempt statute’s mandatory-seeming text seemed of a piece with the Administration’s dubious interpretations of the

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104. LIBYA WHITE PAPER, *supra* note 74, at 25.

105. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

106. Savage, *supra* note 73.

107. Laurie Kellman, *Mukasey Refuses Probe of Bush Aides*, WASH. POST (Mar. 1, 2008, 4:25 AM), [http://www.washingtonpost.com/wp-dyn/content/article/2008/03/01/AR2008030100528\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/03/01/AR2008030100528_pf.html) [<https://perma.cc/PY6P-JDE9>] (“The contempt of Congress statute was not intended to apply and could not constitutionally be applied to an executive branch official who asserts the president’s claim of executive privilege,” Mukasey wrote, quoting Justice policy.”).

statutes regarding torture and electronic surveillance.<sup>108</sup> This is unfortunate because the Olson position is so well-founded.<sup>109</sup> Yet statutory stretches may lead the public to conflate all of an Administration's nontextualist arguments as legal defiance and thus undermine public confidence in government lawyering more generally.

Third, if, as is likely, Congress does not enact legislation repudiating whatever initiative the President's statutory stretch purports to justify, the President's action stands as an institutional precedent that subsequent presidents will cite to justify further—and perhaps more alarming—instances of presidential unilateralism. As it is, presidents now routinely rely on congressional acquiescence in short-term unilateral military ventures as ratifying a view of presidential power that makes statutory authority unnecessary to launch a military campaign short of a major offensive war.<sup>110</sup> In the context of the U.S. anti-ISIS campaign, former OLC official Marty Lederman has offered a characteristically thoughtful argument for the extreme fact-dependency of proper WPR interpretation, which may make the executive's nuanced parsing of the WPR more justifiable.<sup>111</sup> It is hard to see, however, what is left of the sixty-day WPR limit on unauthorized military ventures if the Libya argument is treated as institutional precedent for future presidential ventures.

Fourth, statutory stretches let Congress too easily off the hook. As Stephen Griffin has forcefully argued, the allocation of different war policy roles to Congress and the executive was intended to set the stage for a genuine deliberative process embracing both elected branches before the United States engages in war making.<sup>112</sup> The Constitution is less clear about national security powers more broadly speaking, but the civil liberties implications of initiatives like the NSA surveillance programs surely counsel for the robust engagement of both

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108. See *supra* notes 31–32 and 40–53 and accompanying text.

109. See *supra* notes 18–27 and accompanying text.

110. See Authority to Use Military Force in Libya, 2011 WL 1459998 (O.L.C.), at \*6–\*8 (2011) (reviewing Office of Legal Counsel opinions supporting presidential authority to commit troops abroad without prior congressional approval and Congress's acquiescence in that power).

111. Marty Lederman, *The War Powers Clock(s) in Iraq*, JUST SECURITY (Sept. 8, 2014, 2:05 PM), <http://justsecurity.org/14513/war-powers-clocks-iraq/> [<https://perma.cc/4S4K-3689>].

112. GRIFFIN, *supra* note 10, at 17–18.

elected branches on that front, as well.<sup>113</sup> When, however, an Administration signals its willingness to extend the reach of existing law beyond its most persuasive reading, Congress knows it does not have to take responsibility for either the political risks or serious policy tradeoffs entailed in what the President has done.

Fifth, statutory stretches may inhibit candor over the facts surrounding various presidential initiatives. As mentioned above, President Obama's reliance on the 2001 AUMF to authorize the U.S. anti-ISIS campaign in Syria depends on the fact-based argument that ISIS really *is* a morphed al Qaeda, the organization that launched the 9/11 attacks on the United States.<sup>114</sup> This is not a frivolous argument. Yet there are also strong reasons, based on both ISIS's organization and goals, to think the characterization is misplaced.<sup>115</sup> Relying on dubious facts can hamper the Administration from engaging in a full, frank public discussion of ISIS's aims and organizations precisely because any nuanced factual discussion might undermine its statutory reading. As a result, public understanding of who ISIS is and what its goals might be suffers.

Finally, given the strategy of stretches like the Kosovo and AUMF-FISA arguments, the executive branch might unjustifiably be thought to increase the complexity of the legislative drafting process going forward. In enacting the WPR and FISA, Congress was as explicit as it could be in legislating how future inferences of statutory authority to make war or engage in electronic surveillance, respectively, could legitimately be drawn.<sup>116</sup> In finding Kosovo authorization in an

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113. The literature on the civil liberties implications of post-9/11 electronic surveillance is vast. An excellent starting point from the civil libertarian perspective is DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2007).

114. See *supra* notes 69–70 and accompanying text.

115. See essays by Ryan Goodman and Shalev Roisman cited *supra* note 70.

116. “Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—(1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter.” 50 U.S.C. § 1547(a) (2012). “[P]rocedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and

emergency supplemental appropriation and authority to conduct electronic surveillance under the 2001 AUMF, executive branch lawyers too cavalierly brushed these frameworks aside. The official presentation of the AUMF-FISA position simply ignores FISA's provisions regarding electronic surveillance during wartime.<sup>117</sup> The Kosovo opinion treats the emergency supplemental appropriation on Kosovo as a kind of *pro tanto* repeal of the WPR's insistence that statutory authority for presidential war making be specific in citing the WPR.<sup>118</sup> Congress plainly remembered this strategy in appropriating funds for President Obama to engage ISIS militarily,<sup>119</sup> but the executive branch's statutory stretches have effectively shifted the onus to Congress not only to put in place general frameworks that express its intentions with regard to inferences of presidential authority, but also to reiterate the applicability of those frameworks in every relevant instance. This would seem to be a direct incursion into Congress's intended checking-and-balancing role vis-à-vis the executive branch in military and national security matters.

One may debate, of course, how weighty each of these harms is with regard to any particular statutory stretch of the kind I have identified. At the very least, however, the strategy seems risky in terms of possibly shaking public confidence, undermining government lawyering more generally, facilitating executive expansionism, enabling congressional fecklessness, distorting public deliberation, and making effective law-making more difficult. These are serious risks to run.

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the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (2012).

117. Moschella Letter, *supra* note 40; 50 U.S.C. § 1811 ("Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.").

118. See Memorandum Opinion for the Attorney General on the Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 328–32 (2000), 2000 WL 33716980.

119. Joint Resolution Making Continuing Appropriations for Fiscal Year 2015, and for Other Purposes, Pub. L. 113-164, § 149(i), 128 Stat. 1867, 1876 (2014) ("Nothing in this section shall be construed to constitute a specific statutory authorization for the introduction of United States Armed Forces into hostilities or into situations wherein hostilities are clearly indicated by the circumstances.").

*C. The Uneasy Rule of Law Case for the Statutory Stretch*

As it happens, however, there is also a rule of law-based case to be made on behalf of the statutory stretch strategy and, in many circumstances, that case is persuasive. It rests on three premises. The first is that the readiness of executive branch lawyers to approve and defend aggressive presidential schemes varies over time. Government lawyers routinely treat even broadly worded legal texts as important sources of constraint and do frequently say, “No,” to proposed initiatives.<sup>120</sup> (My belief in that fact is supported by my brief experience of government service and innumerable informal conversations over the decades with other lawyers who have also worked in government.) Yet the rigor of intrabranched legal review and the willingness to say no is not a constant. It changes with circumstance.

My second premise is that one of the circumstances that affects the rigor of intrabranched legal review is the way in which the President and the President’s key advisors communicate their attitudes towards law and its relationship to executive power. Thus, for example, when then-White House Counsel Alberto Gonzales told his legal team in 2001 that they “were to be vigilant about seizing any opportunity to expand presidential power,”<sup>121</sup> that utterance filtered down and had a profound effect on the institutional psychology of the executive branch. I hypothesize that a White House counsel declaring an equally vehement commitment to the rule of law and respect for coequal branches would have a commensurate effect, but in a different direction.

The third and final premise is that an important way in which the President and the President’s key advisors communicate their attitudes towards law and its relationship to executive power is precisely in their willingness to forego arguments that the President has some reservoir of unbounded

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120. See, e.g., The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 38 Op. O.L.C., 31–32 (2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/UP7N-B6BH>] (advising that DHS lacks authority to implement a proposed program of deferred action for parents of recipients of deferred action under the earlier program of Deferred Action for Childhood Arrivals (DACA)).

121. CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 73 (2007).

exclusive authority under Article II for which he is not accountable to Congress and, in all probability, immune to judicial review. In some cases, of course, there could well be a rule of law claim on behalf of such power. That is, if the Constitution truly vests in the President some completely discretionary power, his exercise of that power, if not otherwise in violation of the Constitution, is a form of legal compliance. Nonetheless, arguments of this kind—especially if novel and difficult to verify—are inherently destabilizing in a checks and balances system. Presidents generally serve the public better in avoiding broad Article II claims because such avoidance squares more fully with the accountability principle that is central to a rule of law.<sup>122</sup>

My central claim is thus that a President's relative modesty in asserting exclusive constitutional power does the public a major service by strengthening the ethos of accountability in the executive bureaucracy more generally. It buttresses the organizational psychology to which I have alluded, in which government lawyers routinely impute constraining force to even broadly worded texts. In contrast, an executive establishment that views itself as having broad constitutional authority to work its will without regard to Congress is, I believe, far more likely to engage in arbitrary and ill-considered ventures than an Administration that speaks of itself as beholden in nearly all matters to congressional approval. A government of laws looks for such approval preferably in the form of positive law or at least in legislative acquiescence made manifest in some largely uncontroversial way. A president's rhetorical attentiveness to statutory constraint, even when counterintuitive, can reinforce these values.

The Bush 43 signing statement controversy is consistent with this analysis. As is well known, President Bush objected to approximately 1,070 provisions embodied in 127 statutes he signed into law between 2001 and 2009.<sup>123</sup> Many of these

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122. See generally HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION (2015). This is not to say, of course, that the President lacks any such powers. Some discretionary powers, such as the veto or pardon power, are firmly rooted in constitutional text. Others, such as the President's unilateral power over the recognition of other governments, rest on a combination of text, history, and functional argument. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084–88 (2015).

123. Kinkopf & Shane, *supra* note 28.

objections focused on claims of foreign affairs or national security power that are routine for the executive branch.<sup>124</sup> Many, however, were wholly unprecedented and even silly.<sup>125</sup> As I have argued elsewhere—because no one has demonstrated that Bush actually defied any significant number of these 1,070 provisions—the point of making these objections was largely a matter of institutional discipline.<sup>126</sup> They are best understood as a way of habituating executive branch lawyers to claiming constitutional license for presidential authority at every imaginable turn. That Vice President Cheney expressly regarded the expansion of presidential power as a key objective for the Administration reinforces this view.<sup>127</sup> But if presidential rhetoric can incentivize lawyerly ambition for claims of exclusive executive authority, presidential rhetoric can presumably do the opposite. Statements by or on behalf of the President that purport to hew to statutory constraints can acclimate the executive legal establishment to an understanding that such constraints are to be observed. Congressional authority is ordinarily to be accepted. Interbranch accountability is to be treated as a given.

The statutory stretch also does the work, of course, of implicitly inviting Congress to weigh in. By never challenging the constitutionality of the WPR, the Obama Administration is implicitly open to an amendment defining “hostilities” with greater precision. In making the argument it made regarding Kosovo,<sup>128</sup> the Clinton Administration was acknowledging Congress’s authority—exercised in the case of ISIS—to state explicitly when it did not want its appropriations acts to be treated as legislative authorization under the WPR. The Obama Administration’s ISIS campaign defenses could also have this positive effect. By clearing the decks, so to speak, of controversy over the sixty-day limit, the Administration laid

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124. *Id.* at 185 (cataloguing 152 objections to statutory provisions based on alleged conflict with the President’s foreign affairs powers and eighty-eight based on alleged conflict with the President’s military powers).

125. SHANE, *supra* note 6, at 135–38 (discussing, for example, President Bush’s objection to a statutory requirement of qualifications for Postal Rate Commissioners as interfering with the President’s nominations power and his objection, on commander-in-chief grounds, to a statutory limit on the number of military personnel to be assigned to the Defense Department’s Legislative Affairs Office).

126. *Id.* at 142.

127. SAVAGE, *supra* note 121, at 75–76, 201–02.

128. *See supra* notes 34–39 and accompanying text.

the groundwork for a new AUMF focused on counterterrorism campaigns in the future.<sup>129</sup>

Even in the case of FISA and the Bush surveillance programs, a similar case might be made. Following leaks of aspects of these programs, the Bush Administration successfully turned to Congress for new legislative authorization to legitimate its electronic surveillance.<sup>130</sup> Congress initially chose not to amend section 215 of the USA PATRIOT Act—the basis for telephone metadata collection—so the executive branch continued to rely on its “statutory stretch” to justify bulk collection under that section.<sup>131</sup> In 2015, however, Congress took a different turn and, with the Obama Administration’s assent, imposed new constraints on executive branch access to telephone metadata.<sup>132</sup>

The argument under the original section 215 was more than a little tenuous. But the executive branch’s reliance on that section was also accompanied by its acquiescence in the oversight of its metadata collection by the Foreign Intelligence Surveillance Court.<sup>133</sup> It has been argued forcefully that the FISC and the system of oversight it administers, including the promulgation and monitoring of so-called minimization requirements, is really not adequate to the task of protecting privacy and curbing abuse.<sup>134</sup> One can imagine, however, how a

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129. The Obama Administration’s proposed new AUMF was transmitted as an attachment to the President’s February 11, 2015 letter to Congress. Letter from President Barack Obama to Congress, Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant (Feb. 11, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection> [https://perma.cc/N5UE-ASY8]. See also EXECUTIVE OFFICE OF THE PRESIDENT, DRAFT AUMF (2015), [https://www.whitehouse.gov/sites/default/files/docs/aumf\\_02112015.pdf](https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf) [https://perma.cc/442M-5NYE] (containing the draft resolution itself).

130. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008).

131. See Steven G. Bradbury, *Understanding the NSA Programs: Bulk Acquisition of Telephone Metadata Under Section 215 and Foreign-Targeted Collection Under Section 702*, LAWFARE RES. PAPER SERIES 3–4 (Sept. 1, 2013), <https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2013/08/Bradbury-Vol-1-No-3.pdf> [https://perma.cc/28WQ-NN4M] (account by former acting head of the Office of Legal Counsel of the operation and justification for the Section 215 program).

132. USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

133. Bradbury Memo to Files, *supra* note 31, at 2.

134. See e.g., Jennifer Granick & Christopher Sprigman, *The Secret FISA Court Must Go*, DAILY BEAST (July 24, 2013, 2:45 AM), <http://www.thedailybeast.com/articles/2013/07/24/the-secret-fisa-court-must->



hypothetical Cheney Administration—told that section 215’s relevance requirement made it inapposite for bulk collections—might react. It might assert that the President’s authority to pursue foreign intelligence is not subject to congressional limitation, and that the executive was thus empowered at least to seek the voluntary cooperation of the telecommunications companies in providing metadata to the NSA. Towards that end, it might provide letters to cooperating companies assuring them that, because of the President’s constitutional prerogatives, compliance would not be unlawful under the statutory bar that ordinarily prohibits the sharing of such information. Such a position would be dubious, but not frivolous. And, of course, were this hypothetical Administration to procure metadata through this Article II route, it would not be subject to FISC supervision at all.<sup>135</sup> It is hard to regard such a scenario as superior to the system that labored under the “statutory stretch” of section 215. As in the case of war powers “stretches,” the President’s attempt to shoehorn the executive surveillance power into a statutory scheme at least opened the executive branch to some measure of checks and balances.

#### *D. Fashioning a Responsible Stretch*

Of course, not all possible stretches are created equal. Whether a statutory stretch appears to be legitimate and responsible lawyering—and thus whether a rule of law argument in favor of a statutory stretch proves persuasive—is likely to depend on a variety of factors. Some pertain to the context surrounding the stretch, some to its internal character.

For example, some stretches, while leading to unexpected results, may turn out to be quite plausible using traditional tools of interpretation. Congress might not have foreseen in 2002 that its AUMF for Iraq would be used in 2015 to support military action against a yet-more-radical offshoot of al Qaeda,

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go.html [<https://perma.cc/5C5G-D7XV>].

135. The Foreign Intelligence Surveillance Court has jurisdiction only to hear applications for and grant orders approving electronic surveillance or physical searches pursued under the procedures set forth in the Foreign Intelligence Surveillance Act, as amended. 50 U.S.C.A. §§ 1803, 1822, 1881a, 1881b, 1881c (West 2015). Should a President claim authority to conduct surveillance not following FISA procedures, there would be no FISC jurisdiction to review such an initiative.

but the statutory interpretation supporting such a reading is straightforward. The 2002 AUMF authorizes the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq.”<sup>136</sup> Once “the continuing threat posed by Iraq”<sup>137</sup> is understood (accurately) to mean not only the threat posed by Saddam Hussein, but also threats posed by instability following his ouster, the grant of authority is clear cut.<sup>138</sup>

Likewise, a stretch might seem acceptable should the Article II argument that the Administration forebears from advancing appear to be especially strong. One might offer such a defense of the Olson contempt of Congress interpretation discussed earlier.<sup>139</sup> An Administration argument based squarely on the proposition that it could not constitutionally be required to prosecute an executive official for advancing a President’s executive privilege claim would hardly have seemed trivial.

A stretch might appear to be more or less acceptable depending on Congress’s contemporary stance on the issue in question. David Pozen, for example, has identified a phenomenon he calls separation of powers “self-help,” which is “the unilateral attempt by a government actor to resolve a perceived wrong by another branch.”<sup>140</sup> The argument, both empirical and normative, is a complex one. For current purposes, I would simply raise the possibility that it might

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136. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. Law No. 107-243, § 3(a), 116 Stat. 1498, 1501.

137. *Id.*

138. At the Rothgerber Conference, Professor Pozen speculated that another “internal” factor potentially contributing to the legitimacy of a statutory stretch might be whether the Administration’s interpretation built in limits to its availability. For example, one might urge in defense of the Obama Administration’s cramped reading of “hostilities” in the War Powers Resolution that the factors on which it relied to characterize its prolonged military engagement in Libya as something other than hostilities are unlikely to repeat themselves. On the other hand, because every event can be described in some sense as unique, the assertion of one particular event’s uniqueness as grounds for a statutory stretch might not seem a strong impediment to basing the next stretch of the same statute on the unique circumstances surrounding some other event. See David Pozen, Remarks at the Ira C. Rothgerber Jr. Conference on Constitutional Law (Oct. 16, 2015), <https://www.youtube.com/watch?v=JJkqOuVTURc> [<https://perma.cc/K49C-LTH6>].

139. See *supra* notes 19–27 and accompanying text.

140. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 12 (2014).

enhance the appeal of a statutory stretch if, for example, a President believes that Congress is unjustifiably refusing to take a vote on (a) a position that the majority of Congress would actually endorse or (b) correcting technical problems with a statute already enacted by one Congress, but which the current Congress refuses to revisit. In effect, the stretch would assert authority to move forward on a position that a majority in the current Congress tacitly approves or fix a technical problem that a less self-incapacitated Congress would fix as a matter of course.

The two most important “external” factors supporting the rule-of-law legitimacy for a statutory stretch, however, are likely to be exigency and transparency. The executive branch can reduce the negative rule-of-law implications of the statutory stretch if it limits the strategy to truly extraordinary situations. The initial worry cited above with regard to the strategy is that it may be seen to communicate disrespect for law.<sup>141</sup> That danger seems dramatically reduced, however, if the Administration deploying the strategy uses it very rarely—that is, if the Administration employs a statutory stretch only in the context of executive initiatives that the President thinks to be especially urgent. An Administration stretching on such rare occasions to justify its actions within a statutory text would appear to be more respectful of law than an Administration routinely insisting on plenary and exclusive Article II power to do what it pleases. This is especially true if the Administration is exercising self-restraint in a context where judicial review is probably unavailable to check the Administration’s more ambitious legal claims—the very situation that pertains in most of the national security and war powers contexts in which the stretch phenomenon is most likely.<sup>142</sup>

Likewise, if the strategy is used very rarely, it might not be taken as having much bearing on an Administration’s lawyering in run-of-the-mill contexts, even where the Administration in other contexts also takes nontextualist approaches to statutory interpretation. That is, what the

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141. See discussion *supra* page 1255.

142. See, e.g., *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000) (dismissing for lack of standing a suit by members of Congress challenging President Clinton’s participation in the NATO campaign in the former Yugoslavia as an alleged violation of the War Powers Resolution).

strategy may communicate is not that the Administration's lawyers will "say anything," but rather that, in truly exigent circumstances, they may be willing to make arguments that don't meet the standards of craft they pursue in the normal course. Conscientious lawyers are unlikely to depart an Administration if asked to support a statutory stretch only in isolated, urgent contexts. On the other hand, an Administration that too routinely proffers the statutory stretch risks alienating its best lawyers, who may or may not go quietly if they find the demands on their forbearance too frequent and offensive.<sup>143</sup>

Transparency is also a critical tool for reducing the negative risks associated with the statutory stretch. Congress, the media, the legal academy, and the public at large—all may legitimately exhibit some patience with a rare statutory stretch that is undertaken in the name of some plausibly compelling public objective and publicly defended in clear and intelligible terms. By making its interpretation public, an Administration is at least enhancing its political, if not legal accountability; it is willing, as it were, to take its lumps for statutory stretchiness. Such deference, however, is or ought to be a limited resource. The executive branch's recognition that forbearance outside the executive branch is finite should operate to prevent undue reliance on the statutory stretch.

On the other hand, the constraining force of external opinion will not operate if the statutory stretch appears only in legal opinions that no one outside the executive branch is expected to see. This is one reason why, for example, the Justice Department's torture memo deserves condemnation. The implausibly narrow construction of the torture statute,<sup>144</sup>

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143. Historically, few government officials have announced, upon leaving government, the precise links between their departures and specific disagreements on matters of law and policy. It may or may not be coincidence, for example, that then-general counsel to the Navy Alberto J. Mora resigned his position in 2006 shortly after the public release of his 2004 internal memo to the Navy inspector general describing Mora's objections to the Bush Administration's legal opinions authorizing harsh interrogation methods and his efforts to push back against those opinions. See Jane Mayer, *The Memo*, NEW YORKER (Feb. 27, 2006), <http://www.newyorker.com/magazine/2006/02/27/the-memo> [https://perma.cc/M8MK-RHE5].

144. Memorandum of Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice for Alberto Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172, 173–83 (Karen J. Greenberg &

supported by an explicit underlying premise that Article II would prohibit Congress from limiting the President's discretion in guiding the interrogation of enemy combatants,<sup>145</sup> appears yet more irresponsible because it served the institutional interests of the executive branch so badly. If anything, a confidential legal memorandum ought to provide the most appropriate occasion for the utmost candor in sharing with a client the strengths and weaknesses of competing arguments. It is no surprise that a newly appointed assistant attorney general in charge of the Office of Legal Counsel was so disappointed in the quality of the advice rendered.<sup>146</sup>

Rarity, urgency, and transparency, of course, may not seem a complete rebuttal to the rule of law concerns that counsel against the use of the statutory stretch. One may worry, as mentioned earlier, that a statutory stretch, unless Congress responds, may stand as an institutional precedent for executive unilateralism that could prove on later occasions to be unfortunate.<sup>147</sup> But that would seem to be equally true when a President asserts Article II authority and Congress fails to respond. Indeed, the precedent of an unchallenged Article II claim is arguably worse because it might be thought to stand not for congressional acquiescence in a statutory interpretation it could amend, but rather for congressional acquiescence in a constitutional interpretation that Congress would obviously have much more difficulty undoing. And, to the extent Congress is unwilling to stand up and legislate on a controversial matter, the President's willingness to go on his own lets Congress off the hook, no matter what legal justification is offered. In this respect as well, the stretch strategy seems no greater a threat than reliance on Article II power.

A statutory stretch may inhibit the candor of an Administration's public discussion about matters of serious national concern. It starts the conversation with a seeming wink. On war powers and national security matters, it may distort national debates already stunted for lack of transparency. How much they actually worsen the chronic

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Joshua L. Dratel eds., 2005).

145. *Id.* at 200–07.

146. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 142–51 (2007).

147. *See supra* notes 110–11 and accompanying text.

problem of executive branch obscurity, however, is debatable. The Obama Administration may be limited in its ability to discuss publicly the ways in which ISIS might actually not be the same as al Qaeda, but it is not as though others are not raising that question in thoughtful ways.<sup>148</sup> And, for all the public knows, the Administration may well be more candid in confidential discussions with Congress.

The final rule of law argument against the statutory stretch is that it makes it yet more difficult for Congress to enact legislation checking and balancing the executive. But Congress, as the emergency supplemental appropriations bill for the ISIS campaign has shown, knows how to take a stand when motivated to do so. “Entrepreneurial presidents”—that is, presidents prone to seemingly unilateral extensions of executive power—always make Congress’s job harder. Assuming, once again, that the statutory stretch is a rare phenomenon, initiatives based on tendentious statutory readings may still be easier to respond to legislatively than initiatives purportedly based on the Constitution.

### III. AN ETHICAL STRETCH?

In asking whether he might make a claim with “right and conscience,”<sup>149</sup> Henry V, as Hal Bruff reminds us, was worried about both legal entitlement and personal ethics.<sup>150</sup> Even readers sympathetic to my legal analysis may wonder where it leaves the conscientious government lawyer. Newspaper accounts make clear that, when Harold Koh offered President Obama a defense for remaining engaged in Libya beyond sixty days, Obama was aware of the Justice and Defense Departments’ contrary positions and the consequent weaknesses in the WPR interpretation he advanced.<sup>151</sup> He still offered the defense. Government lawyers in a similar position may well wonder about the ethical limits to putting forward interpretive arguments they know to be legally vulnerable.

The ambiguities in the government lawyer’s position may be illuminated by reviewing events subsequent to the leak of

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148. See essays by Ryan Goodman and Shalev Roisman cited *supra* note 70.

149. See SHAKESPEARE, *supra* note 4.

150. BRUFF, *supra* note 2, at 8.

151. See Savage, *supra* note 73.

the Justice Department's 2002 torture memo.<sup>152</sup> On July 29, 2009, the Justice Department's Office of Professional Responsibility (OPR) issued a 261-page report on possible professional misconduct related to that advice.<sup>153</sup> Its investigation primarily targeted Jay Bybee, who signed the critical memo, and John Yoo, its lead drafter.<sup>154</sup> OPR found that Yoo committed intentional professional misconduct and Bybee committed reckless professional misconduct.<sup>155</sup>

Under OPR's analytic framework, attorneys commit professional misconduct if they intentionally violate or act in reckless disregard of a known, unambiguous obligation imposed by law, the rules of professional conduct, or DOJ policy.<sup>156</sup> OPR concluded that both Yoo and Bybee were bound by rules of the District of Columbia Bar, including Rule 2.1, which imposes a duty to "exercise independent professional judgment and render candid advice"<sup>157</sup> and Rule 1.1, the general competence rule.<sup>158</sup> OPR determined that Yoo and Bybee violated these rules, specifically finding that, in critical respects, Professor Yoo "knowingly provided incomplete and one-sided advice" and "knowingly misstated the strength" of his memo's analysis.<sup>159</sup> As for then-Assistant Attorney General Bybee: (1) he "should have known that the memoranda were not thorough, objective, or candid in terms of the legal advice

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152. This discussion is largely drawn from PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 1047–49 (3d ed. 2011).

153. OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS (2009) [hereinafter OPR MEMO], <http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/2317> [<https://perma.cc/SL8F-U9SR>].

154. *Id.* at 1.

155. *Id.* at 254 (Yoo), 257 (Bybee).

156. *Id.* at 18.

157. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." D.C.R. PROF'L CONDUCT r. 2.1 (2015).

158. "(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. (b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." *Id.* at r. 1.1.

159. OPR MEMO, *supra* note 153, at 252–53.

they were providing to the clients,”<sup>160</sup> (2) he “should have recognized and questioned the unprecedented nature of [his] conclusion that acts of outright torture could not be prosecuted under certain circumstances,”<sup>161</sup> and (3) he “should have questioned the logic and utility of applying language from the medical benefits statutes to the torture statute.”<sup>162</sup>

In reacting to the OPR report, David Margolis, the Associate Deputy Attorney General to whom OPR reported, rejected substantial portions of the OPR analysis and softened the Department’s negative judgment.<sup>163</sup> Although he found that the torture memo fell below D.C. Bar standards in several respects, he concluded that a preponderance of evidence did not demonstrate that incorrect advice had been given knowingly and recklessly or in bad faith.<sup>164</sup> Likewise, although their errors were “more than minor,” Margolis concluded that the failings of Bybee and Yoo did not amount to “serious deficiencies that could have prejudiced the client.”<sup>165</sup>

The Margolis memo itself came in for some withering criticism.<sup>166</sup> Hal Bruff, writing before the OPR investigation, nominated Alberto Gonzales, David Addington, and John Yoo, each for bar discipline.<sup>167</sup> Whether Margolis or Hal and OPR had the better of the argument, however, each of their discussions points similarly to the kinds of considerations that ought to color a government attorney’s engagement in a statutory stretch. Not surprisingly, these factors bear a clear kinship to those factors identified earlier as supporting the

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160. *Id.* at 256.

161. *Id.* at 255–56.

162. *Id.* at 257.

163. Memorandum from David Margolis, Assoc. Deputy Attorney Gen., for the Attorney Gen. & the Deputy Attorney Gen., Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists (Jan. 5, 2010), [https://www.aclu.org/files/pdfs/natsec/opr20100219/20100105\\_DAG\\_Margolis\\_Memo.pdf](https://www.aclu.org/files/pdfs/natsec/opr20100219/20100105_DAG_Margolis_Memo.pdf) [<https://perma.cc/L4LH-YEKP>] [hereinafter Margolis Memo].

164. *Id.* at 64.

165. *Id.* at 65.

166. See, e.g., David Luban, *Margolis Is Wrong*, SLATE (Feb. 22, 2010, 11:49 AM), <http://www.slate.com/id/2245531/pagenum/all/> [<https://perma.cc/43VT-ZD6B>]; Brian Tamanaha, *Why Yoo’s Sincere Extremist Excuse Doesn’t Work*, BALKINIZATION (Feb. 20, 2010), <http://balkin.blogspot.com/2010/02/why-yoos-sincere-extremist-excuse.html> [<https://perma.cc/YT3P-EUAG>].

167. BRUFF, *supra* note 2, at 295–96.



legitimacy of a statutory stretch as a tool of the presidency.

One of those factors will obviously be the strength or vulnerability of the interpretation at issue; in other words, how stretchy is it? A textualist might deem the 1984 Olson opinion<sup>168</sup> on executive privilege prosecution a stretch, but it is plainly a sounder and more substantial analysis than the Obama Administration's defense of its Libya position. Likewise, the Obama Administration's reliance on the 2002 Iraq AUMF to justify fighting ISIS in Iraq<sup>169</sup> is clearly more plausible than the Bush Administration's reliance on the 2001 AUMF to justify warrantless electronic surveillance.<sup>170</sup>

A second consideration will be the context in which the lawyer has offered his or her advice to the Administration. Mr. Margolis found it unclear whether applicable rules of professional responsibility or Justice Department policy unambiguously required John Yoo to note in his memorandum any counterarguments to his position.<sup>171</sup> From an ethical point of view, however, it clearly should make a difference whether, in developing a proffered statutory stretch, the attorneys did or did not make their principals fully aware of the vulnerabilities of their argument. To inflate an argument's strength in presenting it to one's client is to expose that client to risk that may prejudice their position.

Finally, it ought to make a difference what the statutory stretch is defending. The OPR report premises its analysis of the torture memo on the assumption that "the right to be free from official torture is fundamental and universal, a right deserving the highest status under international law."<sup>172</sup> Hal Bruff's analysis is likewise driven critically by the enormity of the stakes for those at the receiving end of "enhanced interrogation."<sup>173</sup> Giving an Administration legal cover for torture is unmistakably more suspect than justifying the non-prosecution of a government official who refuses to testify to

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168. See *supra* notes 17–27 and accompanying text.

169. See *supra* notes 65–66 and accompanying text.

170. See *supra* notes 46–53 and accompanying text.

171. Margolis Memo, *supra* note 163, at 45.

172. OPR MEMO, *supra* note 153, at 24 (quoting *Siderman de Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993)).

173. "A vital question of moral conscience is how close to the line lawyers responsibly may advise interrogators to go. Some legal judgments, even if supported by credible claims of right, may allow or even encourage unacceptable treatment of prisoners in the war on terrorism." BRUFF, *supra* note 2, at 226.

Congress in violation of a presidential claim of executive privilege—a claim to which Congress can respond with significant political tools.

The upshot is this: government lawyers who conscientiously and objectively evaluate the strength of their analyses, who familiarize their clients with the weaknesses in their arguments, and who do not facilitate grievous wrongs by advancing legal arguments they recognize as vulnerable may ethically deploy a statutory stretch under the circumstances I have outlined. A legal claim based on a statutory stretch may be regarded as respecting both right and conscience in sufficiently exigent circumstances.

#### CONCLUSION

On some highly significant occasions, recent presidents have occasionally defended the legality of their military and other national security initiatives through plainly counterintuitive readings of relevant statutes. Sometimes, the statutory arguments appear as nothing other than makeweight to buttress an Administration's core belief that, without regard to Congress, the Constitution has already given the President exclusive and plenary discretion to do as he or she pleases. At other times, however, the political and rhetorical framing of the President's legal defense makes plain that an Administration does not want to advance an Article II argument. It wants to be understood as acceding to the legitimacy of congressional authority and to its ordinary obligation to obey congressional enactments.

The implicit appeal of legal reasoning of this kind is that it is more consistent with rule of law values than legal reasoning that advances a view of presidential power as beyond congressional control and probable judicial review. But, as described above, there are at least half a dozen serious reasons why the statutory stretch strategy might be thought actually to undermine the rule of law.<sup>174</sup> Given the undeniable importance of conscientious government lawyering to any meaningful pursuit of the rule of law, it is a strategy not to be employed lightly or often.

In exceptional circumstances, the use of the statutory

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174. *See supra* Section II.B.

stretch strategy may represent a second-best vindication of rule of law values—and thus consistent with professionally responsible government lawyering—if the strategy is used rarely, transparently, and under genuinely urgent conditions. In making this argument, I am invoking a comparison between two states of affairs—one in which the President uses the statutory stretch and one in which the President asserts unilateral constitutional power.

There is, of course, always a third option—namely, that the President not act or at least not act until Congress provides statutory authority in clearer terms. Where the stakes are not high for the national interest, this third option would surely be best from a rule of law point of view. There may be instances, however, in which a President truly believes that delay would disserve the national interest, in which he likely has majority support in Congress, and in which—for reasons unrelated to the merits of the project in question—Congress will not take a vote. Proceeding on a legal basis as thin as the Obama Administration’s Libya report was unfortunate. Assuming any plausibility to the Administration’s statutory stretch, however, it seems a close call whether the risk posed by the Administration’s argument to the rule of law should have been thought serious enough to counsel delaying or foregoing an initiative the President thought critical to American security and foreign policy. The President was informed of the weaknesses in his argument.<sup>175</sup> He was willing to expose the argument to public scrutiny. He was neither trampling on individual liberty, nor working harm to human rights.

When a President is determined to move forward in a context such as this, the statutory stretch is preferable to an unadorned claim of Article II authority beyond Congress’s regulatory reach. It preserves the executive branch’s commitment to an ethos of accountability to legislative restraint and invites Congress to respond if it thinks the existing constraints insufficient. In so urging—indeed, in identifying the statutory stretch as a distinct strategy that is legitimate both for lawyering and for governance under certain circumstances—I do not mean to invite its frequent or untroubled use. In *Bad Advice*, Hal Bruff quotes Robert Jackson as observing that “the value of legal counsel is in the

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175. See Savage, *supra* note 73.

*detachment* of the adviser from the advised.”<sup>176</sup> The availability of the statutory stretch should not provide an excuse to dilute that detachment by too easily relieving government lawyers of the common tension between client desire and tenable argument. Even objective counsel, however, may conclude in certain circumstances that the presidential statutory stretch is acceptable, given the available alternatives.

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176. BRUFF, *supra* note 2, at 70.